

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 394 J.R.]

BETWEEN

U.M. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of November, 2019

1. The applicant arrived in the State from Pakistan on 17th June, 2011 and sought asylum. That application was refused by the Refugee Applications Commissioner on 7th September, 2011. An appeal to the Refugee Appeals Tribunal was dismissed. The applicant then made submissions pursuant to s. 3 of the Immigration Act 1999 on 28th March, 2012 and applied for subsidiary protection. The latter application was also refused, and a deportation order was made on 30th August, 2012. The applicant then evaded his presentation requirements for a period of six years. In the meantime, he entered into a relationship with an EU citizen. A child of that relationship was born on 14th January, 2016. The relationship broke up but the applicant has the benefit of an order of the District Court giving him some limited access to the child.
2. On 4th July, 2018, the applicant's solicitors applied for revocation of the deportation order under s. 3(11) of the 1999 Act. In August, 2018 the applicant presented to the GNIB for the first time since the making of the deportation order. On 10th May, 2019 the revocation application was refused. The applicant was then arrested on 8th June, 2019 and deported to Pakistan on 13th June, 2019. I granted leave in the present proceedings on 29th July, 2019, the primary relief sought being *certiorari* of the refusal to revoke the deportation order. Helpfully, the applicant's counsel is not pressing the claim for damages or indeed asking for a mandatory order.
3. A statement of opposition was filed on 18th October, 2019 and I have now received helpful submissions from Mr. Gavin Keogh B.L. for the applicant and from Ms. Sarah K.M. Cooney B.L. for the respondent. Ms. Cooney very generously acknowledged that the respondent's opposition papers and written submissions had been drafted by Mr. John P. Gallagher B.L. prior to her involvement in the case.

Context – a revocation decision

4. The context here is that of an attempt to revoke an existing decision, in which situation the court has a somewhat more limited role than the role it has in a challenge to an original adverse decision: see *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 19 [2007] 3 I.R. 603 per MacMenamin J. If the focus is normally in practice on the extent of the change in circumstances since the original order, here the birth of the child is indeed a changed circumstance, but that does not render irrelevant the unfavourable aspects of the applicant's situation that are unchanged. Nor does it render irrelevant other new circumstances that are unfavourable to the applicant since the

original orders, such as his evasion since that date. Both are relevant and are primarily for the Minister to weigh.

5. Thus I would reject Mr. Keogh's proposition that family rights should be considered in splendid isolation from matters that are adverse to the applicant, whether those matters predate or postdate the original deportation order. I previously held in *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018) at para. 15 that the Minister was entitled to have regard to evasion in the deportation context. That judgment is as it happens cited by the decision-maker, and the principle applies here. The Minister was perfectly entitled to have regard to the applicant's evasion.

Ground 1

6. Ground 1 contends that "*The manner in which the Minister proceeded to refuse to revoke the deportation order made in respect of the Applicant is unlawful and breaches fundamental principles of Fair Procedures and Due Process*".
7. That complaint is totally vague and unparticularised and not a proper basis for relief under O. 84, but in any event it has not been made out. The applicant made a submission to the Minister, who then wrote twice seeking further information, not all of which was provided. A decision was then made taking into account the materials furnished. No breach of fair procedures or due process occurred.

Ground 2

8. Ground 2 contends that "*In particular, the Minister failed to have any or any sufficient regard to the particular representations made on the Applicant's behalf as to why that deportation order should be revoked pursuant to section 3(11) of the Immigration Act, 1999, as amended. Specific representations were made on the Applicant's behalf regarding his parentage of a Union citizen child. In order for the principle of audi alterem partem to have any reality such representations must be considered in a meaningful manner*".
9. In the decision, there was considerable narrative acknowledgment of the various points in favour of the applicant. Even if that had not been the case, lack of narrative discussion does not amount to non-consideration where the decision indicates that submissions have been considered, in the absence of evidence of such non-consideration. There is no such evidence: see *per* Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401.
10. It follows from well-established Strasbourg caselaw and the Supreme Court decision in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164 that deportation of a non-settled migrant such as the applicant would breach art. 8 of the ECHR only in exceptional circumstances. No such circumstances have been demonstrated. The claim is made of a lack of "*sufficient regard*" or undue "*weight and significance*" having been given to various factors. As the respondent's written submissions comment, "*these matters are simply not amenable to quantification*" (para. 18). The claim of a lack of sufficient regard is, as the respondent submits, simply a "*way*

of suggesting that the decision-maker should have made a different decision" (para. 17 of respondent's submissions).

Ground 3

11. Ground 3 contends that *"The Minister's considerations failed to have sufficient regard to the Applicant's changed circumstances and instead made (sic) focused excessively on the fact that the Applicant had been classified as an evader and had failed to engage with the immigration authorities in respect of the deportation order of which he is the subject for a period of almost 6 years"*.
12. Unfortunately for the applicant, his evasion and lack of engagement is a relevant factor; and the fact that the Minister gave that significant weight does not make the decision unlawful.

Ground 4

13. Ground 4 contends that *"Once representations from the Applicant had been received pursuant to section 3(11) of the Immigration Act, 1999, as amended, it is thereafter incumbent upon the Minister to consider those representations. The decision to deport the Applicant has serious and lifelong consequences and ought not to be one which is made lightly or in a generic fashion. While the Applicant's behaviour in terms of having been classed as an "evader" forms part of the consideration of his case as a whole, this ought not to have been the primary focus of the Minister's consideration. The core issue to be considered was the extent to which the Applicant's circumstances had changed or altered since the deportation order was initially made in respect of him. In assessing the application in the manner in which he did the Minister failed to have sufficient regard to the basis upon which the Application was made and the consequential obligations on the Minister to consider and fully take into account the Applicant's changed circumstances"*.
14. Claiming that the Minister failed to have sufficient regard to the applicant's points is really a challenge to the merits of the decision. That decision is perhaps not the most favourable one from the applicant's point of view but there is no basis to say it was made lightly or in a generic fashion or that it failed to take matters into account. Ground 4 as pleaded illustrates an attempt to transfer the centre of gravity of decision-making from the Minister to the applicant by alleging that the Minister *"failed to have sufficient regard to the basis upon which the application was made"*. The inference is that the applicant can dictate the terms of engagement by specifying a particular basis upon which an application is made, and that the decision-maker is then acting unlawfully and invalidly if he or she fails to view the case through a lens ground specially for the purpose by the applicant. That is a misconception. The Minister is required to consider all relevant matters, not simply those favourable to or emphasised by the applicant. As noted above, the initial focus of consideration of a revocation application is whether circumstances have changed since the original decision which is sought to be revoked. In a sense that is more a negative threshold, in that if there is no change of circumstances then there is no judicially-reviewable infirmity in a decision not to revisit the original decision. However, that is not the end of the reasoning process. Even having identified a change of circumstances potentially favourable to the applicant, the Minister is then entitled to

weigh that against all other relevant factors, not just other changes unfavourable to the applicant but including factors that remain unchanged since the original decision, such as the applicant's lack at all material times of any entitlement to be in the State other than the purely temporary one of making an unfounded protection application.

Ground 5

15. Ground 5 contends that "*The Minister failed to have adequate regard to the fact that the Applicant is the parent of a Union citizen child and to properly and fully consider the best interests of that child, which must be a primary consideration in the context of the application pursuant to section 3(11) of the Immigration Act, 1999, as amended. Instead, the Minister engaged in an exercise of balancing the Applicant's behaviour and character based on his having evaded a deportation order for some time, against the accepted changed circumstances which gave rise to the application for the revocation of that deportation order. These changed circumstances pertained to the Applicant's parentage of a Union citizen child whose birth post-dated the making of the deportation order. In those circumstances it was incumbent on the Minister to assess whether or not there was a material change in the Applicant's circumstances since consideration had been given to the making of a deportation order in respect of him and thereafter to proceed to consider whether that changed circumstances would warrant the revocation of the deportation of which he was the subject.*"

16. No specific jurisprudential basis for the best interests test in this context is actually pleaded, but the decision under challenge refers to best interests expressly in the context of the relevant jurisprudential basis, which is art. 8 of the ECHR, citing *Jeunesse v. Netherlands* (Application No. 12738/10, European Court of Human Rights, 3rd October, 2014). The best interests of the child thus are noted expressly in the decision but are found to be outweighed by other factors. The decision cites my judgment in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 [2016] 7 JIC 2924 (Unreported, High Court, 29th July, 2016) at para. 30 to the effect that such a weighing process is a permissible exercise. That decision was upheld by the Court of Appeal in *O.O.A. v. Minister for Justice and Equality* [2019] IECA 123 (Unreported, Court of Appeal, 22nd February, 2019). At para. 53, Peart J. for that court endorses the concept that it may be open to the Minister to find that the best interests of the child are outweighed by adverse factors, such as the requirements of the immigration system. Best interests being a primary factor is not equivalent to saying they are automatically a decisive factor. It has thus not been demonstrated that the Minister failed to assess the applicant's situation lawfully.

Discretion

17. The respondent pleads at para. 16 of the statement of opposition that the application should in any event be refused on discretionary grounds. The applicant has not given an account of his whereabouts between 2012 and 2018 and did not furnish a copy of his current and expired passports (see para. 8 of the affidavit of Jim Boyle). Thus, as put in the respondent's submissions, there is "*both proven abuse of the Irish immigration system and a subsequent question mark concerning his recent travels*". This lack of disclosure as to relevant matters militates against the grant of relief so I would have

decided against him on a discretionary basis if, counterfactually, he had otherwise established a basis for relief.

Order

18. The application is dismissed.