

THE HIGH COURT

[2018 No. 788 JR]

BETWEEN

MH AND SH (A MINOR SUING BY HER MOTHER AND NEXT FRIEND MH)

APPLICANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 22nd July, 2020.

1. Ms MH is a Pakistani national. She lived in Pakistan until 2009. She married her husband in 1999. They had a daughter (Ms SH). Unfortunately, Ms MH's husband died in 2009. Previously, Ms MH's brother had emigrated to the United Kingdom in or about 2001, and at some point became a UK national. One theme that comes through the documentation in this case is the issue of DNA. There is a supplementary affidavit before the court sworn on 19 February 2019. At that stage a DNA test had been done at the request of the applicants. At para.3 of that affidavit, Ms MH avers, *inter alia*, as follows:
 - "3. *I say that my solicitors...advised the Respondent by letter dated 26 September 2016 that the Applicants and our EU Citizen family member, my brother [named]...were willing to submit ourselves to DNA testing should the Respondent so require and I say this invitation was never taken up by the Respondent.*
 4. *I say that the Respondent did not have sufficient regard to the various documents supporting the Applicants' application as a family member of my brother [named]...and I say that the Respondent should have taken up the Applicants' offer to submit ourselves to DNA testing.*
 5. *I say that this Honourable Court was advised on 17 December 2018 that the Applicants...[would] be carrying out the requisite DNA testing and I say that by letter dated 28 January 2019 my solicitors...advised the Respondent that the Applicants would be undergoing the said DNA testing on 7 February 2019 utilising the services of [named provider]...in accordance with the letter dated 24 January 2019 issued to my brother...and I say that my solicitors provided the Respondent with the time, date and location of the said DNA testing should an officer of the Respondent wish to attend....*
 6. *I say that the Respondent did not take up the offer to attend the said DNA testing.*
 7. *I say that the Applicants together with my brother...attended at the offices of [named doctor and stated address]....*
 8. *I say that two DNA tests were carried out, namely (1) a Maternity DNA Test involving the first-named applicant and the second-named applicant and (2) a sibling DNA test involving the first-named applicant and [her brother]....*

9. *I say that the results of the Maternity DNA Test Report dated 14 February 2019 is that the first named applicant is the biological mother of the second-named applicant...*
 10. *I say that the results of the sibling DNA test dated 14 February 2019 is that the first-named applicant and [her brother] are full siblings....”.*
2. The court accepts that the DNA evidence followed on the decision that is impugned in the within proceedings. However, the ultimate object of government and of any branch of government is to do what is lawful and right. Here, the review of the decision on the deportation order included words like “*purported*” in relation to the blood relationship between the applicants and Ms MH brother. That adjective clearly no longer applies after the DNA testing, albeit that that testing followed on the decision. The court admits to surprise that, in the course of these proceedings, the respondent has not elected to re-visit the decision to deport in light of the fact that the DNA evidence shows that the applicants have been telling the truth all along as to their being blood relatives of Ms MH’s brother. That being the truth, Ms MH’s claims as to having been supported by and dependent upon her brother – claims which for so long have, at least implicitly, been disbelieved by the respondent – become so credible as, surely, to merit re-visitation of her application.
 3. Ms MH’s story, shortly put, is this. She was widowed in Pakistan. As a widowed mother she was in a precarious position until her brother stepped in to help her. He (a UK national) brought her first to the United Kingdom to live with him there. Then when he got a job here in Ireland, she came with him and has remained with him here, getting a maths-related qualification and putting her daughter through school (the daughter having now proceeded, the court understands, to further studies). In the verifying affidavit filed in support of the EU treaty rights application, there are circa. 150 pieces of documentation relating to the familial arrangements in the United Kingdom, including the financial support situation. It is very onerous that an applicant should be required or feel compelled to supply so much documentation, and it seems inconsistent with the notion of free movement that such a weight of information should fall to be provided. At some point, when it comes to permitted family members, the reference to “*extensive examination*” in reg.5(3) of the European Communities (Free Movement of Persons) Regulations 2015 appears to have become transmuted by the respondent into requiring an ‘exhaustive’ or ‘intensive’ (or even ‘exhaustively intensive’) examination whereas the word ‘extensive’ means merely wide-ranging or covering a large area.
 4. In July 2014, the two applicants came with Ms MH’s brother to Ireland, after he secured employment here. An EU treaty rights application took place on or about 1 May 2015. That application is the genesis of the within application. There is an enormous amount of documentation in support of that initial application and the court would reiterate in this regard the point that it made in the preceding paragraph. On 26 November 2015, the respondent refused the EU treaty rights application on the (surprising) basis that insufficient evidence of dependency on the EU national had been provided. On 14

December 2015, a review of this decision was sought. The letter seeking this review described the dependent relationship outlined in the preceding paragraphs, both as it existed in the United Kingdom and also in Ireland. A number of requests followed from the respondent seeking further information, which information was provided, some of it for the second time. It is inappropriate that the State should be provided with documentation and then raise a query which essentially seeks that the same documentation be provided to it a second time. In any event, in the course of this to-ing and fro-ing the applicants issued their offer to obtain DNA evidence *at their expense*. It is incomprehensible to the court that – in a context in which a DNA test result that was favourable to the applicants would essentially favour the version of events that they had recounted from the outset and in a context where, at least implicitly, the State was dubious as to the existence of the claimed relationship, and where the applicants (not wealthy people) were prepared to pay for the test themselves – the respondent did not welcome the offer and await the outcome of that test.

5. On 23 February 2017, the respondent wrote to Ms MH to indicate that the review had been unsuccessful, stating, *inter alia*, that “[Y]ou do not fulfil the criteria in respect of permitted family member as set out in Regulation 3(5) of the [European Communities (Free Movement of Persons) Regulations 2015]”. Regulation 3(5) has nothing to do with those criteria (it addresses who is a “qualifying family member”), so there was a clear error of law presenting in this regard and were that decision the subject of the within proceedings (it is not), it would have fallen on that ground. Additionally, the court accepts as true the observation made by counsel for the applicants at the hearing of the within matter that it is not clear what further evidence could have been provided, additional to the mountain of evidence that was provided, all of which supported the applicants’ application. There is, the court notes in passing, an almost Morton’s Fork dimension to such applications that seems thoroughly unfair, with applicants placed in the dilemma of having to guess what type of information will suffice to ensure that an application is successful and, when an application ultimately fails, being left in the dark as to what further information would have sufficed.
6. Also on 23 February 2017, the respondent indicated that a deportation process would ensue. Thereafter, by way of letter of 16 March 2017, submissions were made by the applicants’ solicitors pursuant to s.3 of the Immigration Act 1999 and also concerning the applications that had been made pursuant to the free movement regulations seeking that the applicants be treated as permitted family members. These latter submissions were made on foot of the wording of the confirmation of refusal and the failure to have regard to the correct legal provision in reaching that confirmatory decision. No response has yet been received to this letter of 16 March, save for a letter of acknowledgement. The court does not consider that it is proper for the respondent (i) to acknowledge receipt of a letter (leaving the natural and to-be-expected impression that a fuller response will issue), (ii) fail to issue any response and (iii) then come to court offering the contention that ‘this matter is not inchoate because the EU rights application was closed’; if it was closed and that was the approach being taken, then the applicants should have been told as much after receipt of the further letter (to which the acknowledgement was sent) and not left to

divine from the respondent's provision of a letter of acknowledgement but non-provision of any further response, as to what it meant in this regard; even as a matter of basic courtesy that is no way to treat people, but this is not just a matter of courtesy, for the Minister's letter of acknowledgement created an expectation of an answer, no answer has been provided and the matter was and is inchoate; (iv) additionally, and in any event, the explanation offered for the failure to respond properly sits most uneasily with the threefold mention by the Reviewer (as defined hereafter) in her pre-deportation order review of the file that that the applicants' representations to the Minister "*are currently being considered*", the said representations presumably including those made in the letter of 16 March.

7. On 5 September 2018, the respondent wrote to the applicants to inform them that it had been decided to make the deportation order. Separate from the legalities presenting, it is, the court notes, discourteous in the extreme that a person faced with the prospect of a deportation order should be left 'dangling' for eighteen months, not knowing whether the order will issue or not. Life is short enough as it is, without month after month being taken up in an immigration process that ought to be swift to arrive at decisions and swift to arrive at any (if any) corrections of such decisions. Most people can deal with whatever adversities life may bring, but it is the waiting and not knowing that can be nigh on impossible to bear. No good explanation has been offered for the 18-month delay which presented in terms of making the deportation order; the court suspects that this is because no good reason exists. As it happens, there is a legal dimension to the foregoing. The court accepts the contention by counsel for the applicants that a delay of 18 months between the prospect of deportation being raised and the issuance of the related deportation orders can have, and in this case has had, an adverse impact on the applicants in the unhindered exercise of their personal and family rights under Arts. 40, 41 and 42A of the Constitution (and, even if this were not so, has had like impact on their private and family law rights under Art. 8 ECHR) in circumstances where the respondent is obliged to have regard for such rights and humanitarian conditions in considering the appropriateness or otherwise of deportation. Additionally (and indeed even if the foregoing were not so), the delay of 18 months has rights implications in determining the proportionality of the deportation decision; in this regard, the court notes that previous courts (foreign and domestic) have recognised that delay may be a relevant factor in considering whether deportation is an appropriate remedy: see in this regard the judgment of Lord Bingham in *E.B. (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, paras. 14-16 (incl.) and the judgment of MacMenamin J. in *PO v. Minister for Justice* [2015] IESC 64, para.33. The court does not accept that the delay here is insufficiently long to come within this case-law.
8. The deportation order is dated 21 August 2018. The reasons offered for the deportation order are that the applicants had remained in the State without the permission of the respondent, and the respondent was satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system outweighed such features of the applicants' case as might have tended to support the applicants being granted leave to stay. Four principal objections are taken to the

deportation order and the reasons therefore, viz. (i) that the respondent erred in law and/or fact in concluding that the applicants be regarded as permitted family members of an EU citizen pursuant to the European Communities (Free Movement of Persons) Regulations 2006, 2008 and 2015, (ii) that the respondent erred in law and/or in fact in issuing notifications of deportation in respect of the applicants on 23 February 2017, (iii) that the entirety of the respondent's deliberations to ground the issuance of the deportation orders were inchoate, and (iv) that the conclusions arising from the enquiry performed by the respondent pursuant to s.3(6) of the Immigration Act 1999 were unreasonable and irrational.

9. The respondent's decision to make the deportation orders in respect of both applicants is based on an examination of the applicants' file by a named reviewer (the 'Reviewer'). A number of observations might be made in respect of this review:

(i) the duration of the applicants' residence in the State

The Reviewer questions the length of time that the applicants have been in the State. However, the evidence on file, including school records in respect of Ms SH, most clearly indicates to them having been in the State since in or about July 2014.

(ii) family and domestic circumstances

The Reviewer notes the EU rights application but does not appear to have properly considered the evidence that the applicants are related to Ms MH's brother. Separately, the court does not see how, in circumstances where the Reviewer indicates that the applicants' representations to the respondent are being considered that she could then proceed to make a recommendation as to deportation – that suggests that the representations were not being or would not be duly considered, or that an element of pre-judgment as to the outcome of such considerations was brought to bear.

(iii) nature of connection with State

It does not appear that the Reviewer has had due regard to the applicants' connection to the State in circumstances where they had then been here for four years, and where both the first and second-named applicant had pursued 2nd and 3rd level education in Ireland and generally integrated with the Community at large. As for the conclusion that "*the employment prospects [of the applicants] in the State are limited*", the court cannot but note that if the respondent were correct in this last regard (and it is very difficult to see that it is, though it was open to the respondent to take the view it took), that would surely buttress the case as to dependency that Ms MH has been making all along.

(iv) humanitarian considerations

Following the death of her husband in 2009, Ms MH found herself in a most precarious position, being a widowed mother, without prospects of earning a living, in circumstances where her extended natural family had emigrated to the United Kingdom. With the support of her brother, Ms MH journeyed first to the United Kingdom and then followed with her brother to Ireland (at all times with her child, Ms SH). Both applicants have now

been in Ireland for years, have been educated here, have integrated here, and speak English here. The prospect that now faces them is of being returned to a country of origin that they left years ago, returning them in effect to the precarious situation that confronted them when they left. The humanitarian considerations appear to point so clearly in one direction – *i.e.* in allowing the applicants to remain – as to require express and substantial reasoning of a type not provided, insofar as the contrary conclusion has been reached.

10. A trio of additional points might usefully be made:
 - (1) again, given that (a) the applicants' solicitors have not yet received anything beyond a brief letter of acknowledgement to their letter of 16 March 2017, and (b) the Reviewer indicates three times in her review that the applicants' representations to the Minister "are currently being considered", the court cannot but conclude that the respondent's deliberations as to whether to deport are inchoate with the result that the deportation orders must fall (the court recalls in this regard the observations of Mac Eochaidh J. in *NJ v. Minister for Justice, Equality and Law Reform* [2013] IEHC 603) (the inchoate nature of the deliberations also affects the considerations under s.50 of the International Protection Act 2015);
 - (2) the Reviewer in her review implicitly questions the relationship between Ms MH and her brother; given that the offer to undergo DNA testing was made in the letter of 26 September 2016; the court does not see that the enquiries engaged in by the Reviewer can be said to have been adequate in circumstances where the offer to undergo DNA testing was there (and where proof of a blood relationship between Ms MH and her brother could only strengthen such claims as the Reviewer was making); in truth, given that the Ms MH was offering to undergo the DNA testing at her own expense, the court finds it unfathomable that the offer was not taken up by the respondent;
 - (3) sometimes the same points fall to be made in a different context without, to borrow from Charleton J. in *PO v. Minister for Justice* [2015] IESC 64, on which the respondent sought to place reliance, there being any redundant "*regurgitation of old and rejected contentions*". So, for example, when the applicants contend that they are (and they are) related to Ms MH's brother that is not made as some form of repeat EU treaty rights application, but rather to point to the reality of the relationship (and the consequences of breaking up that relationship) in the context of the proposed deportation orders. Charleton J. does not seem to this Court to have been seeking to prevent the same facts ever being mentioned twice; rather he seems to have been concerned with the making of futile contentions in reliance on previously rejected facts. If the respondent is contending that it was futile to raise the contended-for relationship point in the context of the deportation order considerations, that contended-for futility points to a further deficiency in the deportation order process as that point was not, and ought not, for the reason outlined at the start of this paragraph, to have been treated as (if it was treated as)

futile *ab initio* in the context of the deportation order considerations. Separately, the court cannot but note its surprise that the respondent would now turn up in court and argue that some such regurgitation was at play when everyone in the court now knows that nothing of the sort was at play – the applicants are, per the DNA evidence, blood relatives of the brother/uncle. Yes, the deportation decision falls to be judged by reference to what was known at the time, but arguments in court surely fall to be tempered by what is known at this time, if only in an effort to ensure that the end-result arrived at by government (in its executive and/or judicial guise) is both legally correct and otherwise just.

11. Turning next to Art.8 ECHR, the court considers that (i) deportation of the applicants to Pakistan would breach Art.8 ECHR in circumstances where, *inter alia*, (a) they would lose the financial and emotional support of Ms MH's brother, (b) the educational advancement of the applicants (certainly, at this time, the second-named applicant) seem/s likely to be frustrated; (ii) the Reviewer did not conduct a proper examination of the issues pertaining to the applicants' right to respect for private and family life, in particular in failing to carry out a full and updated assessment of the applicants' position; and (iii) the Reviewer implicitly questioned the relationship of Ms MH and her brother, despite the open offer to undergo DNA testing at her expense, an approach which seems to be entirely unreasonable. As a result of the foregoing, the court does not consider that a proper examination was undertaken from an Art.8 ECHR perspective. The Art.8 ECHR-related conclusions cannot therefore stand.
12. For the reasons outlined above, the court considers that: (i) the respondent erred in law and perhaps also fact in making the decision to deport; (ii) the respondent's deliberations in the deportation matter are inchoate; (iii) the decision to deport was unreasonable; and (iv) the respondent erred in law and perhaps also fact in failing to have proper regard to the provisions and consequences of s.3(6) of the Immigration Act 1999, Art.8 ECHR and s.50 of the International Protection Act 2015. Though the point was not pursued at length at hearing, the court further considers that the respondent erred in law and perhaps also in fact in issuing the deportation orders without due regard for the welfare of Ms SH as a minor, in breach of Art.42A of the Constitution (and, if that had not been breached, in breach of Art.8 ECHR).
13. It was claimed by the applicants, *inter alia*, during the proceedings, that the respondent in the EU treaty rights application erred in law and/or in fact in concluding that there was insufficient evidence that the applicants be regarded as permitted family members. In this regard, the court would but note that the time for challenging the decision of 23 February 2017 has long expired and the application for an order for *mandamus* as regards the granting of EU residence cards has not been made out (and cannot in any event be granted). That said, the court would have expected that, in a bid to do right, given what is now known as regards the blood relationship between the applicants and the brother/uncle some effort would have been made to re-visit that decision, not because that is legally required but because it would be entirely proper in light of the changed circumstances now known (thanks to the DNA evidence) to present. After all, a widowed

mother of a young child (a) living with her UK national, blood brother in England because she cannot live by herself in her country of origin, who (b) comes with that brother to Ireland when he takes up employment here, and who (c) (if the respondent is to be believed) has limited employment prospects, would seem a near-classic example of someone who (i) is a dependent family member of an EU national, (ii) has entered Ireland in the company of same, and (iii) all else being equal, the type of person whom one would instinctively expect the Minister to determine was a permitted family member within the meaning of the applicable regulations.

14. The court does not see that the decision of the European Court of Justice in *Chenchooliah v. Minister for Justice and Equality (Case C-94/18)* [ECLI:EU:C:2019:693] is of any avail to the applicants, being persons who have never been treated by the respondent as enjoying any rights as family members.
15. For the reasons stated above, the court will grant the orders of *certiorari* sought in respect of the deportation orders.