Neutral Citation [2016] IEHC 470

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 30 J.R.]

BETWEEN

N.N.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The applicant states that he left Algeria in 1987 and lived in France, the United Kingdom, Italy and Spain for various periods. Despite hailing from Algeria, he asserts what the Minister has described in correspondence as "*self-styled*" statelessness, a status which would appear from the papers to be pure invention on his part. It might suit the applicant to claim to be stateless, but he has furnished no basis whatever as to why he would not be in a position to assert his Algerian nationality.

2. He sought asylum in the State in 1999. That application was refused.

3. A proposal to deport him was made in 2001. Pending a decision on that proposal, he was granted temporary permission to remain in the State for a three-year period in 2007. That permission duly expired in 2010 and he has been illegally present in the State ever since.

4. On 23rd November, 2011, a deportation order was made against him.

5. On 21st January, 2015, he made an application under s. 3(11) of the Immigration Act 1999 for revocation of the deportation order. That application was refused on 29th October, 2015. The letter of refusal noted that the applicant had been evading the Garda National Immigration Bureau (G.N.I.B.).

6. By further letter dated 9th November, 2015, the Minister offered to pay for the costs of repatriation, if the applicant was unable to do so.

7. The present judicial review was filed on 20th January, 2016. In the original papers presented at the leave application, the applicant sought *certiorari* of the original 2011 deportation order, as well as a declaration and damages in relation to alleged breaches of the ECHR as implemented by the European Convention on Human Rights Act 2003, in relation to the lack of social provision for the applicant.

8. During his time in the State, the applicant has committed a number of criminal offences, and has been detained in Cloverhill Prison as recently as October 2015. Mr. Killian McMorrow B.L. for the applicant stated at the leave stage that his client is currently homeless.

9. The applicant recently presented himself to the G.N.I.B., at the prompting of the court it must be said, but since June, 2016 has gone underground and has not make contact with Gardaí or his solicitors.

The leave hearing

10. I heard the leave application in this case on 25th January, 2016. At the leave stage I refused to permit the applicant to challenge the deportation order (a challenge which is several years out of time). I was not minded to permit him to amend the pleadings to impugn the refusal under s. 3(11) of the Immigration Act 1999, because that challenge would also be out of time. No basis for an extension of time exists. Even if a basis did exist, no grounds have been made out to the level of arguability, let alone substantial grounds, as to why that refusal is invalid. On the contrary, it appears to be entirely reasonable.

11. On 2nd February, 2016 I gave leave, with liberty to make certain amendments, to challenge the failure to make provision for social assistance to, or permit the employment of, the applicant on the basis of an alleged incompatibility with the ECHR. At that stage I asked Mr. McMorrow whether he wished to include the housing authority (Dublin City Council) in the challenge and he indicated that he did not.

The first substantive listing

12. When the matter was first listed for hearing on 29th April, 2016 before Faherty J., the applicant sought an adjournment to enable Senior Counsel to be briefed. This application was acceded to and the matter was re-listed for 1st June, 2016.

The second substantive listing

13. The matter then came before me for substantive hearing on 1st June, 2016. At that point, Mr. Michael Forde S.C. (with Mr. McMorrow) appeared for the applicant and sought a series of amendments at the outset, specifically:-

(i) a plea relating to a breach of constitutional rights;

(ii) a plea relating to a breach of the EU Charter of Fundamental Rights;

(iii) an application to add Dublin City Council as a respondent.

14. These amendments were opposed by Mr. John Healy S.C. (with Ms. Eva Humphreys B.L.) for the respondents.

15. I have previously set out the requirements for amending judicial review pleadings in *B.W. v. Refugee Appeals Tribunal & ors* [2015] IEHC 725 (Unreported, High Court, 17th November, 2015) and *S.O. v. Minister for Justice and Equality & ors* [2015] IEHC 821 (Unreported, High Court, 21st December, 2015) based on the Supreme Court decisions in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 and *O'Neill v. Applebe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014).

16. The three key requirements to permit an amendment are:-

(i) arguability;

(ii) explanation;

(iii) lack of irremediable prejudice.

17. As regards arguability, I was of the view on the submissions made at that point that the constitutional plea was arguable insofar as it related to the prohibition on employment and the failure to provide social assistance. The EU Charter plea is not arguable because the deportation of an illegal third country immigrant who is not entitled to rely on EU Treaty rights is a matter of domestic, not EU law. The applicant relied on the Opinion of Advocate General Bot in Case C-562/13, *Centre Public d'Action Sociale v. Abdida* (18th December, 2014), but that is a decision under the return directive (2008/115/EC) which does not apply to Ireland. The EU Charter therefore simply does not apply in this case. Adding Dublin City Council as a respondent is not appropriate because that was rejected by the applicant at the leave stage and in any event relates to a specific decision making process which would require to be set up for judicial review by specific reference to a statutory application and a refusal to grant it in a way that goes beyond merely adding in the council to a general challenge to legislative provisions on employment and social assistance. The claims relating to lack of housing and healthcare seem to depend on a failure to make administrative decisions in favour of the applicant and are not in the same category of statutory prohibition or non-provision as the claims in relation to the ban on employment and the lack of social assistance. It is not arguable that the applicant has been deprived of healthcare and housing by the State as such where he has failed to pursue that matter in a structured way with the statutory bodies having operational responsibility for those services. To allow amendments to deal with such matters would truly be an "*entirely new case*", as submitted by Mr. Healy.

18. As regards explanation, Mr. Forde stated that the amendments sought were not originally included due to oversight on the part of the applicant's legal advisers, and I accepted that explanation insofar as it relates to the constitutional issues to which I have referred.

19. As regards lack of irremediable prejudice, I considered that any prejudice suffered by the State was not irremediable.

20. Mr. Healy raised various other objections to the amendments including that the original letter from the Minister was not challenged if it constitutes a decision (it does not, it is a statement of her position), alleged delay in the proceedings overall and as regards the ECHR complaint, and reliance on *M.E.O. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 394 (Unreported, High Court, Cooke J. 5th September, 2012) citing Murphy J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259. All of these matters seemed to me more appropriate to consider at the resumed substantive hearing rather than as a basis to refuse an amendment.

21. In the light of the foregoing I permitted certain amendments along the lines indicated as being arguable above, and fixed dates for an exchange of pleadings, submissions and, if necessary, additional affidavits.

22. I listed this matter again on 3rd June, 2016 to clarify the current status of the applicant in terms of reporting, at which point the applicant reported to Gardaí. Since June, 2016 however he has gone off the grid and his solicitors have not been able to make contact with him. Despite this, they did not apply to come off record.

The third substantive listing

23. At the substantive hearing on 13th July, 2016, and despite the outcome of the application to amend, Mr. McMorrow B.L. (who addressed the court due to the unavailability of Mr. Forde on the hearing date), sought to advance the case that the failure to provide accommodation and a medical card was a breach of the applicant's rights under the ECHR.

24. As the Minister pointed out to the applicant as far back as 23rd January, 2015, the request for accommodation would require an application to the relevant housing authority. This would result either in a positive decision, a negative decision, which could be subject to *certiorari,* or a failure to make a decision which could be subject to *mandamus*. In either of those proceedings, the housing authority would be a necessary party. The applicant has failed to lay the ground for this challenge by failing to make an application, and in addition has failed to join the appropriate respondent. He is not entitled to make this case in the proceedings as presently constituted.

25. The same difficulty affects his complaint in relation to the absence of a medical card. He has failed to make an application to the HSE and to challenge any refusal by way of *certiorari*. Nor, importantly, has he been wholly denied medical services. He has been able to avail of the Accident and Emergency Department of St. Vincent's Hospital.

26. Whether phrased as complaints under the Constitution or the ECHR, the applicant simply has not set up this challenge in an appropriate manner and is not entitled to pursue either the accommodation or the medical complaints in the proceedings as presently constituted.

27. Mr. McMorrow submitted that the applicant had joined the State and corresponded with the Department of Justice and that two additional parties would only add cost and delay. However, the correspondence with the Department of Justice resulted in an unambiguous response more than a year before the proceedings were instituted, namely that the applicant should take up his complaints with other identified parties. The only waste of cost and time arising stems from the applicant's failure to do so.

The applicant's remaining complaints arise from unchallenged legislation

28. The two remaining areas of complaint made by the applicant are that he is not being provided with social assistance and that he is unable to work.

29. As regards the claim relating to social assistance, s. 246(7)(f) of the Social Welfare Consolidation Act 2005, states expressly that a person, the subject of a deportation order is deemed not to be habitually resident in the State.

30. Section 192 of the 2005 Act makes it a condition of the receipt of supplementary welfare allowance that the applicant be habitually resident. Thus, the applicant is precluded from receiving even the most basic social welfare payment by virtue of a combination of these two statutory provisions.

31. The proceedings, however, do not challenge these provisions. They are predicated on an assumption that the applicant's difficulties derive from an executive failure to provide social welfare to the applicant (the applicant's alternative claim of legislative omission was not pursued and was withdrawn by Mr. McMorrow at the hearing on 13th July, 2016, but it is equally misconceived because this is not a case of legislative omission but positive legislative provision which disqualifies the applicant).

32. The assumption that the absence of an entitlement to social welfare is a matter of executive omission as submitted by the applicant is simply misconceived. As set out above, it arises from positive statutory provision. If the applicant considers that his statutory provisions breach his rights under the Constitution or the ECHR, the appropriate approach is to challenge those provisions. The applicant has simply not done this. In those circumstances, no question of relief under this heading can arise.

33. The second leg of the applicant's remaining complaints relates to the absence of an entitlement to work. Section 2(1) of the Employment Permits Act 2003 makes it an offence for a non-national to be in employment in the State except in accordance with an employment permit granted by the Minister for Jobs, Enterprise and Innovation. There are, of course, certain exceptions but these do not apply to this applicant.

34. Again, the matter the applicant complains of arises from a specific statutory provision and not from executive or indeed legislative inertia. If the applicant wished to challenge the refusal to allow him to work, he would first have to apply for an employment permit and then seek *certiorar*i of any refusal or as appropriate *mandamus*, in the case of a failure to make a decision.

35. Again, in the absence of taking the steps to set up his proceedings appropriately, relief under this heading does not arise.

The applicant's failure to currently instruct his solicitors precludes relief

36. In any event, by going off-radar since early June 2016, and failing to respond to his solicitors (who endeavoured to pass on correspondence requiring the applicant to report again to the GNIB), the applicant has disentitled himself to relief. A litigant cannot move the court to grant relief, damages and so forth while at the same time immunising himself against orders, directions or costs against himself by the simple expedient of disappearing. A solicitor who is not being provided with instructions is *required*, rather than permitted, to apply to come off record under the Law Society *Guide to Good Professional Conduct for Solicitors* (3rd ed., p. 15), but I appreciate that this is a matter of degree. No instructions for a period of a couple of weeks is one thing, but if the eerie silence lasts for a period measured in months, particularly a crucial period when the case is actually at hearing, one might feel that the critical point had been reached. In the context of a discretionary remedy such as judicial review, I would exercise discretion against granting any relief to such an applicant, despite the no doubt quixotic attractions of his "*bohemian*" lifestyle, as he describes it. A litigant who is missing-in-action and who fails to provide instructions to his solicitors cannot expect too much when applying for a discretionary remedy.

Does the applicant enjoy socio-economic rights as alleged?

37. In any event, the applicant would still have to show that he enjoys socio-economic rights as alleged. Mr. Healy, for the respondent, submitted that even if such rights exist under the Constitution, they are limited to citizens and persons lawfully in the State and such rights did not extend to persons the subject of a deportation order. As regards the ECHR he submitted that only residual and narrow rights in this regard exist and only in limited circumstances (*D. v. U.K.* (1997) 24 E.H.R.R. 423 (2nd May, 1997)).

38. I appreciate that some previous caselaw has not been altogether favourable to such rights (*M.E.O. v. Minister for Justice Equality and Law Reform*; Murphy J. in *T.D. v. Minister for Education*) although since then, a range of such rights have been recognised in the EU law context, by the EU Charter. The flexible doctrine of unenumerated rights must keep pace with changes in society, including changing social recognition of the nature and extent of rights warranting recognition in a modern European democracy; just as indeed there are unenumerated constitutional duties of a living and dynamic nature such as respect for the borders of the State and compliance with its immigration law.

39. Assuming for the sake of argument that economic, social and cultural rights arise in certain circumstances as unenumerated rights under the Constitution, the conclusion that such rights are inapplicable to persons the subject of a deportation order is inescapable for several reasons. As discussed by Finlay Geoghegan J. in *N.H.V. v. Minister for Justice and Equality* [2016] IECA 86, at para. 28, the right to work flows from the social contract between the State and the individual and "*is intimately connected with the citizen's entitlement to live in the State*". An identical point could be made in relation to the right to social assistance as claimed by the applicant.

40. Secondly, the recognition of economic, social and cultural rights for migrants, particularly illegal migrants and those subject to the deportation order even more specifically, could have a severely distorting effect on migration. It is not the sort of endeavour that an individual state or its judicial arm in particular can engage in by way of creative unilateralism. To confer such benefits on migrants (particularly by judicial decision) would significantly erode the ability of the State to rationally manage its migration system, would drain its resources such that it would preclude the facilitation of other categories of migrants that might be required by the labour needs of the State, and would give a massive incentive to "free riders" whose posture was one of seeking to frustrate their deportation and avail of any and all benefits available in the meantime.

41. As regards the constitutional claim therefore, I am of the view that assuming that such rights are protected by the Constitution, they do not extend to non-citizens generally and in particular persons subject to a deportation order such as the applicant.

42. As regards the ECHR claim, the applicant has not established that he comes within the exceptional category that could benefit from economic or social rights under that instrument (see *N. v. U.K.* (Application no, 26565/05, 27th May, 2008), and *A.S. v. Switzerland* (Application no. 39350/12, 30th June, 2015).

43. Admittedly, a finding that non-nationals and particularly those subject to a deportation order do not have a right to social provision raises the ultimate question as to whether it would be lawful for the applicant to be allowed simply expire from destitution and starvation. Mr. Healy's response to this prospect was that the applicant and others similarly situated do not have a call on the public purse but that in practice they are unlikely to starve. Ireland is, after all, endowed with a superabundance of charitable organisations all too eager to assist those down on their luck (or, depending on your point of view, plagued by a superabundance of persons willing to assist illegal migrants in maintaining an unlawful presence in the State). The business end of social provision is that someone has to pay for it and therefore there must be limits to its scope. Those who fall outside those limits simply do not benefit. Their fate must therefore be left to private initiative or indeed to their own efforts, a matter to which I now turn.

The applicant's failure to facilitate compliance with the deportation order precludes relief
44. There is a further, independent, reason as to why the present claim must fail. One can envisage two categories of persons subjected to a deportation order. One category might be willing to co-operate with a deportation, but find that such co-operation is frustrated by factors beyond their control. In the present case, the Algerian authorities have indicated that they do not have a record of the applicant. Oddly the applicant has not offered any reason why this would be the case. This suggests at least the possibility that the applicant's identity is fraudulent. If it is not, it seems to me that there is much the applicant could do to rectify this position whether by way of inquires with family members to obtain documentation or otherwise. He cannot make the case of a person who is caught in limbo despite his best efforts, because he has made no efforts.

45. He falls firmly into a second category of proposed deportee, namely those whose attitude is essentially "catch me if you can". The applicant has simply failed to engage with the Minister or the Algerian authorities in any meaningful way as to facilitate his deportation. His identity documents are conveniently and predictably unavailable (he claims to have lost them) and he has done nothing to rectify that difficulty. Under these circumstances, it seems to me that he cannot be heard to say that he is being forced into destitution by the current situation. If he does not wish to be destitute in Ireland, he can co-operate with his removal to Algeria, where he will have a right to earn a livelihood. Having failed to offer any such co-operation, his claim must be dismissed.