Neutral Citation [2012] IEHC 109

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 935 J.R.]

BETWEEN

K. A. [Nigeria]

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke dated the 12th day of March 2012

l. This is an application for leave to seek judicial review of a decision to issue a deportation order dated the 20th September, 2011, made by the second named respondent in respect of the applicant. The statement of grounds for the application as originally issued included claims for a series of reliefs and named the Refugee Appeals Tribunal as a respondent apparently with a view to obtaining on order of certiorari quashing an appeal decision of the Tribunal of the 25th November, 2008, a decision which was almost three years old at the time.

2. Although apparently invited to abandon the claims mad e in the respect of the Tribunal decision and to withdraw the proceedings as against the Tribunal, it was not until the written submissions for the present application were exchanged that the respondents were informed that no reliefs were to be pursued against the Tribunal or in respect of any of the decisions which featured in the reliefs sought at section d of the statement of grounds, other than the deportation order.

3. Similarly, although the statement of grounds set out some 20 distinct grounds. At the hearing of the application counsel for the applicant reduced the issues in the case to a single ground directed at the argument that the Minister, in the analysis which is set out in a memorandum accompanying the deportation order, had erred in law in assessing the manner in which the deportation order would impact upon the applicant's entitlement to respect for her family life under Article 8 of the European Convention on Human Rights.

4. In particular, the essential argument formulated by counsel for the applicant was this. In the memorandum entitled "Examination of File under s. 3 of the Immigration Act 1999" the Minister had concluded that a decision to deport the applicant would not "constitute an interference in the right to respect for family life under Article 8(1) of the EC IIR" because it was considered that "her circumstances" do not suggest anything more than "normal emotional ties" and accordingly that the applicant was not taken as having established a "family life" in this country since her arrival here. This, it is argued, was based upon the mistaken understanding that because the applicant had attained the age of eighteen at the time when the Minister's decision was being made, it could not be presumed that, as an adult, she had established a family life in the household of the aunt and cousins with whom she had been residing since her arrival. Thus, the legal law alleged is that the Minister failed to recognise these circumstances as "family life" for the purpose of Article 8 with the result that he failed to proceed to carry out any analysis of the proportionality of the interference with that family life which would result from her expulsion from the State.

5. The applicant is a young woman from Nigeria who is said to have been born on the 6th December 1992, and to have arrived in the State on the 18th November, 2007, as an unaccompanied minor when she was approximately one month short of her fifteenth birthday.

6. She had an aunt already living in the State who had two children, one of whom was Irish born and the aunt had permission to reside in the State since 2002 as a result. With the assistance of her aunt she applied for asylum but was unsuccessful, an appeal against the negative recommendation at first instance having been rejected by the Tribunal on the 16th November 2008.

7. There appears to have been confusion about some discrepancy in the detail of the applicant's family background in Nigeria as given by her and by her aunt during the asylum process. However, the applicant claimed that her mother had died at childbirth and that she had not known who her father was. She claims that before leaving Nigeria she had lived with her grandparents and two older women who she believed to be her sisters, but may have been, it appears, aunts.

8. Her application for asylum was made in July 2008, although she claimed to have arrived in the State in November, 2007. Whilst in the asylum process she gave an account of having been attacked, chased and possibly sexually assaulted by a group of twenty young boys when she was working as a street trader, she said that her reason for coming to Ireland was for a "better life".

9. Following the failure of the asylum claim and the rejection of an application for subsidiary protection, the Minister considered the representations made for leave to remain in the State under s. 3 of the Immigration Act 1999 and then made the deportation order now sought to be challenged.

10. The application for leave to remain together with the application for subsidiary protection was made by a letter of the Legal Aid Board (Refugee Legal Services) dated the 10th February, 2009 and thus at a point when the applicant had been in the State for a year and three months. In the application for leave to remain, the essential reason relied upon was that her aunt in this country, together with her own two children, had come to regard the applicant as a member of that family. The aunt regarded her as a daughter and the children regarded her as an older sister. It was submitted that the applicant with "her aunt as her guardian and her

cousins, together form a family unit protected by Article 41 of the Constitution". This basic argument was supplemented by some information as to the applicant's schooling since she had arrived; the fact that she was preparing to sit the Leaving Certificate and that she was active in her church and in its youth group. It was submitted that the return of the applicant to Nigeria would not in these circumstances be in her best interest. It is fair to say that the gist of the remaining submissions and arguments made in that letter was concerned with the legal basis upon which the case was advanced - the legal reason which militated against making a deportation order.

11. As already indicated these submissions were taken up and addressed under the heading of "Consideration under Article 8 of the European Convention" and "family life" in the memorandum setting out the reasons for the decision. Her family history in Nigeria, so far as it was known, is referred to and the description of her life with her aunt and the family in Ireland since 2007 is described. In the course of argument counsel on behalf of the applicant sought to suggest that this assessment failed to have regard to the fact that the applicant was an orphan and unmarried with no children of her own. This submission cannot be accepted. The fact that the applicant was single and living with her aunt and two cousins is explicitly recorded in the opening sentences of the memorandum and the fact that her parents were deceased is referred to elsewhere. The fact that these basic background facts are not repeated in the section dealing with the Article 8 consideration, cannot be relied upon as indicating that these facts were ignored in the assessment.

12. As already indicated in the conclusion quoted from the final paragraphs of the memorandum above, the essential basis upon which the Minister decided that Article 8 family rights would not be infringed by the making of a deportation order in these circumstances is that, in the Minister's judgment, the life that the applicant had led since November 2007, in the household of her aunt and cousins was not such as constituted an established "family life" in the sense of that Article. In effect, the judgment in that regard is based upon the fact that the applicant was now an adult aged eighteen and had been living for a relatively short period of years during which she was pursuing an asylum application and not living with more direct relatives such as parents or siblings, but with an aunt and two young cousins. Thus the issue raised by the single ground now sought to be advanced in this case is whether that assessment made by the Minister is a rational one having regard to the information available as to the applicant's circumstances and compatible with the criteria required to be applied by law in assessing "family life" for the purposes of Article 8.

13. In addressing these issues, counsel for the applicant referred to a number of judgments of the European Court of Human Rights in which the question of interference with family life by expulsion of an individual from the territory of a Contracting State has been addressed. These include the case of *Ezzoudhi v. France* (13th February, 2001) which was cited by the Minister in the memorandum. Other cases referred to by counsel included *A.A. v. The United Kingdom* (20th September, 2011), *DaSilva & Another v. Netherlands* (31st January, 2006), *Nunez v. Norway* (28th September, 2011) and *Bousarra v. France* (23rd September, 2010). (See full citations below.)

14. It is instructive accordingly to summarise the types of circumstance in which the Strasbourg court has found "family life" to have been established in these and some of the other cases in which the issue has arisen in relation to the threatened removal of an individual from the territory of a Contracting State.

a) In *Ezzouhdi v. France* (Application No. 47160/00) [2001] ECHR 85 the Court found that there had been a violation of the Moroccan-born applicant's right to family and private life under Article 8 in circumstances where he was prohibited from access to France due to drug-related offences. The applicant had moved to France at the age of five and retained no ties to his country of origin other than his nationality. Single and without children, the applicant had been educated in France and had worked there for several years. All of his family resided in France including his two brothers, two sisters and his mother. His father had lived in France in the years before his death. The applicant claimed not to speak the language in his country of origin. In these circumstances the offences that the applicant had committed were not considered as being of a particular gravity to justify an interference with his Article 8 rights. It is to be noted therefore that the life thus lived in France was the only life the applicant had lived since the age of five years.

b) In *Bousarra v. France* (Application No. 25672/07) [2010] ECHR 1999, the Court considered that the expulsion from France of a Moroccan-born applicant and refusal to permit him to re-enter constituted an interference with his right to respect for family life in circumstances where he was twenty-four, single and without children of his own. The applicant had been convicted of offences linked to violence and drug trafficking. The Court recalled that where young adults had not yet founded their own family their ties with their parents and other close family members could also be considered as family life. The Moroccan-born applicant had arrived in France in 1978 at the age of three weeks and had remained there without interruption until 2002. He lived with his parents, even after attaining the age of majority. His mother died in 2009 and his sick and elderly father still lived in France and had acquired French nationality. It was not demonstrated that at the moment of expulsion, the applicant had links with his country of origin other than hi s nationality. In those circumstances the Court judged that the expulsion of the applicant was disproportionate to the legitimate aim being pursued. Again the applicant had lived in France and nowhere else since he was three weeks old.

c) In *A.A. v United Kingdom* (Application no. 8000/08) [2011] ECHR 1345 the Court held that a young adult of 24 years of age, who resided with his mother and had not yet founded a family of his own, could be regarded as having an established "family life." He had arrived in the UK at the age of thirteen. He had been convicted of rape less than two years after his arrival while still a minor and sentenced to a period of detention in a young offenders' institution. He had been at liberty for seven years following his release. The Court considered his respective ties with the UK and Nigeria. He resided with his mother and had close relationships with two sisters and an uncle, all of whom reside in England. He completed the majority of hi s secondary schooling and further education to post-graduate level in the UK and had commenced a career with a local authority in London. While he had spent a significant period of his childhood in Nigeria, he had not visited that country for eleven years. The Court held that deportation would be disproportionate and would violate Article 8.

d) In *Bouchelkia v France* (Application no. 23078/93) [1997] ECHR 1, the situation of an applicant who had been born in Algeria in 1970 and moved to France at the age of two was considered. He resided with his mother and nine siblings in France. At the time of his deportation order he was twenty years old, had lived eighteen years in France where he received all of his schooling and where he had worked. The applicant had been convicted of aggravated rape while he was 17, and his deportation was held not disproportionate to the legitimate aim of prevention of crime and disorder.

e) In *Boujlifa v France* (Application No. 25404/94) [1997] ECHR 83 the Court held that an applicant who had arrived in France at the age of five and had lived there almost consistently since 1967 with the exception of one period of fifteen months, had established "family life." He was 28 when deportation proceedings were commenced against him. His links to France included the fact that he had received his education there, had worked there for a brief period and his parents and eight brothers and sisters lived there. On other hand, he had never shown any desire to acquire French nationality. He had been convicted of robbery and armed robbery such that his deportation was considered proportionate.

f) In *DaSilva and Hoogkamer v The Netherlands* (Application No. 50435/99) [2006] ECHR 86 the applicant had moved from her native Brazil to the Netherlands in 1994 at the age of 22. She was the mother of two sons who originally stayed in Brazil. While in the Netherlands she lived with her partner with whom she had a daughter in 1996 and from whom she had later separated. The applicant had been living in the Netherlands unlawfully at all times, having made no attempt to regularise her position until more than three years after arriving, and the case concerned the question as to whether the authorities were under a duty to allow the applicant to reside in the Netherlands, in order to enable the applicants to maintain and develop family life there. If she were to return to Brazil, she would have to leave her daughter behind in the Netherlands as the father had parental authority and he would not grant permission for her to leave the country. The Court held that in view of the far-reaching consequences which an expulsion would have on the responsibilities the first applicant has as a mother as well as on her family life with her young daughter and taking into account that it was in the daughter's best interests for the first applicant to stay in the Netherlands, the Court considered that the economic well-being of the country did not outweigh the applicants' rights under Article 8 despite the unlawful nature of the first applicant's residence at the time of her daughter's birth. Thus al though in this instance the presence of the applicant in the Contracting State had been illegal she was held to have established what was in effect a new family life by the birth of a daughter- who could not be expelled - and her relationship with her.

g) In *Nunez v Norway* (Application No. 55597/09) [2011] ECHR 1047, the Court also found an infringement of the applicant's rights under Article 8 notwithstanding her unlawful residence in the Contracting State. The applicant had been born in the Dominican Republic in 1975. She arrived in Norway in January 1996 as a tourist. Two months later she was arrested on suspicion of shoplifting, accepted a summary fine and was deported with a two-year prohibition on re-entry. In July of the same year, she defied the prohibition and returned to Norway with a false identity and travel document. She married a Norwegian national and applied for a residence permit stating she had not previously visited Norway and that she had no criminal convictions. On the basis of this misleading in formation, she was granted a one-year work period in January 1997, which was repeatedly renewed, and a settlement permit in April 2000. In 2001 she started cohabiting with a man who also originated from the Dominican Republic and who held a settlement permit. They had two daughters, born in 2002 and 2003. The applicant was apprehended in relation to her previous stay in Norway in 2001 and her permit was revoked in October 2002. In 2005 it was decided that she should be expelled and prohibited from re-entering for a period of two years. The Court found that the relationship between the applicant and her daughters constituted "family life" for the purposes of Article 8 and that her links to Norway did not outweigh her attachment to her home country. They had been formed through unlawful residence and without any legitimate expectation of being able to remain in the country. From their birth, the children had been living permanently with the applicant until a court judgment in 2007 granting custody to their father. The consequence of this judgment was that the children would remain in Norway in order to live with their father, a settled immigrant. Having regard to the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court held that sufficient weight had not been given to the best interests of the children for the purposes of Article 8.

15. In the view of the Court, a clear approach emerges from these judgments. To constitute "family life" for the purpose of Article 8, mere residence, even over a prolonged period and even when legal, is not sufficient. There must be evidence of some more substantial existence lived with close relatives in which the individual concerned can be shown to have established personal roots in the Contracting State through personal relationships, parenthood, education, employment or other indicators that the Contracting State has become the real centre of the individual's settled way of life. Whether or not the expulsion of an individual from a Contracting State can be shown to be an unlawful interference with such a "family life" will depend upon a variety of factors which can be expressed as a series of questions which is not of course exhaustive:

> Who are the other members of the family in question and what is their degree of relationship to the individual concerned?
>
> Are they immediate relatives in the direct line, such as parents, children, siblings or a spouse?
>
> In what circumstances did the family life in question come to be established within the Contracting State?
>
> Most importantly, for how long has it been established as the household situation in which the individual concerned has been living?
>
> Has the individual's presence in the Contracting State been lawful?
>
> Has the presence of the individual concerned in the Contracting State been brought about by some circumstance or purpose such as the making of a claim for asylum to which the family life in question is incidental or consequential?
>
> What ties have been established in the course of that family life by way of education, employment and the other normal incidents of personal existence lived in a settled location?

16. The wide variety of these and other possible permutations can be seen readily illustrated in the judgments opened to the Court, in those referred to above and to be found elsewhere in the case-law. As has been seen, in many the subject of the proposed expulsion was a member of a family of settled migrants lawfully present in the State. In many instances the individuals concerned had arrived in the Contracting State at a very young age with the family involved and had there grown up, been educated and pursued employment before, for example, facing expulsion as a result of committing a crime.

17. When this approach to the criteria of Article 8 is applied to the circumstances of the present case there is a stark contrast. It is clear, in the judgment of the Court, that it could not be said that the assessment made and conclusion reached by the Minister in relation to "family life" is either wrong in law or irrational in the sense of being unsupported by the available information as to the applicant's history and circumstances. In essence the position of the applicant appears to have been as follows:-

> (a) She was born in Nigeria in 1992 and lived there until 2007. Her "family life" for almost fifteen of her years before adulthood was that spent with her grandparents and other relatives in Nigeria;
>
> (b) Although there was some very vague attempt to suggest that her "aunt" had some involvement in the applicant's life following the death of the mother in 1992, no information whatsoever was given as to the nature of that involvement. In response to a question on this point at the hearing, counsel for the applicant conceded that the "family life" relied upon was that which had subsisted since November 2007 in this country and that it was not being argued that the relationship between the aunt and the applicant in Nigeria between 1992 and 2002 (when the aunt left) constituted a "family life" which might be said to have been resumed and continued in this country in November 2007;

(c) Further doubt was placed upon the reality of family ties between the aunt and the applicant by virtue of the fact that in the aunt's dealings with authorities in this country, including her application for permission to remain in which other family members were listed, no mention was made of the applicant as a member of her family;

(d) Although the aunt and the applicant assert that they regard themselves as mother and daughter and that the applicant is regarded as a big sister by the cousins, the practical quality of the relationship within the household has not been expanded upon or explained in evidence by describing its routine and the day to day goings on and dealings with one another.

18. In summary therefore, the position was this: the applicant arrived in the State in November 2007 with the professed aim of seeking a "better life'". She has since resided with an aunt with whom she had had no contact for at least the five preceding years and with younger cousins she had never previously met. They say they treat her as a daughter and sister respectively. She goes to school and takes part in church activities. That is all that was told to the Minister.

19. In those circumstances, the Court is satisfied that no stateable case can be made that the Minister erred or reached an unreasonable conclusion in deciding that the circumstances so described did not amount to "family life" in the sense of a settled way of life in a close, established family group, in which ties of mutual reliance have subsisted which might be described as going beyond the normal emotional ties that would exist between a young woman aged between 15 and 18 years and her aunt and younger cousins. The description is not one of a settled household in which the applicant has been established as a member in circumstances, and for reasons, independent of her pursuit of an asylum claim and her attempt to seek "a better life" as a migrant.

20. For all of these reasons the application for leave is refused