Neutral Citation Number: [2010] IEHC 223

THE HIGH COURT

JUDICIAL REVIEW

2010 709 JR

BETWEEN/

Q. L. AND Y. Y.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 15th day of June, 2010.

1. This is an application for leave to seek judicial review, primarily in the form of an order of *mandamus* to compel the respondent Minister to give a decision on an application for revocation of a deportation order dated 20th January, 2006 made against the first named applicant. Leave is also sought for an application for a declaratory order to the effect that implementation of the deportation order would now be unlawful together with an interlocutory injunction to restrain the Minister deporting the first named applicant pending the outcome of the present proceeding.

2. The factual context in which the application is made is of some importance and can be summarised as follows. The first named applicant is a national of China who entered the State illegally using a false passport in March 2005. When he was arrested he claimed asylum. At that time he claimed to have fled China in order to escape being killed by a Mafia to whom he owed money. In a more recent affidavit sworn for this proceeding on 10th June, 2010, he says he left China lawfully on a visa to study in Malta.

3. He failed to attend for the statutory interview by the Office of the Refugee Applications Commissioner on 18th April, 2005 and his asylum application was deemed withdrawn. He now frankly admits in his recent affidavit that, contrary to the assertion of his wife, the second named applicant in her affidavit of 1st June, 2010, he had indeed been notified of that interview but had decided not to attend because he feared he would be deported.

4. On 15th May, 2005, the Minister gave notification to the first named applicant under s. 3 (3) (a) of the Immigration Act 1999 that he proposed to make a deportation order. No representations were made against that proposal in response to the invitation in the notification.

5. On 20th January, 2006, the deportation order was made and was notified to the first named applicant by letter of 30th January, 2006. This directed the first named applicant to report to the GNIB with a view to arranging deportation on 9th February, 2006. He did not do so. The applicant accepts in his affidavit that he had left the only address then known to the authorities – a hostel in Dublin and did not notify of any change of address in order to avoid being deported. So far as the authorities were concerned, accordingly, the applicant effectively disappeared for five years.

6. The second named applicant is also a native of China. She is - or was - a student and has permission to remain in the State on that basis until 31st December, 2010. Although the Court has not been admitted to the intimacies of their initial meeting and courtship, it is informed that the applicants married in the State on 28th July, 2009 and that a daughter was born to them in Dublin on 18th November, 2009. The Court has not been furnished either with any explanation of the whereabouts, activities or means of livelihood enjoyed by the first named applicant since his disappearance in 2005. In the certificate of the marriage he is described as a student. In the certificate of the daughter's birth he describes himself as a chef. The second named applicant describes herself in that certificate not as a student but as a barmaid. A person unlawfully present in the State in such circumstances does not have an entitlement to be in employment. At the hearing of this application the Court (and the respondent) were informed that the applicant's daughter was now in China with her grandparents. How she was brought there and by whom was not disclosed.

7. On 23rd April, 2010 the first named applicant was arrested and detained in Cloverhill Prison. On 30th April, 2010 the applicant's solicitor applied to the Minister to have the deportation order of 20th January, 2006 revoked. That application was made on a basis that was, at least in part, false in that it was contended that the first named applicant had not been aware of the convening of the s. 11 interview in April 2005. The application was otherwise made on the basis of the changes in the applicants' circumstances since 2006 namely the marriage and the birth of the daughter. This application was supplemented by a letter of 24th May, 2010 which introduced a new factor into the changed circumstances relied upon in that it claimed that both applicants had, since 2005, become "deeply involved" in the Falun Gong cult or movement and would therefore face a risk of persecution by Chinese authorities if returned to that country. Documentation by way of information as to the attitude of the authorities to practitioners of that movement was submitted with the letter.

8. Those, accordingly, are the circumstances in which the application is brought for leave to seek an order of *mandamus*, a declaration and for an interlocutory injunction to restrain deportation.

9. It is appropriate to deal first with the application for leave in respect of the proposed order of *mandamus*. As indicated, this primary relief is sought to compel the Minister to take a decision on the application to revoke the deportation order first made on 30th April, 2010 and then revised by the addition of the significant new element on 24th May, 2010.

10. It is well settled law that the jurisdiction of the High Court to issue an order of mandamus is dependent upon the establishment of a refusal to discharge a public duty on the part of some public authority or officer. The Minister is such a person and obviously has a

duty to decide the application made to him for revocation under s. 3 (11) of the 1999 Act. There is however no basis for the issue of such an order unless there has been an actual refusal to discharge the duty or such manifest delay on the part of the decision maker concerned as to be tantamount to a refusal. (See the judgment of Geoghegan J. in *Point Exhibition Co. v. Revenue Commissioners* [1993] 2 I.R. 551 at 555; and the judgment of this Court in *Nearing v. M.J.E.L.R.* (Unreported, 30th October, 2009, para. 20).

11. In this instance there is, in the Court's judgment, no stateable case that the respondent has been culpable of any such default at this point. The full application he is asked to consider was only finally made to him on 24th May. The short lapse of time is manifestly inadequate of itself to justify the inference that there has been any refusal. No such application could reasonably expect to receive a decision within the period of 9 days which elapsed between the letter of 24th May and the commencement of this proceeding on 2nd June. Having regard to the almost total absence of explanation as to the activities or whereabouts of the first named applicant since 2005 it would not be unreasonable to expect the Minister to require some months in order to conduct inquiries before deciding the application. Has the first named applicant been in unlawful employment? Has he acquired any criminal convictions? Has he been within the State throughout that time or has he visited other countries including, perhaps, China in order to return his daughter there? These are all, no doubt, matters into which the Minister will need to enquire.

12. In the judgment of the Court, therefore, no arguable case can be made out that in these circumstances the Minister has unlawfully refused either expressly or by implication of unreasonable delay to discharge the duty to decide the application made under s. 3 (11) of the Act. Leave to seek judicial review on that basis cannot therefore be granted.

13. It is necessary to consider next the application for leave insofar as it proposes to seek a declaration that the implementation of an existing and valid deportation order has become unlawful because (a) it would violate the prohibition on refoulement in s. 5 of the Refugee Act 1996 as a result of the claim that the applicants would be persecuted as Falun Gong practitioners; and (b) it would infringe the right of the applicants to respect for their private and family life under Article 8 of the European Convention on Human Rights by separating them as husband and wife.

14. Although it may be somewhat unusual for relief by way of judicial review to consist solely of a declaration, the Court is satisfied that no legal impediment precludes the making of such an order by reason only of the absence of any primary relief by way of *certiorari* or *mandamus*. It is not difficult to conceive of circumstances in which, in the absence of any actual refusal to take a decision, some legal issue has arisen between an applicant and the administrative authority concerned which it is convenient to resolve by a declaration in order to facilitate the expeditious taking of the necessary decision. Order 84, rule 18 (2) of the Rules of the Superior Courts provides that an application for a declaration or injunction may be made by way of application for judicial review without requiring that it be combined with or dependent upon a simultaneous application made for any one of the primary orders listed in the preceding paragraph of that rule. The only proviso is that it must be "just and convenient" for a declaration or injunction to be granted "having regard to the nature of the matters in respect of which relief might be granted by way of" one of the primary orders and to the nature of the person or bodies against whom such orders might be made. The present case comes within that rule in that the Minister is such a person and the applicants' grievance relates to the discharge of the obligation to consider revocation of a deportation order made under s. 3 of the Act of 1999. Had, for example, the Minister actually refused already to decide the application, this is clearly a case in which judicial review by way of order of *mandamus* might have been allowed.

15. Even if there is no impediment to the grant of declaratory relief in circumstances where no primary order by way of *certiorari* or *mandamus* is sought or available, an issue arises as to whether in the particular circumstances of the present case the declaration sought would amount to a collateral or indirect attempt to challenge the validity of the deportation order contrary to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 which stipulates that the validity of a deportation order may not be questioned other than by way of judicial review and then only when the proceeding is brought within fourteen days of the notification of the order to the proposed deportee. This order was made on 20th January 2006 and the present proceeding was not commenced until 2nd June, 2010. At first sight a dictum of Laffoy J. in *Lelimo v. M.J.E.L.R.* [2004] 2 I.R. 178 might be taken as authority for the proposition that for these purposes no distinction can be made between the deportation order itself and the enforcement process involved in implementing it. The learned High Court judge undoubtedly held in that case that where a deportation order had been validly made, a subsequent change in the law (the later commencement of the European Convention of Human Rights Act 2003,) could not render the implementation of the order unlawful.

16. On closer examination, however, the issue is not so straightforward. The issue considered in that case arose in a particular procedural context and was complicated by the limited terms upon which leave had originally been granted for judicial review. The judgment in question is concerned with an application that had been made after leave had been granted to amend the Statement of Grounds in order to introduce new grounds, including grounds which Laffoy J. considered had already been rejected by O'Sullivan J. in the order of 11th November, 2003 granting leave. The 2003 Act came into force on 1st January, 2004 and Laffoy J. considered the application to amend in April, 2004.

17. In the particular passage which is relevant for present purposes, Laffoy J. was ruling upon an application to amend in order to introduce a ground to the effect that implementation of the otherwise valid deportation order after 1st January, 2004 would be unlawful as a violation of s. 3 (1) of the 2003 Act. That was the context in which she ruled as follows:

> "… the issue which remains is whether the enforcement of the deportation order, which, if it takes place, will take place after the coming into operation of the Act of 2003, could constitute a breach of s. 3 (1) if the deportation order was lawfully made. In my view, it could not. Such authority as any organ of State has to enforce the deportation order derives solely from the deportation order. The enforcement process cannot be severed from and has no basis in law distinct from, the order itself. The decision to make the deportation order and the order itself both pre-date the coming into operation of section 3 (1). They are immune from challenge under the Act of 2003. Therefore, in terms of the application of the Act of 2003, it must be assumed that the deportation order is valid. If it is, its enforcement could not constitute a breach of section 3 (1). … as regards the amendment sought to enable the applicant to challenge the enforcement of the deportation order as contravening the European Convention on Human Rights Act 2003, I am not satisfied that the applicant has established that there are arguable grounds, let alone substantial grounds… for such challenge."

18. The circumstances of the present case are materially different. First, the validity of the deportation order is not sought to be challenged and could not be challenged at this stage. In the *Lelimo* case it was the scope of the permissible grounds for such a challenge which was in issue. Secondly, in that case there had been no change in the applicant's circumstances since the making of the deportation order: only the legal novelty of the commencement of the Act of 2003 had intervened. Here, it is at least contended that the marriage and birth of the applicant's daughter constitute new events and circumstances which have arisen since the making of the deportation order and which justify a genuine application to revoke. It is not disputed that the Minister does have a statutory obligation to decide that application.

19. In principle the Court considers that there is no legal impediment to the grant of relief by way of judicial review notwithstanding the existence of an unquestionably valid deportation order provided that the relief sought does not have as its purpose the striking down of the deportation order but is brought about by a material change in circumstances or by new events or the coming to light of previously unknown facts or information and is related to some other objective such as the revocation of valid order. The very provision by the Oireachtas of a power to revoke under s. 3 (11) of the 1999 Act confirms the recognition of the possibility that circumstances may change in a way which may warrant that execution of the deportation no longer take place. Where a valid application for revocation is made it is not disputed that its rejection would be open to judicial review. Such an application is not caught by the "substantial grounds" limitation of s. 5 of the Act of 2000. It cannot be said, therefore, that as a matter of principle the High Court never has jurisdiction to entertain an application judicial review in the form of declaratory relief where a *bona fide* application for revocation has been made, upon the sole ground that the application has yet to be decided and the ingredients for granting *mandamus* do not exist.

20. It seems to the Court that this approach is effectively supported by the observations made in the judgment of McCracken J. in the Supreme Court in the case of *L.C. v. M.J.E.L.R.* [2007] 2 I.R. 133 at p. 155. That case concerned an appeal brought against a refusal by the High Court to quash a rejection of an application to revoke a deportation order. Pending the outcome of the appeal an injunction was sought from the Supreme Court to restrain deportation. The Supreme Court ruled that in circumstances where a valid and unappealable deportation order existed, an injunction restraining its implementation would " thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order". The judgment went on, however, to make the following observation:

> "There might indeed be circumstances, although it is hard to envisage them, where the Supreme Court might exercise its inherent jurisdiction to grant an injunction which would have this effect, for example, it might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order and which is one of such gravity as might stay implementation of the deportation order."

21. The same can clearly be said of the jurisdiction of the High Court. In principle, therefore, the sole fact that a valid deportation order exists does not preclude the possibility that in the exceptional case of a material change of circumstances since the order was made, it may be just and necessary for the courts to intervene to stay its implementation until a serious legal issue had been resolved. The Court cannot quash the valid order but it can delay its execution until the Minister has had an opportunity to consider whether the alleged change of circumstances is such as to warrant its revocation.

22. In these circumstances, while one might have considerable scepticism as to the plausibility of the threat of persecution raised by the applicants as practitioners of Falun Gong at this stage, the Court is satisfied that the low applicable threshold for leave in respect of such a declaration has been reached. The Court will, accordingly, grant leave for the relief in the form of a declaration as claimed in the Statement of Grounds at section (d) paragraph (ii) upon the grounds set out in s. (e) of the statement at paras. (iii) (breach of s. 3 of the 2003 Act) and para. (vii) (disproportionate interference with the constitutional and Convention rights of the first named applicant).

23. There remains, therefore, the application for an interlocutory injunction pending the outcome of substantive judicial review application limited to that relief. While it might be said that by granting leave in respect of the discrete issues embodied in the proposed declaratory relief the applicant has succeeded in raising a fair issue to be tried, the Court is satisfied that this is not an instance in which an interlocutory injunction can be granted for two reasons. In the first place, the Court is satisfied that the balance of convenience is strongly in favour of the respondent. Secondly, the Court is by no means satisfied that the first named applicant has come to this Court in good faith and with clean hands and with a willingness to make a full disclosure of his circumstances as already indicated earlier in this affidavit.

24. While it might be said that it is more personally convenient for the applicants that the first named applicant should remain within the State for the time being it is the wider balance of convenience in law that the Court must consider. In that regard the first named applicant is unlawfully present in the State and the subject of a valid deportation order. He has no expectation of being declared a refugee. The second named applicant has leave to be in the State but only until the end of the year. They have voluntarily chosen to bring or send their only child to China which suggests they may have an expectation of returning there themselves in due course. As already pointed out in the passage quoted from the *Cosma* judgment above, it is only in rare and exceptional circumstances that the High Court should intervene to obstruct or postpone the implementation of a valid statutory deportation order. Furthermore, the dilemma in which the applicants now find themselves is entirely of the making of the first named applicant in that he decided in 2005 to evade the asylum process. Insofar as the prohibition on refoulement is to be invoked by reference to the practice of Falun Gong, that was a factor which could well have been advanced in 2006 in the representations which were invited to be made in advance of the making of the deportation order. The Court considers that the consequences of that failure and of the evasion of the asylum process could not reasonably be visited upon the Minister at this stage by restraining the implementation of the order. Accordingly, insofar as a possible deportation might inconvenience the first named applicant, it is a result which is of his own making in these circumstances. On the other hand, the Minister has done nothing unlawful at this point and will in due course, no doubt, give a decision on the application to revoke. The claim for an interlocutory injunction effectively invites the Court to assume that the Minister will refuse to decide the application or will reject it on some ground that will be unlawful. Although in commercial cases the balance of convenience is guaged in terms of the prospective costs which might fall respectively on the parties if the injunction is granted or refused, the position is different where the injunction sought involves an interference in the otherwise lawful course of a statutory process. The refusal of interlocutory relief does not mean that the first named applicant will or must be deported. The matter is left to the decision of the Minister. The status quo is that the presence of the first named applicant in the State has been unlawful since April 2005 and he has been at risk if deportation since January 2006. That status quo resulted from the first named applicant's decision to abandon his asylum application in 2005. The mere fact that he has made an application to revoke the order does not create an entitlement to have the status quo altered in his favour. In those circumstances it would, in the Court's judgment, be manifestly unreasonable and offensive to the balance of convenience to place the restraint of an interlocutory injunction upon the Minister.

25. There will accordingly be an order granting leave to seek the declaratory relief based on the grounds indicated above but leave is refused in respect of relief by way of mandamus and no interlocutory injunction will be granted.