[2019] IEHC 729

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 85 J.R.]

BETWEEN

I.I. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of October, 2019

1. Sometimes litigants or their representatives come forward with an interesting legal point brandishing an armoury of authorities, while simultaneously seeking to deflect attention from the lack of an adequate evidential foundation for that interesting point. This is such a case.

2. On 15th October, 2011 the applicant's mother left the applicant in the care of a maternal aunt. A care order was granted under s. 18 of the Child Care Act 1991 on 21st June, 2010. Thereafter the Child and Family Agency was in a position to act on the applicant's behalf at all material times. The applicant was granted a declaration of refugee status on 25th September, 2014. The next logical step would have been to apply for family reunification if appropriate. It is notable that the "evidence" put forward by the applicant as to the reasons for the failure by the CFA as next friend to seek family reunification for a period of four years are inadequate and hearsay in nature. The evidence of Anthony Hegarty, social worker, is certainly inadmissible hearsay. There is no explicit affidavit evidence on the subject from either the applicant herself, after coming of age, or from her aunt. There is no explanation of any kind on affidavit as to on what basis the aunt's mother *(i.e.,* the applicant's grandmother) embarked on a mysterious excursion to Ghana rather than Nigeria in search of the applicant's mother: see para. 5 of Mr. Hegarty's affidavit.

3. The applicant's solicitor, Mary Henderson, avers at para. 8 of her affidavit that the applicant was unable to make a family reunification application as the whereabouts of her mother were unknown. That is again hearsay and inadmissible but in any event is totally unparticularised and unexplained.

4. The claim is made that the parents' whereabouts were unknown but no evidence has been shown of adequate or reasonable efforts to make contact with the parents or family members. There is no evidence as to when the aunt was asked to contact the parents or why she was not asked earlier. I find that the applicant has failed to put forward admissible evidence as to a genuine inability of the next friend or the aunt on her behalf

to contact her mother or other family members within the statutory time limit for applications for family reunification.

5. Even if I am wrong about that, and even if the applicant's relatives were genuinely uncontactable, there was nothing stopping the applicant's next friend, the Child and Family Agency, from applying for family reunification within the statutory period of twelve months from the commencement of the International Protection Act 2015 on the basis that they were endeavouring to make contact with the applicant's relatives, as the respondents' evidence makes clear. The Child and Family Agency as a statutory body must be presumed to know its legal responsibilities and the entitlements of children in its care. There is certainly no averment on its behalf that it was unaware of the twelve-month time limit following commencement of the 2015 Act, and it would be strange to say the least if that were so.

6. On 31st December, 2016, the Refugee Act 1996 was repealed on the commencement of the 2015 Act. No application had been made under the 1996 Act on behalf of the applicant. The Irish Naturalisation and Immigration Service published a notice on its website on 31st August, 2017 indicating that persons previously granted a declaration of refugee status were entitled to make an application for family reunification up to 30th December, 2017. No such application was made on behalf of this applicant by that time. The social work department of the Child and Family Agency did not make an application on the applicant's behalf for family reunification until July, 2018 when the applicant was seventeen.

7. On 8th August, 2018, the Department of Justice and Equality requested full details of all family members in respect of whom family reunification was sought and that was replied to on 27th August, 2018. On 3rd September, 2018 the Department refused the application on the grounds that it was not submitted within twelve months of the commencement of the 2015 Act.

8. The applicant has to this day made no application under the non-EEA policy document or for grant of visas for family members even without prejudice to the present proceedings, which might have achieved the object sought, namely family reunification. Instead of that simple and straightforward available step, she goes for the nuclear option of seeking to have the legislation struck down, not just as it applies to her but *urbi et orbi.*

9. The proceedings were filed on 11th February, 2019, out of time, although the State is not particularly contesting the time issue so it might be churlish of me to hold against the applicant on that ground alone. I granted leave on 15th February, 2019, the proceedings having been instituted through the applicant's next friend and social worker. The primary reliefs sought are *certiorari* of the decision to refuse family reunification and a declaration that the Act is contrary to the Constitution, the ECHR and EU law, as well as other related reliefs.

10. On 15th May, 2019 the applicant came of age. She then swore an affidavit on 18th June, 2019 which is one page long, does not purport to verify the statement of grounds and

says nothing whatsoever about the huge evidential gaps in relation to the issue of the contactability of her relatives.

11. I have now received submissions from Mr. Michael Lynn S.C. (with Ms. Patricia Brazil B.L.) for the applicant and from Mr. David Conlan Smyth S.C. (with Ms. Emily Farrell B.L.) for the respondents.

The claim that the applicant has a vested right under a repealed enactment

12. The only basis of the challenge to the decision in question, apart from a challenge to the legislation, is that the applicant had a vested right to apply under the Refugee Act 1996 s. 18(3) without any time limit and that she carried this right forward for an unlimited period notwithstanding the repeal of the 1996 Act by the 2015 Act.

13. This "vested rights" argument, relying on a very wide interpretation of s. 27 of the Interpretation Act 2005, would deprive the concept of repeal of much of its meaning, creating intolerable uncertainty and giving the Refugee Act 1996 a ghostly after-life such that years or even decades after its repeal, it could violently jerk back into life without warning at the whim of an applicant such as this one.

14. A similar argument urging a wide interpretation of s. 27 of the 2005 Act was rejected in *S.G.(Albania) v. Minister for Justice and Equality* [2018] IEHC 184 [2018] 3 JIC 2311 (Unreported, High Court, 23rd March, 2018) and *V.B. v. Minister for Justice and Equality* [2019] IEHC 55 (Unreported, Keane J., 1st February, 2019), followed in *X v. Minister for Justice and Equality* [2019] IEHC 284 (Unreported, Barrett J., 3rd May, 2019). Such a conclusion is reinforced in the present context by the transitional provisions of s. 70(14) of the 2015 Act which continue pipeline applications for family reunification. That is consistent with an intention not to continue indefinitely a right to continue to make fresh applications under the 1996 Act after the repeal of that Act.

15. Paragraph 25 of the State's submissions in the present case relies on *S.G.* in support of the respondents' argument here, stating that I *"followed the judgment of O'Donnell J. in* [Minister for Justice and Equality v.] Tobin (No. 2) [[2012] IESC 37] in S.G. (Albania) v. Minister for Justice and Equality *[2018] IEHC 184 (para. 33) (under appeal to the Supreme Court), and noted that* "the type of right at issue for s. 27 to be activated *'must not have been a mere right to take advantage of the enactment now repealed'* (Bennion, p. 259)." *It is submitted that the 2015 Act protected the right of a declared refugee to complete the process under section 18, Refugee Act, 1996, but it repealed the right of such a person to make a fresh application thereunder".*

16. One can't help noticing that the phrase in this submission "*under appeal to the Supreme Court*" is not followed by words along the lines of "at the instance of the State which is contending in that appeal that the reasoning in *S.G.*, which the State relies on here, is totally incorrect". Nobody likes hearing "I told you so", but the present case is a good instance of the sort of benefit that accrues to the State and the public interest if repeal means effective repeal. That benefit can only be achieved by taking a restrictive view of the ongoing post-repeal right to rely on the repealed Act that is referred to in s. 27 of the

2005 Act. Counsel in the present case were of course obliged by professional obligation and Practice Direction HC81 to own up to any relevant authorities (even if under appeal). Having said that it does not particularly surprise me that the State is relying on *S.G.* in the present case because that decision generally benefits the State. The actual outcome in *S.G*. was the very unusual minority situation where such an argument works against the State, but that was (in my view) only because of a combination of flawed drafting and a misconceived decision not to own the problem but instead to come up with an implausible and unsustainable legal response when that flaw emerged, contributed to by back-covering fear-mongering about the ramifications, even though there are virtually no ramifications because an unchallenged deportation order, no matter how defective or otherwise invalid, becomes unchallengeable after 28 days.

17. The only unfortunate feature of the timing here is that the State are now relying on my decision in *S.G. after* the Supreme Court has reserved judgment on their appeal against it. In order that the Supreme Court has all the relevant information at its disposal, I feel that I owe it to that court to say that it may conceivably be of benefit if the parties in *S.G.* draw the present judgment to that court's attention before it finalises its deliberations, although I make the present suggestion with all due diffidence, deference, tentativeness and hesitation and only to the extent, if any, that it is helpful to the Supreme Court. I am obviously totally indifferent to the outcome as such of the appeal in *S.G.,* but am not indifferent to the entitlement of the Oireachtas to have repeal interpreted as meaning effective repeal, without a ghostly after-life being injected into the dead enactment. Subject, by definition, to the Supreme Court, that entitlement would be undermined by a wide interpretation of s. 27 of the 2005 Act, as argued against by the executive here, and as argued for by the executive in *S.G*.

18. The conclusion is that here, all that the applicant had was a right to take advantage of an enactment. That right ended on repeal, and was not the sort of vested right preserved by s. 27 of the 2005 Act. The State can't credibly be right in both *S.G.* and in this case; and in fairness to Mr. Conlan Smyth he wisely did not attempt to reconcile the irreconcilable. One could look far and wide without finding a better forensic example of sheer unprincipled expediency. The whole rickety legal confidence trick depends entirely on nobody connecting the dots.

The applicant has not laid the evidential basis for the challenge mounted here

19. Having regard to the factual conclusions above, the challenge to the legislation does not arise here because that challenge is premised on the assertion that the applicant was simply unable to comply with the legislation. In fact that assertion on closer inspection has not been stood up with the appropriate and necessary evidential foundation in the present case. Indeed there is no admissible evidence at all of such inability. And independently of that, even if the relatives were genuinely uncontactable, the application could have been made anyway within the time limits, on the basis that inquiries were being made. Thus the challenge fails in *limine.* The tedious approach of "never mind the facts, look at the interesting law" has no place in the practical business of litigation.

20. If I am wrong about that I will turn to deal with the merits of that challenge. The correct sequence in dealing with a multidimensional challenge such as this would seem to be as follows: firstly, the preliminary issue regarding alternative remedies; secondly, the constitutional challenge; thirdly, the EU law issue, because questions of EU law at least if there could be recourse to the CJEU should only really arise if "necessary" (art. 267 of the TFEU), that is if the matter cannot be disposed of on domestic law grounds; and finally, the ECHR because remedies under the 2003 Act only properly arise if there is no other remedy, so that must be dealt with last.

The applicant has available alternative remedies

21. I dealt with a similar argument in *R.C. (Afghanistan) v. Minister for Justice and Equality* [2019] IEHC 65 [2019] 2 JIC 0109 (Unreported, High Court, 1st February, 2019) in dismissing a challenge to s. 56(9) of the 2015 Act. Many of the same reasons apply in the s. 56(8) context, which is the one that presents itself here. The applicant has an alternative remedy under the non-statutory policy document or by applying for visas

22. Admittedly Barrett J. opined to the contrary in *A and S. v. Minister for Justice and Equality* [2019] IEHC 547 (Unreported, High Court, 17th July, 2019), but given that he did not refer under this heading to *R.C.* at all (something Mr. Lynn was strangely hesitant to acknowledge), let alone engage with its reasoning, that decision does not carry a very great deal of jurisprudential weight, as further discussed in *I.H. v. Minister for Justice and Equality* (Unreported, High Court, 21st October, 2019). In any event, the legitimacy of considering alternative immigration remedies has now been clarified by the Court of Appeal *per* Baker J. in *M.A.M. v. Minister for Justice and Equality* [2019] IECA 116 (Unreported, Court of Appeal, 29th March, 2019).

23. It would be a breach of the separation of powers to strike down a statute if an applicant can obtain the substance of what he or she is looking for through some other reasonably available procedure: see *North East Pylon Pressure Campaign v. An Bord Pleanála* [2016] IEHC 300 [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016). The conclusion here is that as there is a separate procedure which could potentially achieve the family reunification for the applicant's relatives, particularly if the age of an applicant is a factor to be taken into account in that process. It would be an improvident use of the power to strike down legislation to embark on consideration of a challenge to that legislation where the applicant has not even applied under that separate procedure, let alone been refused.

24. If I am wrong about that, I will address the substance of the challenge.

Claim that the Act is unconstitutional

25. It is not a breach of any particular constitutional right to have a twelve-month time limit for family reunification or even to have a time limit that legal guardians must exercise on behalf of a person who is a minor at the time. While we are familiar in say the personal injuries concept that limitation periods only run from attaining one's majority, that is not an absolute constitutional requirement, especially if there is someone in an effective position to assert rights on a child's behalf during his or her minority. (By way of postscript, a *reductio ad absurdum* of the argument that limitation periods can't run

during one's minority might be that on turning 18, a person would have 8 weeks to challenge any and all planning appeal decisions made during the previous 18 years.) The statement of grounds at relief (d) argues to the contrary, relying on equality under Article 40.1, personal rights under Article 40.3 and family rights under Article 41. But there is no inherent constitutional right to family reunification. The mere fact that a person has been admitted into the State for some purpose including international protection does not create a constitutional obligation on the State to admit any or all family members. To put it another way, the admission of one person into the State on the specific basis of a grant of international protection does not generate a free-standing constitutional right on the part of others to enter the State which they did not otherwise possess. It is worth noting that for the purposes of the Geneva Convention, family reunification is encouraged by interested agencies but is not a legal obligation. It is hard to see how it can be said to be a matter of fundamental human rights such that it must be viewed as an implied constitutional right. In the absence of a substantive constitutional entitlement to family reunification, the Act is not a breach of Article 40.3 or 41. Even if there is such a right, a generous twelve-month time limit is not disproportionate and thus no breach of substantive rights arises, and is well within the margin of appreciation of the Oireachtas so it is not contrary to Article 40.1, nor in any event does it relate to the human personality. Every time limit is to some extent arbitrary, so unless and until the day comes when the appellate courts decide that there can be no such thing as a fixed time limit, the possibility of people falling marginally outside the line has to follow as a consequence.

The State is not implementing EU law in making the impugned decision

26. Objection is take that the statute is in breach of art. 23 of Council Directive 2004/83 as interpreted in the light of art. 7, 9, 18, 21 and 24 of the EU Charter on Fundamental Rights. Unfortunately for this applicant, the type of family reunification sought here does not come within art. 23 of the Qualification Directive. Mr. Lynn implausibly suggests that art. 23 should be interpreted to mean something that it clearly does not say. Purposive interpretation is not to be distorted into substantive re-writing of EU legislation. That approach can only be maintained on the Alice in Wonderland premise that words mean what one chooses them to mean. The fact that this application falls outside art. 23 has the consequence that the State is not implementing EU law in deciding on this family reunification application and therefore the Charter is simply not engaged: see art. 51(1) of the Charter.

Claim of breach of the ECHR

27. In *R.C.* I rejected a corresponding ECHR argument relating to post-flight marriages. Mr. Lynn places huge reliance on divergences in the authority as between *R.C.* and *A. and S.* As it happens, Mr. Lynn and Ms. Brazil were counsel in *A. and S.* They argued there that I had overlooked s. 4 of the European Convention on Human Rights Act 2003, waving the decision in *D.P.P. v. O'Brien* [2010] IECCA 103, which was theatrically unearthed by their side during the course of the hearing. Mr. Lynn helpfully now concedes that when he did so he did not add that while I did not mention the *dictum* of Macken J. in the Court of Criminal Appeal in *O'Brien*, I did mention in para. 21 of *R.C a dictum* of Fennelly J. in the

Supreme Court in *McD. v. P.L.* [2010] 2 I.R. 199 to the same effect. Thus, not mentioning *O'Brien* was irrelevant. Mr. Lynn hung his hat on the lack of reference in *R.C.* to s. 4 of the 2003 Act, but that was not an issue in *R.C*. The 2003 Act wasn't overlooked and anyway is mentioned in the judgment, but the issue didn't turn on s. 4 because it was not contended that the court should not "*take due account"* of the principles laid down by Strasbourg decisions (indeed he doesn't say that I didn't take account of or have regard to such principles in *R.C*). The issue was rather whether such regard should slavish. The question is whether the court should adopt the nodding-dog approach to Strasbourg jurisprudence that Mr. Lynn urged on Barrett J. on a logically bogus basis, or whether some element of respectful dialogue with Strasbourg is legitimate. I certainly favour the latter approach. Counsel have therefore, no doubt inadvertently, contributed to the creation of an inconsistency in caselaw, so it goes somewhat against the grain to place much weight on counsel's reliance on that convenient self-encouraged inconsistency.

28. Leaving that minor spat aside however, the alleged disproportionality of the provision in art. 8 terms has not been made out. There was a time window to apply which was not availed of.

29. It is worth adding that the exhaustion of remedies argument is particularly potent in the Strasbourg context: see art. 35 of the ECHR. Here the applicant's failure to even apply under the non-statutory scheme means she has not exhausted all remedies. Admittedly that relates to the admissibility of a complaint to Strasbourg rather than incorporation of the ECHR in national law but nonetheless exhaustion of remedies is a contextual matter that pervades Strasbourg caselaw. The ECHR is not concerned with condemning legislation as such rather than addressing violations on an individual basis. The declaration of incompatibility is a purely domestic invention and not one with any great principled basis in the ECHR itself. While the logic of the declaration of incompatibility is questionable, given that it has no Strasbourg counterpart, such a declaration cannot arise unless a violation of the Convention is inevitable under a particular statute and that is certainly not the case here. Given that the time limits for application under the ECHR itself are non-extendable no matter what extenuating circumstances might exist, it seems implausible that Strasbourg would condemn a generous fixed time limit of one year for family reunification (even longer in transitional cases such as that of this applicant), especially where a non-time-limited non-statutory application process as a fall-back is available. Under those circumstances the ECHR argument cannot succeed.

Order

30. The application is dismissed.