Neutral Citation Number: [2010] IEHC 91

THE HIGH COURT

JUDICIAL REVIEW

2009 500 JR

BETWEEN

SHEROZI KHALIMOV

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 14th day of January, 2010.

1. The applicant is a national of Uzbekistan whose mother, half sister and step father live in Ireland pursuant to the terms of the IBC 05 scheme. His sister was permitted to join them in 2009. The Minister for Justice, Equality and Law Reform ("the Minister") has refused to grant the applicant a visa to enter and live in the State and the applicant is seeking judicial review of that decision. He challenges the legality of the decision on the basis that the Minister failed to consider his individual circumstances and his right to respect for his family life pursuant to Article 8 of the European Convention on Human Rights (ECHR) in refusing him permission to join his family.

2. Leave to apply for judicial review was granted by McCarthy J. on the 8th May, 2009 on an ex parte basis. The substantive hearing took place on the 12th November, 2009. Ms. Karen O' Driscoll S.C. appeared with Mr. Michael McGrath B.L. for the applicant and Ms. Emily Farrell B.L. appeared for the respondents.

The Applicant's Family Circumstances

3. The applicant was born on the 5th June, 1990. Apart from a stay in Moscow he has lived and now lives in Samarkand, Uzbekistan. His sister Jasmina was born in 1992 in Uzbekistan. No information is furnished relating to their father or what role he played in their upbringing. In 2001, when the applicant was just 11 years of age, his mother and her partner left Uzbekistan and came to Ireland where shortly afterwards Jessica, their Irish citizen child, was born. The partner is not the father of either Jasmina or the applicant who both remained behind in Uzbekistan following the departure of their mother. In her affidavit grounding these proceedings, the applicant's mother says that the children remained behind in Uzbekistan in the care of her mother because it would have been too dangerous for them to travel with her. They were cared for by their aunt in Moscow for an unspecified length of time but she became unable to care for them (she was overwhelmed because she has three children of her own) and they then returned to Uzbekistan where they have since been cared for by their grandmother who is now 75 years of age.

4. Because Jessica is an Irish citizen by reason of her birth in the State in 2001, her parents were granted permission to remain in Ireland under the IBC 05 scheme. The mother's permission to remain was renewed in 2007 and is currently valid until the 1st December, 2010. One of the conditions of that renewal was:-

> "that you accept that the renewal of your permission to remain does not confer any entitlement or legitimate expectation on any other person, whether related to you or not to enter or remain in the State."

The Visa Applications

5. In early 2008 the applicant's mother applied for a student visa for her son stating that he wished to attend University College Cork (UCC). That application was refused by letter dated the 17th June, 2008 because (i) he had not demonstrated sufficient family, economic or professional ties to his own country to compel him to leave Ireland following a visit; (ii) he did not adhere to the student visa requirements as set down by the Department of Justice, Equality and Law Reform; and (iii) he had applied for a long term visa in Ireland in order to pursue a course of studies but his plans in that regard were "vague". It was stated that the visa office was of the opinion that the main purpose of travel was to be re-united with his mother and step-father.

6. Meanwhile on the 5th June, 2008 the applicant turned 18. On the 30th July, 2008 the applicant's current solicitors, Thomas Coughlan & Co., made an application on behalf of the applicant and his sister Jasmina for a D-Class or long stay visa. Such a visa is appropriate for a non-EU resident wishing to take up employment, to study, or to join a spouse/partner/parent, and for certain other categories.

7. In the application, it was stated that the applicant was a student of the Information and Technology Commercial College Samarkand in Uzbekistan. His mother was in employment as a cleaning operative in Cork and he sought to join his mother and citizen sister in Ireland. It was submitted that he and his sister Jasmina wished to rely on their rights under the ECHR and under Article 41 of the Constitution. It was submitted:-

> *"You will note that our clients have an obligation to maintain their children under the Family Law (Maintenance of Spouses of Children) Act 1976. While Sherozi Khalimov is now over the age of 18 he made his initial application while he was under the age of 18. You must note that under European Law descendants of European Nationals have an entitlement under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 up to the age of 21. It is also possible under national conditions for Visas to be approved for descendants up to the age of 21. Indeed you will*

note that there is a legal right of maintenance up to the age of 23 if in full time education. Given that both children are in full time education we therefore rely on those further rights of the family."

8. Jasmina who was then 16 was granted a D-class visa and has entered the State. However the applicant was not successful and by letter dated the 7th November, 2008 he was notified that the documentation supplied the Visa Officer had been considered and his application had been refused for the following reason:-

> *"As this applicant is now over 18 and in Irish law an adult, it is felt that the granting of a visa in this case may result in a cost to the public funds."*

9. By letter dated the 27th November, 2008, the applicant's solicitor appealed against the decision to refuse him a visa. It was submitted *inter alia* that:

> the purpose of his stay in Ireland was to live with his family;
>
> he intended to attend University College Cork and would be supported by his mother and her partner in Ireland;
>
> his mother would have a legal obligation of maintenance pursuant to the *Family Law (Maintenance of Spouses and Children) Act 1976*;
>
> his family members are firmly rooted in Ireland and his Irish citizen sister is exercising her constitutional rights to live here;
>
> to suggest that he cannot live with his mother and siblings is "a clear violation" of his Constitutional and Convention rights in Ireland;
>
> if permitted to live in Ireland, he could apply for a work permit and / or humanitarian leave to remain and / or stamp 4 permission to reside in the State;
>
> the application was based on his family rights; and
>
> there was no issue with him becoming a burden on the Irish medical system.

10. It was further submitted that:-

> *"Our clients form a family within the meaning of Article 41 of the Irish Constitution and Article 8 of the European Convention on Human Rights and Fundamental Freedoms. In that regard our clients wish to rely on their rights under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. The refusal of the application for the son, given that he is now pas[t] the age of 18, represents interference by the State in the constitution of this family. You will note that under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 those family members up to the age of 21 are permitted to enter the State."*

11. Further documents were furnished with the appeal being the following:-

- VHI First Plan Cover note;
- Letter of renewal of mother's permission to remain;
- Three of the applicant's mother's bank statements from 2008;
- Letter from Bank of Ireland relating to the mother's account;
- Membership summary from mother's credit union account; and
- Payslips from the mother and her partner in Ireland.

12. By decision dated the 11th February, 2009 the Visa Office informed the applicant that the Minister's original decision had been upheld.

13. A further letter dated the 15th April, 2009 was also sent to the Minister and the Visa Office in Moscow. That letter set out further personal information in relation to the applicant and his family members and reference was again made to his rights under Article 8 of the ECHR and Article 41 of the Constitution. It was submitted that the applicant would attempt to procure a medical report in support of his application but no such report was ever furnished. By letter dated the 22nd April, 2009 the Visa Office stated that it could take no further action unless directed by the Minister to do so.

SUBMISSIONS ON BEHALF OF THE APPLICANT

14. Ms. O'Driscoll S.C. for the applicant argued that the Minister has adopted a general policy whereby adults will *never* be granted visas to join their family in Ireland if they would constitute a burden on the State. She argued that the existence of that general policy is affirmed by a letter written by the Minister for Foreign Affairs to the applicant's mother in April, 2009 which was in response to her contact with him as her local T.D. to intervene on her behalf. That letter stated:-

> *"I have been in contact with Mr. Dermot Ahern T.D., who has informed me as the applicant referred to the applicant being re-unified with his mother as a dependent it is not the general policy to issue a family re-unification visa to a dependent child who is over 18.*
>
> *To protect the integrity of the Irish visa / immigration system, visas for dependent children who are an adult in their own right are not issued.*
>
> *The applicant is welcome to submit a personal visa application."*

15. Ms. O'Driscoll argued that this general policy causes the decision to refuse the applicant a long stay visa to be unlawful as such policy flies in the face of common sense because it does not allow for the examination of individual circumstances. The Minister is obliged by the ECHR Act 2003 to consider the individual circumstances of a visa applicant but in this case he only took account of the applicant's age and concluded that he would be a burden on the State. He did not consider that the applicant enjoys family life with his mother and sister, who are in Ireland and that his relationship with his mother goes beyond "normal emotional ties" because there is evidence of economic dependency insofar as his mother funds his education in Uzbekistan. In those circumstances the Minister has failed to act in compliance with his obligations under the ECHR Act 2003. Reliance was placed on the decisions Dunne J. in *Sanni v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 398; Feeney J. in *Agbonlahor v. The Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309; the Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Mahmood* [2001] 1 W.L.R. 840; and the European Court of Human Rights ("ECtHR") in *Boughanemi v. France* (1996) 22 E.H.R.R. 228.

Submissions on behalf of the Respondent

16. Ms. Farrell B.L., counsel for the respondents, accepted that the Minister is obliged to make decisions in accordance with the ECHR Act 2003 but submitted that this applicant is not entitled to the protection of Article 8 as Contracting States are obliged to accord rights under the ECHR only to persons within their jurisdictions. Furthermore, Contracting States are afforded to a very wide margin of appreciation with respect to Article 8 and may take account of general immigration policy. The applicant did not provide any evidence of a relationship with his family members beyond "normal emotional ties". His relationship with his Irish citizen sister is identical to that of the applicants in *B.I.S. (Sanni)* where Dunne J. held that adult family members could not claim constitutional family rights to join and live with a citizen sibling nor could it be suggested that the Minister did not consider the impact of the deportation of the applicant on his family members, including his Irish citizen siblings, who would remain in Ireland.

17. Ms. Farrell further argued that even if the Minister applies a general policy of refusing visas to adult applicants who seek to join their families in the State, this is not a blanket policy which precludes the assessment of individual circumstances. The Supreme Court in *J.D. v Residential Institutions Redress Committee & ors* [2009] I.E.S.C. 59 affirmed that it is neither arbitrary nor irrational to designate persons over the age of 18 years as adults and that this is "an objective classification, containing no element of discrimination".

THE COURT'S ASSESSMENT

18. The Court does not propose to attach weight to the letter from the Minister for Foreign Affairs to the applicant's mother. The Minister for Foreign Affairs is not a party to this action nor was he the decision-maker in this case. The circumstances in which the letter was written are not clear nor is the Court made aware of the information which had been placed before that Minister before the response was sent.

19. The Minister for Justice, Equality and Law Reform is entrusted with the State's immigration policy and is entitled to adopt, formulate, tighten or loosen that policy in accordance with the evolving needs of the State as determined by the holder of that office. The Minister is entitled to require that applicants meet certain criteria in order to obtain permission to enter and remain in the State. If those criteria are not met then it follows that the Minister is entitled to reject such an application. There can be no dispute that in the exercise of his ministerial functions and duties, the Minister is entitled to consider whether the grant of a long-stay visa may give rise to foreign national adults posing a potential burden on the State and to refuse entry to such persons. As a general proposition, there is nothing inherently objectionable in operating an immigration policy to generally refuse entry visas to adult family members from non-EU states nor is there any illegality in deeming that any such person over eighteen is an adult. While general principles of good governance require that like cases are treated alike, there can be nothing objectionable for the Minister to refuse entry to a particular category of foreign nationals in pursuit of immigration policy.

20. One of the peripheral issues in this case is whether the application of a general policy to refuse entry to the applicant because he is the adult son of his mother who has leave to remain here under the IBC 05 scheme is a policy reviewable by the Court. It is not and cannot be the function of the Court to limit the power of the Minister to formulate immigration policy. However, the Minister's acts are subject to the law, the Constitution and international human rights obligations. The Minister's power to determine who enters or remains in the State is not stated by statute to be a power in his absolute discretion, by comparison for example to the Minister's power to grant a certificate of naturalisation pursuant to s. 15 of the Irish Nationality and Citizenship Act 1956, as amended. The Court can therefore review the process by which the Minister reached his decision to refuse a long stay visa to the applicant to determine if the Minister has breached his obligations to act in accordance with constitutional justice and in accordance with his obligation as an organ of the State, pursuant to s. 3(1) of the European Convention on Human Rights Act 2003, to perform his functions in a manner compatible with the State's obligations under the ECHR.

21. It is the Minister's obligations under the ECHR that are relevant in this case as the applicant asserts that the Minister erred by failing to consider his family rights under Article 8 of the ECHR. While the application and appeal to the Minister relied on purported rights under Article 41 of the Constitution, those provisions were not relied upon before the Court and the sole question for this Court is whether the Minister failed to consider the applicant's Article 8 rights.

22. It is undisputed that as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of foreign nationals into its territory. The jurisprudence of the ECtHR is clear that where immigration is concerned, Article 8 of the ECHR cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence or to authorise family reunion in its territory. With those principles firmly established, it is first necessary to consider whether the applicant can actually establish Article 8 rights.

23. The information presented to the Minister in the visa application asserted that the applicant enjoys "family life" within the meaning of Article 8(1), that the State has a positive obligation to respect that family life and that any interference with that right would have to be justified in accordance with Article 8(2). The respondents have argued that the applicant's family life does not fall to be protected by Article 8(1), then no positive obligation arises and no justification is required.

24. As the concept of "family life" arises from the ECHR it is to that Court's jurisprudence that one must look for guidance once the facts are determined. The applicant's mother, sister, half sister and step-father now live legally in Ireland. The applicant lives in Uzbekistan, which is neither a member of the Council of Europe nor a Contracting State to the ECHR. He has never been to Ireland. Since 2001, any contact that he has had with his mother, step-father and younger sister Jessica, if any, would have been if they visited him in Uzbekistan or Moscow (and no such information was before the Minister.) On those facts the Court is *not* satisfied that the applicant enjoys "family life" within the meaning of Article 8, for two distinct reasons. The first is that the applicant has never lived in the territory of a Contracting State. The benefits of the rights and obligations of the ECHR do not generally extent beyond Contracting States. As the applicant is not now nor has he ever been resident within the territory of a Contracting State (save for a short stay in Russia), he does not benefit from Article 8 family rights. While his family who reside in Ireland do have family rights and undoubtedly enjoy family life together within the meaning of Article 8(1), he has not shared in that family life. In *Slivenko v. Latvia*

(2004) 39 E.H.R.R. 24, the ECtHR held at § 94 that "family life" within the meaning of Article 8 "*has been interpreted as encompassing the effective "family life" established in the territory of a contracting state by aliens lawfully resident there, it being understood that "family life" in this sense is normally limited to the core family*" (emphasis added).

25. The ECtHR has consistently held that a child born of a marital union is *ipso jure* part of that relationship. Hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to family life which subsequent events cannot break save in exceptional circumstances. However this does not avail the applicant as quite apart from the territorial deficit in this case, the fact that the applicant is an adult is a second reason for finding that he does not enjoy "family life" within the meaning of Article 8. The jurisprudence of the ECtHR is clear as to the existence of "family life" between parents and adult children and has consistently held that there can be no "family life" between adult offspring and parents unless additional factors of dependence, other than normal emotional ties, are shown to exist (see e.g. *Emonet v. Switzerland* (2009) 49 E.H.R.R. 11, at § 35). In *Emonet,* which involved the adoption of an adult paraplegic woman by her mother's partner, the ECtHR was satisfied that such "additional factors of dependence" were shown in circumstances where the applicant had a disability. The Court found at § 80 that even though the "child" was an adult, she needed care and emotional support and these factors "*exceptionally bring into play the guarantees that derive from art.8 between adults*."

26. The ECtHR in *Emonet* affirmed the principles set out in *Kwakye-Nti et Dufie c. Pays Bas* (Application No. 31519/96, decision of 7th November, 2000). In that case, the applicants were a married couple of Ghanaian origin. They travelled to the Netherlands in 1987 and in 1992 they were granted a residence permit. In 1993 they obtained Dutch nationality. They were refused a residence permit for their three sons who had remained in Ghana with their aunt, on the basis that the children no longer formed part of their parents' family unit. The ECtHR found no violation of Article 8. In relation to the two children who had reached the age of majority, it noted that their primary links lay with their country of origin where they had been living since birth and they had not established that they would be dependent on their parents for financial or any other material reason. Therefore they had not shown anything more than normal emotional ties and could not benefit from the protection of Article 8.

27. In this case, the applicant argues that a relationship of dependency between him and his mother. However no such evidence was before the Minister. The applicant had previously sought a visa to study at UCC but provided no evidence of the proposed course of study nor was there any evidence that he had been accepted to engage in any course by the University authorities or that his fees had been paid in advance. When the application for a long stay visa was presented to the Minister, the applicant and his representatives were aware of that previous refusal to issue a student visa on the three grounds outlined at paragraph 0 above. If the applicant had complied with the requirements for a student visa he may well have been in a position to argue financial dependency on his mother. In such a case, the reasoning in the decision in *Kwakye-Nti* (cited above) and *Advic v. United Kingdom* [1995] 20 E.H.R.R CD125 cited by Dunne J. in *Sanni,* would potentially have created circumstances that might amount to "family life" within the meaning of Article 8. However no such evidence was ever before the Minister.

28. While the facts of this case show that the applicant was not quite 18 when his student visa application was commenced, it must have been anticipated that his age of majority was approaching. When applying a second time, the burden lay with him to establish that his relationship with his mother and sister went beyond normal emotional ties by reason, for example, of his financial dependence on his mother. The Minister was given very little additional relevant information. While bank accounts of the applicant's mother and step-father were furnished to establish their ability to support the applicant in the short term, there was nothing to suggest that any funds were or had been sent to Uzbekistan towards his maintenance or for payment of university fees there and no evidence was provided of any contact between the applicant and his mother and step-father since 2001. Although it was later suggested that as the applicant was in a fragile mental state because of his continuing separation from his mother, no medical or other evidence was furnished in support of that suggestion. In the circumstances the applicant cannot be said to have established financial or other dependence on his mother or any relationship beyond normal emotional ties. Thus, even if he could enjoy the protection of the ECHR it has not been established that he comes within the *Kwakye-Nti* and *Advic* extension of family life to adult children.

29. The Court notes that in *Sijakova v. Macedonia* (Application No. 67914/01, decision of 6th March, 2003), the ECtHR held:-

> "The Court considers that the issue of maintaining contacts and communication between parents and children who are not minors, and the respect and affection they extend to each other, is a private matter, which concerns and depends on the individuals bound in a family relationship, the lack of which, and the reasons for and origins of such lack, do not call for a positive undertaking by the State and cannot be imputable to it."

30. In other words, where an adult applicant is unable to establish special ties of dependency which show that he enjoys "family life" with his parents within the meaning of Article 8, there is no positive obligation on the State to "respect" his right to respect for his family life.

31. The applicant's mother and her partner made a conscious decision in 2001, when he was just 11 years of age, to come to Ireland and raise their second daughter Jessica as an Irish citizen. That was a decision they were entitled to make. No explanation was provided to the Minister as to why his mother waited six years before seeking visas for her teenage children to join her in Ireland.

32. The UNHCR has recognised the general principles applied by the ECtHR when conflicting interests of family rights and immigration policies are considered by Contracting States to the ECHR. The application of Article 8 in family reunification cases is mentioned and clarified in the *UNHCR Manual on Refugee Protection and the ECHR* (updated April, 2006). Paragraph 3.4 of the Manual states:-

> "Essentially, the Court will seek to determine whether there is anything preventing the family from returning to live in the country of origin with the other elements of the family who are trying to come in the State party to the ECHR. This 'returnability' test is systematically applied. If it is established that the whole family can indeed reunite in the country of origin, the Court will not find a violation of Article 8."

33. The ECtHR has also found that Article 8 does not guarantee a right to choose the most suitable place to develop family life (see *Ahmut v. The Netherlands* (1997) 24 E.H.R.R. 62 at § 71). A violation of Article 8 in family reunion cases is very rarely found unless there are circumstances such as existed in *Sen v. The Netherlands* (2003) 36 E.H.R.R. 7 where the application was made by a family settled legally in the Netherlands, where the Dutch educated children had few ties with Turkey and where the child left behind was only 9 when the application was made.

34. This Court has great sympathy with the situation of this family and especially for the applicant who finds himself in Uzbekistan without his sister. Had he been a few years younger, there seems to be a high probability that he would have been permitted to visit his mother in Ireland. However, he is now an adult and has shown no evidence of dependency beyond normal emotional ties. He cannot impugn the validity of the decision refusing him a long stay visa on the basis of a failure to consider his Article 8 family rights

as, on the evidence before the Minister, such rights do not exist. There is however nothing to prevent the applicant from re-applying for a student visa if he can provide concrete evidence that he fulfils the relevant conditions including his acceptance into a course of study in Ireland, a source of means while studying and of the likelihood of his return eventually to his native country.

35. In the light of the foregoing, the Court is ***not*** satisfied that the applicant is entitled to the reliefs sought.