THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 200 J.R.]

BETWEEN

JAZAB AZEEM NAGRA

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

IRELAND, THE ATTORNEY GENERAL AND THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 5th day of June, 2018

1. The applicant is a Pakistani national. His older brother moved to the U.K. in 2007 and is now a citizen of that country. The applicant followed his brother to the U.K. in 2012 and then to the State on 20th February, 2015. On 5th August, 2015 he applied for a residence card as a permitted family member. Up to 2nd May, 2016 he was here unlawfully. Intermittently between 2nd May, 2016 and 21st May, 2017 he was given a stamp 4 permission as an applicant for a residence card but clearly was not present on a settled basis. On 16th May, 2016 his application for residency was refused. After 21st May, 2017 he was unlawfully present in the State. The applicant is not a settled migrant on any view, and indeed counsel accepts this on his behalf.

2. On 26th June, 2017 his application for review of the refusal of a residency card was dismissed. On the same date a proposal to make a deportation order was made. On 17th July, 2017 and subsequent dates, submissions were made in that regard. On 26th January, 2018 a deportation order was made.

3. I have received helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Shannon Michael Haynes B.L.) for the applicant and from Ms. Emily Farrell B.L. for the respondent and the first and second notice parties.

Relief sought

4. The primary substantive relief is *certiorari* of the deportation order. I note that no challenge was made to the refusal of residency, so caselaw such as *Khan v. Minister for Justice and Equality* [2017] IEHC 800 [2017] 10 JIC 2712 (Unreported, Faherty J., 27th October, 2017) (currently under appeal) does not apply.

Ground 1 - Contention that a relationship between adult siblings does not require wholly exceptional circumstances to give rise to an art. 8 issue.

5. It is clear that deportation of an unsettled migrant only gives rise to breach of art. 8 in exceptional circumstances: *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385, *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64; see also John Stanley, *Immigration and Citizenship Law* (Dublin, 2017) at pp. 397 *et seq.* citing *Costello-Roberts v. the United Kingdom* [1993] 19 E.H.R.R. 112 (Application no. 13134/87, European Court of Human Rights, 25th March, 1993) and *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474 [2016] 7 JIC 2930 (Unreported, High Court, 29th July, 2016).

6. The examination of file stated that the relationship between adult relatives was not "*usually*" covered by art. 8 of the ECHR, as impliedly applied by the European Convention on Human Rights Act 2003, except where there were wholly exceptional circumstances. Mr. de Blacam accepts that the test was correctly stated that relationships between adult relatives do not necessarily attract the protection of art. 8 without elements of dependency involving more than normal emotional ties (see *Ezzoudhi v France* (Application no. 47160/99, European Court of Human Rights, 13th February, 2001). The analysis goes on to say that the material on file did not establish that dependency was based on more than normal emotional ties "*or*" that exceptional circumstances existed such as to attract the protection of art. 8. The word "*or*" covers both scenarios. The Minister has clearly decided that there were two alternative bases for rejecting a claim that a breach of art. 8 would occur on deportation. In order to succeed, the applicant therefore must show that the Minister unlawfully determined that there were no more than normal emotional ties. He has not so shown.

7. In any event, there was no error because the applicant is an unsettled migrant and thus exceptional circumstances are required. More fundamentally Lord Bingham noted in R*. (Razgar) v. Secretary of State for the Home Department* [2004] 2 AC 368 [2004] UKHL 27 at para. 20 that decisions taken pursuant to the lawful operation of immigration control will be proportionate in "*all save a small minority of exceptional cases"*: see e.g. *Agbonlahor v. Minister for Justice and Equality* [2007] IEHC 166 [2007] 4 I.R. 309 per Feeney J., at para. 30 which refers to exceptional cases. Furthermore, the applicant has not demonstrated dependency on the brother involving more than normal emotional ties. Therefore, he cannot succeed under this heading. He was working himself for around a year and had permission to work. Thus, he clearly has capacity to earn an income independently of the brother. To that extent the broad averment at para. 2 of his grounding affidavit used in the ex parte application that "*I am fully dependant on my brother*", while possibly intended to refer only to the current factual situation is not exactly the most forthcoming in terms of the fact that he does not draw attention to material in the exhibits showing that for a time he had a separate source of income.

8. Reliance is placed on the European Commission on Human Rights decision in *Advic v. the United Kingdom* (Application no. 25525/94, 6th September, 1995) to the effect that "*the Commission's first task is to consider whether a sufficient link exists between the relatives concerned to give rise to the protection of art. 8".* Reliance is placed in that decision on the way in which the matter is negatively put in *S. and S. v. the United Kingdom* (Application no. 10375/83, European Court of Human Rights, 10th December, 1984) DR 40 p. 196, to the effect that a relative would not necessarily acquire the protection of art, 8 without further elements of dependency beyond normal emotional ties. The same point was made in *Z. and T. v. the United Kingdom* (Application no. 27034/05, European Court of Human Rights, 28th February, 2006) relying on *Ezzoudhi v. France* (Application no. 47160/99, European Court of Human Rights, 13th February, 2001) para. 34.

9. As it is put in *Advic* the "*first question*" is whether the relationship between the parties is such as to give rise to the potential application of art. 8. That is only a first question, and not by any stretch of the imagination the only question for the purposes of whether a violation of art. 8 is established. The Minister considered that the answer to that question was in the negative. That seems a lawful determination to the effect that the level of dependency established in the present case is insufficient. The Minister gave two bases for the decision, as illustrated by the use of the word "*or*". Even if the answer to that question was yes, the question is only a threshold question. The fundamental point remains that the consideration of the application of art. 8 in the immigration context must be carried out by reference to whether an applicant is a settled migrant. If an applicant is an unsettled migrant, then wholly exceptional circumstances must apply for deportation to breach art. 8. Thus the Minister's decision is also valid under the exceptional circumstances heading. This point was not considered by the England and Wales Court of Appeal in *Senthuran v. Secretary of State for the Home Department* [2004] EWCA Civ 950 (16th May, 2004), which I, do not consider to be a hugely helpful decision for that reason.

Grounds 2 and 3 - undue weight being placed on earlier decisions under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015)

10. The claim is made that undue weight was placed on the refusal of residency and that insufficient regard was had to evidence of dependency as of January, 2015. However, the reference to the previous decisions was in the context of a finding that there was no evidence of more than normal emotional dependency. The earlier decisions were simply facts being legitimately considered in that context as background and material that could be lawfully referred to, not as independent reasons for making of a deportation order. There is no basis to say that insufficient regard was had to up-to-date evidence of dependency seeing as the Minister states that all submissions were considered, a point that is also averred to on his behalf. The applicant has not demonstrated that this was not so: see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.LR.M. 401 *per* Hardiman J.

Order

11. For these reasons the application will be dismissed.