THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 777 J.R.]

BETWEEN

S.A.A.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of October, 2016

1. Where an applicant fails to furnish an address at which he can be served, is the Minister thereby precluded from proceeding to make a deportation order against him? The primary issue raised in this judicial review leave application is whether substantial grounds have been made out in favour of the theory that the Minister is so precluded.

Facts

2. The applicant arrived in the State from Egypt on 28th September, 2015, and claimed asylum at the airport. He says he was brought to the Refugee Applications Commissioner's Office. He did not furnish an address. He says he was then put in a taxi to accommodation. He did not notify the Commissioner of his address at any time thereafter. He then left the accommodation, claims he became lost, and went to live elsewhere. He did not make contact thereafter with either the Commissioner or the Department of Justice and Equality.

3. This course of conduct, which is obviously a repudiation of the legal basis on which he was admitted into the State, had the predicable result that his asylum application failed and the Department then proceeded to consider his deportation.

4. The Minister prepared a proposal to deport on 14th January, 2016, followed by a deportation order dated 8th April 2016, and an accompanying notice dated 4th May, 2016.

5. The applicant in the meantime applied for a residence permission on an atypical working scheme which was granted on 5th August, 2016, but when he presented himself to Gardaí with a view to registering this permission, he was informed for the first time of the deportation order. His permission was revoked on 27th September, 2016, and his passport was confiscated.

Whether lack of an address precludes the operation of the deportation provisions of the Immigration Act 1999

6. Mr. James Buckley B.L. in a very able argument on behalf of the applicant submits that the various decisions of the Minister are defective because they were not served as required by the Act. He accepts that if an applicant gave an initial address and then moved without notifying a change of address, the Minister could proceed in the absence of actual notice because service on the last-known address would be deemed good. But he submits that an applicant that commits the more significant breach of failing to give an address in the first place cannot be subject to the machinery for a deportation order because the Act contains no deeming provision in that case. Thus, on a literal interpretation, a more significant breach of the Act has beneficial consequences for an applicant.

7. Mr. Buckley places reliance on the decision of Hogan J. in *M.M. (Georgia) v. Minister for Justice* [2011] IEHC 529. The version of the judgment made available to me is slightly confusing in the sense that it discusses s. 3(6) of the 1999 Act throughout, but those references appear to be intended to be to the deemed service provisions of s. 6(1). What is said to be the text of s. 3(6) quoted at para. 4 of the version of *M.M.* given to me appears in fact to be the text of s. 6(1) as enacted, although that provision had also been amended in by the 2000 Act, an amendment not reflected in the text cited in the judgment.

8. Speaking of the notice provisions of the 1999 Act, Hogan J. says at para 16 that *"[g]iven that a deportation order is of fundamental and far reaching importance to any applicant, it is vital that there is fundamental compliance with these procedural requirements as prescribed by statute. For these reasons, failure to demonstrate that an applicant had been served with a notice of an intention to deport … is so fundamental that this Court could not permit any subsequent deportation order to stand, at least absent quite special circumstances."* But judgments are not statutes. Any statement in a judgment, and particularly a sweeping *obiter* statement, must be read in the context in which it was made. *M.M.* was a case where the Minister knew exactly where the applicant was. The *obiter* comments as to the necessity for service have no relevance to the totally different situation where no current address has been furnished by an applicant.

9. If a literal interpretation would create a situation whereby a completely non-engaging applicant was in a better position than a partly non-engaging one, then the situation that would flow from acceptance of the applicant's argument is the sort of absurdity that is contemplated by s. 5 of the Interpretation Act 2005. Thus, insofar as s. 6(1)(b) of the 1999 Act provides that *"[w]here a notice is required or authorised by or under this Act to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in some one of the following ways: … (b) by sending it by post in a prepaid registered letter, or by any other form of recorded delivery service prescribed by the Minister, addressed to him or her at the address most recently furnished by him or her …"*, it follows that where no such address is furnished then a notice can be deemed served by being simply recorded, there being no address to send it to. Such an interpretation seems to me to be within the scope of even a literal reading but in any event avoids the absurdity that would follow from any alternative interpretation and provides for the orderly implementation of immigration law. Mr. Buckley's alternative argument that the Minister should be required to hold off doing anything until a runaway applicant resurfaces does not seem conducive to upholding the law of the State. Substantial grounds to argue that a total failure to engage with the system entitles an applicant to challenge the resultant decision on judicial review have not been made out.

Whether failure to furnish an address constitutes waiver of rights

10. If I am wrong in the foregoing and assuming for the sake of argument that there was non-compliance with the Act due to the absence of service, this is a matter entirely of the applicant's own doing in abusing the immigration process of the State by gaining entry on the basis of an asylum claim and then frustrating its examination by failing to furnish an address, and by thereby frustrating any further engagement with the Department of Justice and Equality. One can only regard that as conduct amounting to waiver of

rights under the Act. Substantial grounds to maintain otherwise have not been shown. Mr. Buckley valiantly argued that his client wished to pursue his claim, but the applicant's conduct says otherwise.

Whether failure to engage with the system is a ground for refusal of the application on discretionary grounds
11. As Lord Carnwath said in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at para. 61, "*[j]udicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes.*" (See also my judgment in *Mirga v. Garda National Immigration Bureau* [2016] IEHC 545.)

12. Finlay C.J. in *G. v. D.P.P.* [2994] 1 I.R. 374, 378 made clear that discretion arises at the leave stage: having set out various tests for leave he added that *"[t]hese conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy…"*

13. There are no substantial grounds to challenge deportation-related decisions in circumstances where any non-compliance with notification provisions of the Refugee Act 1996 can be attributed to the applicant's own flagrant breach of his obligations as a non-national within the State and where the court can thereby legitimately exercise its discretion against the grant of leave.

Whether the deportation order is defective by reason of a lack of a date
14. Secondly Mr. Buckley submits that the deportation order is "*untenable*" because it is required to give a date for the applicant to comply with it. However the deportation order requires the applicant to leave the state by the date specified in the accompanying notice, and that accompanying notice states that the applicant must present himself for deportation "*at the time and place of service*".

15. Thus by necessary implication a date is specified for the applicant to leave the State – the date on which he is served with the notice accompanying the deportation order. That specifies a particular date of compliance, albeit that it involves an immediate requirement to leave the State upon service of the notification. That is a sufficient specification of the date for the purposes of giving effect to the deportation order. Even if it were not, the foregoing issues of waiver and discretion arise. The notice had to take that form due to the applicant's unknown whereabouts and failure to comply with the duty to specify an address, so any difficulty with the form of the order or notice is attributable to the applicant. Judicial review as a discretionary remedy will not lie to assist the applicant out of a problem he has created himself.

16. In relation to the other complaints raised in the proceedings, no grounds have been made out to challenge the confiscation of the passport or the cancellation of the residence permission in the circumstances of the case, or for the other relief sought. Those decisions are reasonable and necessary incidents of the entitlement of the respondent to see to the enforcement of the deportation order, and no grounds have been made out to contend otherwise.

Order.
17. For the foregoing reasons I will order

(i). that the application for leave to apply for judicial review be dismissed; and

(ii). that as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies, that the applicant be heard on any application for leave to appeal, which if made, should be on notice to the respondent.