

**THE HIGH COURT  
JUDICIAL REVIEW**

[2020] IEHC 561

**Record No. 2019/581/JR**

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT  
2000 (AS AMENDED)**

**BETWEEN:**

**AA, SK, HA (A MINOR) AND SA (A MINOR)**

**APPLICANTS**

**- AND -**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Ms Justice Tara Burns delivered on 3 November, 2020**

**General**

1. The applicants are Pakistani nationals. They are not Irish citizens, nor have they ever had permission to reside in this State. An application for intentional protection has never been made by any of them.
2. The first applicant entered the State in October 2015. The second and third applicants entered the State in January 2016. In February 2016, the first applicant made an application to be treated as a permitted family member of an EU citizen, such person asserted to be his brother. The second and third applicants were not included in this application. In November 2016, the fourth applicant was born within the State.
3. In February 2017, the first applicant's application was refused. He sought a review of this decision which was unsuccessful. A notification of the respondent's proposal to make a deportation order under s. 3 of the Immigration Act 1999 (hereinafter referred to as "the Act of 1999"), was issued to him on 10 August 2018.
4. On 3 October 2018, the first applicant submitted a further application to be treated as a permitted family member of an EU citizen. The other applicants were referred to in this application. This application was refused on 22nd January 2019.
5. In November 2018 and January 2019, the first applicant's former solicitor submitted detailed representations under s. 3 of the Act of 1999.
6. In April 2019, the respondent informed the second to fourth applicants that he proposed making a deportation order in respect of them. Detailed submissions were submitted on their behalf, by their former solicitor, in May 2019.
7. Section 3 examinations were carried out in respect of the applicants on 19 June 2019.
8. The various requirements which the respondent must consider pursuant to s. 3(6) of the Act of 1999 were considered by the respondent in respect of the applicants. Having considered these matters, the respondent concluded 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 case as might tend to support a decision not to make a deportation order in respect of each of the applicants.

9. The respondent also determined that no refoulement related reasons existed as to why the applicants could not be returned to Pakistan. Further, the respondent determined that repatriating the applicants to Pakistan was not contrary to s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2000.
10. The respondent considered Article 8 of the European Convention on Human Rights in relation to the applicants' situation and determined that a decision to deport the applicants was not in breach of the right to respect for private life.
11. The respondent also considered the applicants family life and determined that as it was intended to deport the entire family, no separation or sundering of the family was anticipated and that a decision to deport the family did not constitute an interference with the right to respect for family life under Article 8(1) of the ECHR and was not in breach of Article 8.
12. Accordingly, deportation orders issued in respect of the applicants on 21 June 2019.
13. Leave to apply by way Judicial Review seeking orders of certiorari quashing the deportation orders was granted by Humphreys J on 25 October 2019.

#### **Grounds of Challenge**

14. Counsel for the applicants does not take any issue with the decision of the respondent in relation to the matters considered by him. However, what he does take issue with is the submitted failure by the respondent to consider the applicants' asserted constitutional rights pursuant to Articles 40.1, 40.3, 41 and 42A of the Constitution.
15. The Statement of Grounds filed on behalf of the applicants does not set out the nature of the rights allegedly engaged pursuant to Article 40.1, 40.3, 41 or 42A of the Constitution: there is simply a blank assertion that rights, pursuant to these articles of the Constitution, were not considered by the respondent. When offered an opportunity by this Court to develop the nature of the rights engaged, counsel for the applicant did not take up this offer, indicating that it was not for him to set this out.

#### **A decision maker can only decide matters which are before him**

16. Asserted rights flowing to the applicants pursuant to Article 40.1, 40.3, 41 and 42A of the Constitution were not raised in the section 3 representations made to the respondent.
17. Counsel for the respondent makes an initial objection that the applicant cannot complain about matters not considered by the respondent when these matters were not before him in the first place. She points to the extensive and detailed submissions made by the applicants' former solicitor on their behalf, noting that there is no reference within these three sets of submissions to constitutional rights arising under the aforementioned articles of the Constitution.
18. Counsel for the applicant argues that this cannot be a correct statement of the law. It is submitted that the respondent is obliged to consider all relevant matters; that fault cannot lie with an applicant for failure to raise some matter with the respondent. Counsel

points to the fact that many applicants do not avail of legal advice before making s. 3 representations to the respondent and to interpret the law in the manner suggested by the applicant would place an unfair onus on lay persons. This argument is made despite extensive case law which exists in this regard, most particularly case law emanating from the Asylum division of the High Court.

19. As is clear, the applicants do not fall into the category of persons who did not avail of legal advice: they had the benefit of legal advice and representation during the s. 3 process. Three sets of submissions were made by their former solicitor to the respondent.

20. It is important to consider the process envisaged by s. 3(3) of the Act of 1999 with respect to the issue of deportation orders. Section 3(3) states:-

*"(a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it..."*

*(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall-*

*(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and*

*(ii) notify the person in writing of his or her decision and of the reasons for it..."*

21. It is clear from s. 3(3) of the Act of 1999 that it is envisaged that persons who are being considered for deportation are given the opportunity to make representation to the respondent regarding his decision, which the respondent is obliged to consider.

22. There is an onus on a person who is seeking not to have a deportation order issued against himself, to bring matters which he wishes to have considered, to the attention of the respondent for his consideration. He cannot complain later, by way of judicial review, that there is an illegality regarding the decision because matters which were never raised before the respondent were not considered by him. This Court, by way of judicial review, can only review the decision making process. If a matter was not raised before a decision maker by an applicant, this Court cannot determine that the decision reached was arrived at by an improper means.

23. Accordingly, the failure by the applicants to raise before the respondent, the rights which they assert under the Constitution, would be fatal to these proceedings, unless such asserted rights should clearly have been considered by the respondent. As stated by the Supreme Court in *The Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360, at p. 410:-

*"[A] person who is not entitled to be in the State cannot enjoy Constitutional rights which are co-extensive with the Constitutional rights of citizens and persons*

*lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution although they are not co-extensive with the citizen's Constitutional rights."*

24. The manner in which the High Court should review a deportation order is most helpfully set out in *Lofinmakin (a minor) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 38. Cooke J., stated at paragraph 21 of the report:-

*"The Supreme Court has also made it clear in cases such as *Dimbo v. Minister for Justice, Equality and Law Reform* [2008] IESC 26 and *Oguekew v. Minister for Justice, Equality and Law Reform* [2009] 3 IR 795, that where the Minister is considering whether to make a deportation order in circumstances where its effect will impinge upon fundamental rights of the applicant and his or her family members, he has an obligation to consider a wide range of matters (the "factual matrix") including the personal and family circumstances of the persons concerned and the potential interference with their rights... The Minister must have a substantial reason for making the deportation order and all relevant factors and principles must be weighed in a fair and just manner so as to arrive at a reasonable and proportionate decision. That is the test of the validity of the decision to make the deportation order. While the High Court on judicial review does not substitute its own view as to whether a deportation order ought to be made or not, it can consider its lawfulness by reference to that test and set it aside if the result achieved in balancing those considerations is so clearly lacking in proportionality as to render it unreasonable or irrational.*

Cooke J further stated at paragraph 23:-

*"[T]he object of giving the prospective deportee notice of the proposal to deport and an invitation to make representation against it, is to afford him or her an opportunity of putting before the Minister all relevant facts, information, evidence and reasons which he is asked to consider... Thus the "rule" which confines the Courts examination of the legality of a decision to the material before the decision maker does not, in the case of a deportation order mean that certiorari in an ineffective remedy when the particular legislative context of s. 3 of the Act of 1999 is fully considered*

#### **Asserted Constitutional rights**

25. Articles of 40.1, 40.3 and 42A of the Constitution are referred to as having not been considered by the respondent. Article 41 and the Court of Appeal decision in *Gory v. Minister for Justice and Equality* [2017] IECA 282, are also referred to, as having not been considered by the respondent.
26. However, there is no analysis on behalf of the applicants as to how these rights are engaged, either in the Statement of Grounds, written legal submissions or indeed in oral

argument before this Court, even after having been invited by the Court to demonstrate how it is alleged such rights arise.

27. The applicants have failed to establish that the respondent should have considered these articles of the Constitution with respect to them in their specific circumstances.
28. The respondent took careful account of all matters required to be considered pursuant to s. 3(6) of the Act of 1999. He took particular account of the extensive representations made to him on the applicants' behalf and the asserted effect on the family, specifically the minor applicants, of a move to Pakistan. It has not been established that the applicants have engaged Constitutional rights pursuant to the various articles of the Constitution cited. Accordingly, the respondent did not fail to have regard to a matter which he ought to have considered.
29. I therefore refuse the applicants relief sought and make an order for costs in the respondent favour against the applicants.