THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 235

Record No. 2017/351

Peart J.
Irvine J.
Hogan J.

BETWEEN/

BSS (an infant acting by his father and next friend AS) and AS

APPLICANTS /

APPELLANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 31st day of July 2017

1. Under what (if any) circumstances can an applicant seek to restrain the enforcement of a deportation order otherwise than by means of an application for judicial review in accordance with the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as inserted by s. 34 of the Employment Permits (Amendment) Act 2014)("the 2000 Act")? This issue is of some importance so far as the appeal in this case is concerned, because if the present proceedings are in fact governed by s. 5 of the 2000 Act, then this Court only has jurisdiction to hear such an appeal if the appropriate certificate for this purpose was granted by the High Court and in respect of which no application was made to that Court.

2. This, accordingly, is the jurisdictional question presented on this appeal. But before the nature of this jurisdictional issue can be fully explained or understood, it is first necessary to describe the background to these proceedings.

The background to the present proceedings

3. The second applicant, Mr. AS, is an Indian national who arrived here in March 2016 and promptly claimed asylum. He was given a date for interview with the Refugee Applications Commissioner on 17th March 2016, but he did not attend for interview on that date. No explanation for non-attendance was given and the application was subsequently deemed to have been withdrawn. He was so notified by a registered letter sent by the Minister to the last known address of the applicant on 16th June 2016.

4. Mr. S. was subsequently informed by letter dated 19th July 2016 that his entitlement to remain in the State had expired but that he could make an application for subsidiary protection. There was no response to that letter and the Minister then sent a letter on 25th August 2016 indicating that he proposed to make a deportation order against him and inviting any representations for this purpose. A deportation order was ultimately made on 24th October 2016 and notified to the second applicant on 29th November 2016.

5. As it happens, Mr. S. did not leave the State by the date specified for his deportation, namely, 30th December 2016. Nor did he present to the Garda National Immigration Bureau on 18th November 2017 in order to make arrangements for his departure from the State, so that it may fairly be said that throughout the asylum process there had been no engagement at all by the second applicant with the authorities.

6. It was, however, only when the second applicant was arrested by the Gardaí at his home in Dublin in April 2017 that he sought, in effect, to contest his deportation from the State. He now belatedly informed the authorities that he had been in a relationship with a Polish national, Ms. J.M., and that their son, the first named applicant, had been born on 30th September 2016. While the question of paternity was put in doubt, subsequent DNA tests have confirmed that he is in fact the father of the child. In the correspondence from his solicitors the second named applicant asserted a derivative right to remain in the State based on recent case-law interpreting the effect of Article 20TFEU ranging from Case C-34/99 *Ruiz-Zambrano* EU:C:2011: 124 to Case C-135/15 H.C. Chavez-Vilchez EU:C:2017: 354. In effect, the argument was that if the second applicant were to be deported, this might have the effect of depriving the first applicant of his right to live in the territory of the European Union.

7. It should be stated, however, that it appears that immediately prior to the arrest of the second applicant Ms. J.M. had left him along with their son in order to take up residence with a previous Polish boyfriend of hers. Ms. L.M. is now based in Co. Donegal and it would seem that there has been at least intermittent contact between the two parents for the purpose of facilitating access by the second applicant to his infant son.

The judgment of the High Court

8. These judicial review proceedings were commenced shortly thereafter, but, critically, the application did not purport to be made in accordance with s. 5 of the 2000 Act. Section 5(1)(c) of the 2000 Act requires any challenge to the validity of a deportation order to be made by way of application for judicial review within 28 days of the making of that decision. Time may be extended where the High Court considers that there is good and sufficient reason for so extending time: see s. 5(2) of the 2000 Act.

9. The principal relief now sought by the second applicant is an order that "the implementation of the deportation order…at this juncture would be unlawful." The second applicant now in effect seeks to restrain his deportation pending the determination by the Minister of his application under s. 3(11) of the Immigration Act 1999 to revoke the deportation order by reason of the fact that he is the father of an EU citizen child.

10. In her judgment in the High Court delivered on 17th July 2017 O'Regan J. held that these proceedings amounted to a collateral

attack on the validity of the deportation order, so that the provisions of s. 5 of the 2000 Act applied to the application for judicial review: see [2017] IEHC 463. As s. 5(2) of the 2000 Act provides that any such application must be made within 28 days of the making of the deportation order, O'Regan J. held that the application was out of time and she refused to extend time for this purpose.

11. Critically, however, no application was made to O'Regan J. for a certificate permitting an appeal to be taken to this Court in respect of that decision for the purposes of s. 5(6)(a) of the 2000 Act. The absence of a certificate is of some importance because if s. 5 of the 2000 Act does indeed apply to the present proceedings, it follows that this Court has been improvidently seized of the appeal for want of jurisdiction. Section 5(6)(a) is clear that no such appeal will lie from the High Court to the Court of Appeal in such cases absent such a certificate. (It is true that s. 5(6)(a) refers in terms to the Supreme Court, but that reference should now be read as a reference to this Court by virtue of s. 44 of the Court of Appeal Act 2014).

Do the present proceedings amount to a collateral attack on the validity of the deportation order?

12. The key point to bear in mind regarding the present proceedings is that the second applicant has sought an order restraining the enforcement of the deportation order. There may well be instances where certain post-hoc events would render a deportation order either spent or unforceable: examples here would include cases where the subject matter of the order had become a naturalised Irish citizen and could include cases where the individual in question had validly married an EU national who was genuinely exercising free movement rights so that the third country national could only be "removed" from the State in accordance with the procedures contained in Article 20 *et seq.* of Directive 2004/38/EC or where the effect of the order would actually infringe the *Zambrano* rights of a child who was an EU citizen by obliging that child to leave the State.

13. It is, however, necessary to dwell on these issues because the question actually confronting this Court is a slightly different one, namely, whether the present proceedings are in fact captured by s. 5 of the 2000 Act. If they are, then it is clear that, for all the reasons just stated, this Court lacks jurisdiction in the absence of such a certificate from the High Court.

14. The opening language of s. 5(1)(c) of the 2000 Act provides that a person "shall not question the validity of…a deportation order under s. 3(1) of the Immigration Act 1999." A valid administrative decision generally has both retrospective and prospective effects in the sense that a legal adjudication to this effect carries with it not only the implication that what has been done in the past was valid, but that the giving effect to that order in the future will also be valid. In the specific case of a deportation order, a finding of validity implies that the enforcement of that order by actually removing the applicant from the State would also be valid. The corollary, therefore, is that any application (as in this case) to restrain the *enforcement* of the deportation order amounts in substance to a questioning of the validity of that order so that the provisions of s. 5(1)(c) of the 2000 Act accordingly apply.

15. This conclusion is also borne out by the case-law. In *Nawaz v. Minister for Justice, Equality and Law Reform* [2012] IESC 58, [2013] 1 I.R. 142 the plaintiff had challenged the constitutionality of aspects of the Immigration Act 1999 otherwise than by means of an application for judicial review under s. 5 of the 2000 Act. In his judgment for the Supreme Court Clarke J. held that ([2013] 1 I.R. 142, 160):

> "…an action, brought in the context of the relevant process which is being applied to Mr. Nawaz, which seeks a declaration of invalidity of the underlying legislation under which the particular measure can be adopted, can be described as a challenge which has the potential to question the validity of the relevant measure. The only purpose of Mr. Nawaz challenging the constitutionality of s. 3 of the Act of 1999 is so that any measures which might be adopted under that section will be regarded as invalid…"

16. The very same point was made by MacEochaidh J. in *F.O. v. Minister for Justice and Equality* [2013] IEHC 206, a case where the plaintiff had issued a plenary summons claiming that aspects of the subsidiary protection system were unconstitutional and sought an order restraining the enforcement of the deportation order pending the outcome of that challenge.

17. MacEochaidh J. held that these proceedings nonetheless amounted to a collateral attack on the validity of the deportation order and that the requirements of s. 5(1) of the 2000 Act could not thereby be by-passed:

> "What would be the effect of the plaintiff winning these plenary proceedings? It is clear to me that if she succeeds, the effect of this must be that she would be entitled to have her (as yet non existent) application for subsidiary protection determined prior to being deported. Inescapably, this means that the deportation order could not be implemented and that it was unlawful on the day that it was made as it precluded such application being made and determined with the presence of the plaintiff in the State. That this is so is made plain by the terms in which the third declaration sought by the plaintiff is expressed. It seeks a declaration that *the deportation* of the plaintiff prior to a decision on subsidiary protection being made is unlawful. An unlawful deportation could not happen on the back of a lawful deportation order. The deportation and the deportation order are as inseparable as the dancer from the dance, to borrow a phrase. If the deportation would be unlawful because there had been no prior determination of an application for subsidiary protection, that implies a defect in the deportation order. I therefore conclude that the effect of success by the plaintiff in these proceedings would require an actual or implied finding of invalidity in a deportation order and therefore the proceedings would have the effect of questioning the validity of that order. Such an outcome is only permissible if the proceedings comprise judicial review under Ord. 84 RSC as contemplated by s. 5 of the 2000 Act."

18. It seems to me that the reasoning in both *Nawaz* and *FO* are equally applicable to the present case. The entire object of these proceedings is to restrain the enforcement of the deportation order, albeit for a limited period. Yet this is in itself to question – if only indirectly – the validity of the deportation order, since if, in McEochaidh J.'s felicitous phrase, the dancer of the deportation order cannot be separated from the dance of the subsequent enforcement of that order, a challenge to its enforcement implies a questioning of the validity of that order within the meaning of s. 5(1)(c) of the 2000 Act.

Conclusions

19. For all of these reasons, therefore, I am of the view that these proceedings are governed by s. 5(1)(c) of the 2000 Act as they involve a challenge in substance to the validity of a deportation order by seeking an order restraining the enforcement of that order. If this is so, then, absent the grant of a certificate by the High Court pursuant to s. 5(6) of the 2000 Act, this Court has no jurisdiction to entertain this appeal.

20. It follows, therefore, that this appeal must be struck out for want of jurisdiction.