THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 846 J.R.]

BETWEEN

O.O. (NIGERIA), I.O. AND I.O.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of March, 2019

1. The applicants are a Nigerian family, being a mother born in 1964 and two adult children, born in 1994 and 1996. The mother arrived in Ireland in 2002, entering the country unlawfully, a fact about which she later misled the Refugee Applications Commissioner when she claimed that she had only arrived in 2006.

2. When she applied for asylum on 7th November, 2006, presumably the reason why she misstated her date of arrival was for the purpose of making her asylum application more prompt, and therefore more credible. She claimed in the application to have left Nigeria on 3rd November, 2006, travelling from Lagos to Amsterdam, and falsely claiming to have arrived in Dublin on 4th November, 2006. All pure fabrication.

3. The Refugee Applications Commissioner rejected the asylum application. The applicants appealed to the Refugee Appeals Tribunal.

4. An oral hearing took place on 21st February, 2007. Ms. Muireann Grogan B.L. appeared for the applicants. The tribunal rejected the appeal on 28th August, 2007.

5. Submissions were then made under s. 3 of the Immigration Act 1999 by Rehoboth Solicitors on 30th October, 2007, the applicants' first set of solicitors. Subsidiary protection was also applied for. That was rejected by the Refugee Applications Commissioner on 23rd November, 2006.

6. Deportation orders were made against the applicants on 14th August, 2008. Ceemax solicitors, a second set of solicitors acting on behalf of the applicants, made a first application to revoke the deportation orders under s. 3(11) of the Immigration Act 1999, by letter dated 10th December, 2008, in which they requested revocation "*on compassionate grounds*" and pleaded disruption of the children's education. The Minister decided to refuse that application on 2nd April, 2009, a decision that appears to have been communicated to the applicants on or about 2nd September, 2009. They were then required to present to the GNIB on 8th November, 2009 and failed to do so as required, thus evading the deportation order for an ongoing period until the time of institution of the present proceedings.

7. In 2012 and 2014 the children came of age. They failed to present to the GNIB in their own right, or indeed to engage with the Minister in any other meaningful way. On 8th March, 2015 the applicants' third and present set of solicitors, Trayers & Co., issued a second s. 3(11) application, which purported to apply to the mother and her "*minor children*", although they were in fact adults, as noted above, at that time.

8. On 12th March, 2015, the Department wrote to the applicants' solicitors, indicating that the first-named applicant had failed to present as required, requesting an up-to-date address and asking the applicants' solicitors to advise their client to present immediately. This advice doesn't seem to have triggered the required action by the applicants however.

9. Further representations were made to the Minister on 24th June, 2016 and 18th June, 2018. By letter dated 19th September, 2018, received on or about 24th September, 2018, the Minister notified the applicants that the second s. 3(11) application was being refused. Since that decision, the evasion continued for a period. The present proceedings were filed on 18th October, 2018, the primary relief sought being an order of *certiorari* challenging the decision of September, 2018, refusing to revoke the deportation order. Following the filing of the proceedings, the applicants started presenting again on 22nd October, 2018, because, as their counsel informs me, they were informed that they could not maintain the proceedings without regularising their position.

10. On the same date, the *ex parte* application for leave was moved before Barrett J., who directed that it be heard on notice on 25th October, 2018. It was the further adjourned and ultimately came before me on 28th January, 2019 when I granted leave. I have now received helpful submissions from Mr. Garry O'Halloran B.L. for the applicants and from Mr. John P. Gallagher B.L. for the respondents.

Reiteration of a previous decision can be quashed only in exceptional circumstances

11. The context here is that the applicants are the subject of an unchallenged deportation order. Merely because they get the idea later to seek to revoke it does not entitle the court to quash a refusal to do so, save in exceptional circumstances. The fact that this is their second revocation application, the first one having been refused and that refusal having been unchallenged, does not particularly help their position. Such exceptional circumstances have not been demonstrated here.

Deportation of non-settled migrants is unlawful only in exceptional circumstances

12. ECHR caselaw establishes that, for the purposes of art. 8 of that instrument (applicable in Irish law in the terms envisaged in the European Convention on Human Rights Act 2003), deportation of persons other than settled migrants infringes the Convention only in exceptional circumstances (see *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385 at 408 *per* Finlay Geoghegan J., *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164). That principle can, broadly speaking, be generalised for the purposes of Irish law beyond the art. 8 context to say the deportation of unsettled migrants is unlawful only in exceptional circumstances, such as where considerations of *refoulement* might arise. No such circumstances exist here.

13. If I am wrong about all the foregoing, I will consider the specific grounds pleaded.

Ground 1 - disproportionality
14. Ground 1 contends that "*The decision of the Minister to affirm the deportation orders is disproportionate due to the failure to strike a fair balance when assessing the relative weight of the competing factors. In particular, while properly highlighting factors adverse to the Applicants relating to immigration history and including a history of evasion, the Minister failed to acknowledge the existence of any rights attaching to the Applicants."*

15. The premise of this ground is incorrect. The applicants do not have any right that is breached by a refusal to revoke a lawful deportation order requiring them, as persons with no right or title to be in the State, to leave it. The applicants' status as not being settled migrants does not assist the claim that they have any such substantive right, as was ultimately accepted on their behalf. No particular such rights are identified or pleaded. I would therefore uphold the plea at para. 5 of the statement of opposition that *"the applicants have not identified with sufficient particularity nor at all those rights which it is claimed that the Minister overlooked".*

16. If I am wrong about that, I consider that Mr. Gallagher is correct when he states at para. 9 of his written submissions that the application for revocation "*was effectively an* ad misericordiam *submission*". The rights alleged under ground 1 were not particularly identified in the submissions made to the Minister. Even if those submissions could be construed as an assertion of rights, which I do not accept, a narrative discussion of such submissions is not necessary, save in exceptional circumstances which do not exist here.

17. The Minister relied on a number of decided cases in declining to revoke the deportation order, in particular *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 19 [2007] 3 I.R. 603 *per* MacMenamin J., *Kouyape v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380 [2011] 2 I.R. 1 *per* Clarke J., as he then was, *Smith v. Minister for Justice, Equality and Law Reform* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) *per* Clarke J., as he then was, *Mamyko v. Minister for Justice, Equality and Law Reform* [2003] IEHC 75 (Unreported, High Court, 6th November, 2003) *per* Peart J., and *P.O. v. Minister for Justice and Equality* [2015] IESC 5 [2015] IESC 64 *per* MacMenamin J., and also referred to my own decisions in *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016) and *C.M. v. Minister for Justice and Equality (No. 1)* [2018] IEHC 217 (Unreported, High Court, 25th April, 2018). The Minister was entitled to take into account, and to apply, the principles emerging from this caselaw.

18. The conclusion that "*nothing new has now been advanced…which would require any further consideration by the Minister*" is a lawful conclusion, and in the context means that having considered all matters raised on behalf of the applicant, including the passage of time, it is not necessary or appropriate to revoke the deportation order. When pressed on the question of what rights were at issue, as referred to in ground 1 of the statement of grounds, Mr. O'Halloran was not in a position to identify any substantive right, but argued that the case hinged on a procedural right, namely to have the Minister entertain the possibility that passage of time on its own was a factor tending in favour of revocation of the deportation orders. That would, however, misunderstand both the decision in this case and the law in relation to revocation of such orders.

19. As regards the decision itself, the passage of time is either expressly or impliedly acknowledged in the narrative discussion on behalf of the Minister depending on how one wishes to read it.

20. As regards the law, if, as is the case, the Minister is entitled to refuse to revoke a deportation order unless new matters come forward, subject to *refoulement*, then the court by necessary inference cannot quash a refusal to revoke an order merely on the basis that the Minister did not narratively address the argument that passage of time alone was a sufficient basis for revocation. Judicial review is not an appeal on the merits and proportionality is not a back door way for the court to simply disagree with a decision even if I was minded to do so, which I certainly am not. Mr. Gallagher is correct to state, as he eloquently does at para. 11 of his written submissions, that "*in effect this is little more than a legally ornate claim that the decision was, in the applicants' opinion*, 'wrong'".

Ground 2 - failure to make reference to the judgment of the Supreme Court in *Sivsivadze v. Minister for Justice, Equality and Law Reform*
21. Ground 2 contends that "*The Minister erred in law in citing a series of court judgments as the basis for dispensation with the need to strike a fair balance between the competing factors without making any reference to the Supreme Court judgment in* Sivsivadze."

22. Paragraph 18 of the applicants' written legal submissions does not identify any particular legal basis for this plea. I should say that the formulation of this ground is somewhat tendentious in the sense that the Minister did not cite the judgments, which I have referred to above, *"as the basis for dispensation with the need to strike a fair balance between the competing factors".* That is simply the applicants' mischaracterisation and is essentially a rephrasing of the applicants' complaint that they do not agree with the decision ultimately arrived at.

23. As regards the claim that the Minister should have made express reference to the Supreme Court judgment in *Sivsivadze v. Minister for Justice, Equality and Law Reform* [2015] IESC 53 [2016] 2 I.R. 403 [2015] 2 I.L.R.M. 73, I have already dealt with this point in previous cases (see *A.B. (Albania) v. Minister for Justice and Equality* [2017] IEHC 814 (Unreported, High Court, 21st December, 2017) at para. 6, *H.A. (Chad) v. Minister for Justice and Equality* [2019] IEHC 57 (Unreported, High Court, 29th January, 2019)). Essentially the position is that one can make a s. 3(11) application on any ground, including matters that were there originally (see *Sivsivadze, per* Murray J. at para. 52) but the Minister is entitled to refuse to revoke the decision unless there is anything new (as explained in *A.B. (Albania) and H.A. (Chad)*). So there is no conflict in the caselaw.

24. Independently of that, but more broadly, Mr. Gallagher also raises a valid question (para. 13 of his written submissions) as follows: *"In making this somewhat bare-bones argument, the Applicant[s] ha[ve] not identified, nor even sought to, how the law was thereby misapplied. As any lawyer will be well aware, one can describe the law using a bewildering variety and permutation of reported and unreported decisions, from this jurisdiction and further afield. It would amount to a striking departure in the law to suggest that a narrative decision, such as that which is under review, must completely and exhaustively recite all relevant decisions of the superior courts, or else risk being declared legally invalid. Indeed it is doubtful whether such decisions need name any published legal authorities at all – provided the decision is made correctly and is in accordance with the laws which currently prevail.* ". The answer to that question is that what a decision-maker must do is to provide sufficient reasons in the context in question, as opposed to engaging in narrative discussion, still less citing caselaw. In particular, neither narrative discussion in general nor citation of caselaw in particular is necessary in the context of a decision simply to affirm a previous decision, save in very exceptional circumstances, which do not exist here, where a feature of the case calls for such narrative discussion. Deciding that, in the Minister's opinion, no major new change of circumstances has been demonstrated is not such a feature.

Discretion
25. If, counterfactually, there was infirmity in the s. 3(11) decision, I would have refused relief as a matter of discretion, in particular

having regard to:

(i). the massive abuse of the protection system involved;

(ii). the submission of unfounded protection claims, which included lies as to the date of arrival which was a highly material fact in the circumstances;

(iii). the applicants' evasion and disregard of their legal obligations.

26. Fundamentally, the applicants' best point is the passage of time and the fact that they have been in Ireland for seventeen years. But that is a situation of their own making because they failed to engage with the system between 2002 and 2006 and positively evaded presentation requirements between 2008 and 2018. So a period of fourteen years out of the total was due to their complete disregard of the law, albeit that the children were minors for some of that period, but their position is derivative. No immigration system can function on the basis that the passage of time that an applicant procures themselves by unlawful conduct counts in their favour. As Lord Carnwath said in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at para. 61, *"Judicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes*"; see also *C.R.A. v. Minister for Justice Equality and Law Reform per* MacMenamin J., *Smith v. Minister for Justice and Equality* [2013] IESC 4 [2013] 1 I.R. 294 *per* Clarke J., as he then was, at para. 6.1. I would, therefore, if it had been necessary to do so, have upheld the plea at para. 11 of the statement of opposition that relief should be refused on a discretionary basis.

Order

27. This is not a borderline case. Insofar as the applicants' immigration history is saturated in fraud and illegality, it is unfortunately representative of many, although thankfully not all, immigration and protection cases. The applicants' attempts to thwart the enforcement of a lawful and unchallenged deportation order by presenting material that is not significantly new is the sort of procedure that was stigmatised by Clarke J., as he then was, in *Smith* at para. 5.4 as "*having an adverse effect on the orderly implementation of the Irish immigration system"*. These applicants have no entitlement to be in the State and, while the separation of powers can be a flexible doctrine, it is not so flexible as to give the court any legitimate role in interfering with the Minister's clear entitlement to remove them.

28. The order therefore will be:

(i). that the proceedings be dismissed; and

(ii). that the first-named respondent be released from his undertaking not to deport the applicants.