Immigration – decision by Secretary of State certifying human rights claims clearly unfounded – Dublin II Regulation – whether Secretary of State's decision unlawful

Neutral Citation No. [2006] NIQB 14 | *Ref:* **GIRC5509**

Judgment: approved by the Court for handing down | *Delivered:* **13/03/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
NGOZI CHRISTIANA OKOYE FOR JUDICIAL REVIEW

GIRVAN J

[1] The applicant is a Nigerian national. In this application she challenges the decision of 24 October 2005 of the Secretary of State that she should be removed from the United Kingdom to Italy and a decision by the Secretary of State of 24 November 2005 certifying that her human rights claim was clearly unfounded.

[2] The applicant applied for asylum in the United Kingdom on 25 August 2005. During a screening interview she claimed to be a single person and claimed to have travelled directly from Nigeria by boat and entered the United Kingdom clandestinely on 18 August 2005 at an unknown port whence she went to London. The applicant did not have a passport but had in her possession an Italian identity card confirming that she was permitted to reside in Italy. By letter of 30 September 2005. She was informed that the Immigration Service was considering the application of Council Regulation (EC) 343/2003, known as the Dublin II Regulation ("Dublin II Regulation") in relation to her case. The Dublin II Regulation came into effect on 1 September 2003 and is binding on Member States of the EU, Norway and Iceland. It determines which of the participating States is responsible for considering an asylum claim made in their territories. For example, it may apply where an individual travels between countries without seeking asylum in the first participating country has asked for asylum in other participating countries or has been issued a visa or residence permit by one participating country before seeking asylum in another. The Italian Government accepted the transfer of the applicant for the determination of her asylum claim under Article 9.1 of the Regulation. On 24 October 2005 the applicant was informed of the certification of her asylum application on third country grounds and that she was to be removed to Italy where her asylum claim would be considered.

[3] On 22 November 2005, the application was arrested and detained at Hydebank Detention Centre in order to facilitate her removal to Italy. This was arranged for 5 December 2005.

[4] By letters dated 22 November 2005 and 23 November 2005, the applicant solicitors made representations to the Home Office that removal of the applicant to Italy would be in contravention of her Convention Rights. In the letter of 23 November 2005 the solicitor contended that the removal of the applicant would cause severe harm amounting to a breach of her rights under Article 3 and Article 8 of the Convention. She claimed to have a well founded fear of persecution by her husband with whom she resided in Italy and that he forced her to return to Nigeria where it was envisaged that she would suffer grave ill-treatment.

[5] According to the affidavit of Mr McRitchie, the solicitor acting for the applicant, medical records recorded that the applicant appeared to have suffered hallucinations, had become unconscious on one occasion and was failing to respond to stimuli. She was hospitalised between 25 November and 27 November. The applicant told her solicitor she required psychiatric treatment and that her blood pressure was very high. Medical records show that on 30 November it was 200/115. On 3 December prison staff informed the solicitors that the applicant was having serious difficulties and could not attend the prison visits area. He was allowed to see her in the prison landing. The applicant appeared to be visibly shaking and in a very distressed state in the opinion of the solicitor. The prison staff expressed concern about her welfare and concern about her mental health.

[6] The Third Country Unit in the Immigration Service considered that no medical evidence had been submitted to support the allegation. The Secretary of State concluded that he was not satisfied that the applicant's human rights claims were not clearly unfounded and he so certified. Following further representation from the applicant's solicitors, the decision was confirmed on 2 December 2005. It was noted again that no medical evidence had been forthcoming from the applicant.

[7] In her affidavit, Lesley Elliott, the acting Higher Executive Officer with responsibility for the case, made the following points (inter alia):

> (a) The applicant had adduced no evidence that she was suffering from psychological problems.
>
> (b) High blood pressure and a hospital stay were mentioned but little else of a specific nature. The applicant was discharged from hospital and considered fit for further detention. It was noted that she had been refusing medication.

(c) Her Article 5 claim was certified as clearly unfounded. Once an individual had been served with the Third Country Certificate there was always a possibility that she would abscond.

In a subsequent letter of 12 December 2005, the Home Office re-affirmed the decision which they had reached.

[8] Under paragraph 5(4) of the Asylum and Immigration (Treatment of Claimants Etc) 2004 ("the 2004 Act") a person:

> "may not bring an immigration appeal by virtue of section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies unless satisfied that the claim is not clearly unfounded."

[9] By paragraph 3(1) of Schedule 3, Part 2 of the 2004 Act, the provision applies for the purpose of the determination by any person, tribunal or court whether a person who has made an asylums claim or a human rights claim, may be removed from the United Kingdom and to a state of which he is not a national or citizen.

[10] Paragraph 3(2) of Schedule 3, Part 2 of the same Act provides that:

> "A state to which this Part applies shall be treated, insofar as is relevant to the question mentioned in sub-paragraph (1), as a place –
>
> (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
>
> (b) from which a person will not be sent to another state in contravention of his Convention rights, and
>
> (c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention."

[11] By Schedule 2, paragraph 8 the immigration officer is empowered to make directions for the purpose of removing an individual concerned from the United Kingdom. Paragraph 8(1)(c) of Schedule 2 of the Immigration Act 1971, provides that an immigration officer may make arrangements

> "for his removal from the United Kingdom in any ship or aircraft specified or indicated in the direction to a country or territory so specified being either (i) a country of which he is a national or citizen; or (ii) a country of territory in which he had obtained a

> passport or other document of identify, or (iii) a country or territory in which he embarked for the United Kingdom, or (iv) a country of territory to which there is reason to believe that he will be admitted."

[12] Leaving aside for the moment the human rights claim, the decision of the Secretary of State that the applicant be removed to Italy is not one that could be successfully challenged. The Secretary of State was fully entitled to find that Italy was a place which satisfied the criteria laid down in Schedule 3, Part 2, paragraph 3(2) of the 2004 Act and he was acting within his statutory powers under paragraph 8(1)(c) of Schedule 2 of the 1971 Act.

[13] The applicant challenges the certification of her human rights claim being clearly unfounded by the respondent. The statutory provision does not set out the criteria that should be applied by the Secretary of State when making a certification decision. The decisions of the House of Lords in R (Thangarasa) v Secretary of State for the Home Department [2002] UKHL 36 and in Ex parte Razgar provide guidance. In Thangarasa Lord Bingham stated:

> "Before certifying as manifestly unfounded an allegation that a person has acted in breach of the human rights of a proposed deportee, the Home Secretary must carefully consider the allegation, the grounds in which it is made and any material relied on to support it. But this consideration does not involve the full-blown merits review. It is a screening process to decide whether the deportee should be sent to another country for a full review to be carried out there or whether there appeared to be human rights arguments which merit full consideration in this country before any removal order is implemented. No matter what the volume of material submitted or the sophistication of the argument deployed to support the allegation, the Home Secretary is entitled to certify, if after reviewing this material, he is reasonably and conscientiously satisfied that the allegation must clearly fail."

Lord Hutton noted:

> "Whilst the process in which the Secretary of States engages in coming to his decision will not involve as detailed a consideration of the facts and issues as would be involved in the hearing by an adjudicator under section 65 or by a court clerk the extent of the consideration which the Secretary of State will give to the issue will depend on the nature and detail of the arguments and the factual background presented to him by the applicant."

Speaking further in the context of that case which turned on an issue of whether Article 3 would be breached, Lord Hutton went on to point out:

> "The court must subject the decision of the Secretary of State to a rigorous examination but that the examination must be on the basis and against the background that, the extent of the consideration which the Secretary of State will have given to the issue will have depended on the nature and details of the argument and the factual background presented to him by the applicant ... The essential question ….. is ….. whether the Secretary of State had adequately considered and resolved the issue whether the applicant's claim that his human rights had been breached is manifestly unfounded. The court should also have regard to the onus which rests on the applicant to show that there are substantial grounds for believing that if he were removed from the United Kingdom he would face a real risk that he would be subjected to treatment contrary to article 3."

[14] In Razgar in the case of reliance on Article 8, Lord Bingham outlined five questions which should be considered by the reviewing court.

> "(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect is private or (as the case may be) family life?
>
> (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (iii) If so, is such interference in accordance with the law?
>
> (iv) If so, is such interference necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others?
>
> (v) If so, is such interference proportionate to the legitimate public end as sought to be achieved?"

Lord Bingham pointed out that the decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable only on a case-by-case basis. Lord Carswell stated with regard to Article 8:

> "In order to bring himself within such an exceptional engagement of Article 8, the applicant has to establish a very grave state of affairs, amounting to a flagrant or fundamental breach of the Article which in effect constitutes a complete denial of his rights."

[15] Mr McTaggart, on behalf of the applicant, contended that when the medical evidence of the applicant is considered it is clear that there is a real risk to her life from the high blood pressure from which she suffers although he referred to no medial evidence to support that proposition. She was in hospital from 27 until 29 November 2005. He argued that it was clear that no enquiries had been made as to her health, fitness to travel and what impact removal would have on her health. The respondent, as the authority responsible for detaining the applicant, was responsible for her health and would have access to her health records. He contended that it could not be safe to remove someone with such a high blood pressure as the applicant, given the stress that forced removal would entail. No reference had been had to the decision by the decision maker to the impact the decision to remove would have on her health and this failure the check the health of the applicant could easily lead to breach of Article 3. Relying on Keenan v United Kingdom [2001] ECHR 242, counsel argued that the state authorities had a positive obligation to make sure that the applicant was in a fit state to travel and health was their responsibility. He contended that the way in which the Immigration Service had expressed itself in the letter of 12 December, showed that they had applied the wrong test.

[16] Miss Connolly, on behalf of the Secretary of State, argued that with regard to Article 3 issues the Secretary of State was entitled to find against the applicant. Removal was to be to Italy where the applicant had previously resided and for which she had a valid identify card. The applicant failed to show any substantial grounds for belief that if she was removed to Italy she would subjected to treatment contrary to Article 3. I accept Miss Connolly's argument on that issue.

[17] With regard to the Article 8 claims, Miss Connolly argued that the applicant had to establish a very grave state of affairs amounting to a fundamental breach of Article 8, a complete denial of her rights. The allegations made about the applicant's psychological and physical ill health were imprecise and unsupported by any medical evidence. The Secretary of State had made it clear that all reasonable precautions would be taken to safeguard the applicant's well being during a return to Ital. The applicant was to be escorted throughout until she had landed and was taken into the care of the Italian authorities. Specially trained medical escorts would be used. The Italian authorities were alerted to the applicant's medical condition and would be to ensure that appropriate reception arrangements to be made. These measures comprised all that could be reasonable expected of a removing State in compliance with it obligations to the applicant under the Convention.

[18] The onus of proof lies on the applicant to show that there are substantial grounds for believing that her Article 8 rights would be infringed if she were to be removed from the United Kingdom and that the consequences of the removal would be disproportionate, set against the background of the state's lawful entitlement to ensure that its immigration control procedures are followed through. The medical evidence that exists in this matter comprises entries in prison medical records

relating to the applicant and clinical notes from the Belfast City Hospital. The applicant and her advisers have obtained no medical report or advice other than what is contained in the unexplained records. It is clear that the applicant would have been free to obtain such advice and evidence. The applicant herself has sworn no affidavit setting out her current medical position. The contention that travelling to Italy would be life threatening or physically damaging to the applicant is not made good by any medical evidence. From the records it is apparent that the applicant's blood pressure has fluctuated markedly. It is also clear that she had deliberately refused on occasion to take her anti-hypertensive medication. Failure to take which can lead to fluctuations and increases in blood pressure. The conclusions reached by the Home Office on the Article 8 issue have not been shown to be unreasonable or arrived at on the basis of an improper taking into account of irrelevant considerations or a failure to take into account relevant considerations. The decision letters from the Immigration Service, including the letter of 12 December 2005, demonstrate no error of law on the part of the decision-maker taking account of the guidance given by the authorities on the proper approach which should be taken.

[19] In these circumstances the applicant has failed to make good her case to challenge the decision of the Secretary of State, either in respect of the removal decision or the certification decision and taking account of Articles 2, 3, 8 and 5.

[20] In the circumstances the application is dismissed.