Neutral Citation [2012] IEHC 86

THE HIGH COURT

JUDICIAL REVIEW

[2011 No.129 J.R.]

BETWEEN

N.D. [Nigeria] (No. 2)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 28th day of February 2012

1. On the 2nd February, 2012, the Court gave judgment upon the applicant's application for leave to seek judicial review of (a) the determination of an application for subsidiary protection by a letter of the 8th December, 2010, and (b) a deportation order made in respect of the applicant on the 13th January, 2011. The applicant now applies for a certificate under s. 5(3) of the Illegal Immigrants (Trafficking) Act 2000, for leave to appeal to the Supreme Court against so much as that judgment and the order of the Court as refused leave in respect of the deportation order. Such a certificate is not necessary for an appeal to the Supreme Court in respect of the determination of the application for subsidiary protection and the Court has been informed that it is the applicant's intention to take such an appeal irrespective of the outcome of the present application.

2. So far as concerns the application for leave to challenge the deportation order, the main focus of the arguments advanced on behalf of the applicant was directed at the issue addressed at para. 28 *et seq* of the judgment namely, the alleged invalidity of the deportation order by reference to Regulation 4(5) of the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulation"). It was submitted that, having regard to the chronology of the steps taken in considering the making of the two decisions as set out in para. 30 of the Court's judgment, Regulation 4(5) had been infringed because the Minister had "proceeded to consider" the making of the deportation order before a definitive determination of the subsidiary protection application had been made.

3. This argument having been rejected by the Court for the reasons set out in that judgment, the point of law of exceptional public importance put forward as the basis for the grant of the certificate is as follows:-

> "Whether Regulation 4(5) of the European Communities (Eligibility for Protection) Regulations 2006, precludes the Minister, his servants or agents, from affording consideration to whether a deportation order should be made in respect of an applicant for subsidiary protection, including conducting an analysis of matters relevant to the making of a deportation order, prior to making a final determination of the application for subsidiary protection.''

4. Paragraph 3(a) of the s. 5 of the Act of 2000, provides that leave is not to be granted by the High Court unless it certifies that "its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court".

5. The approach to be adopted by the High Court in interpreting and applying that provision and very similar provisions to be found in other legislation governing judicial review appeals is not in dispute between the parties. Some of the main authorities in the area were referred to by this Court in its judgment of the 4th May, 2011, in *O.O. and B.O. (a minor) v. The Minister for Justice Equality and Law Reform and Others* [2011] I.E.H.C. 175. At para. 4 of that judgment, the Court endeavoured to summarise the essential elements of the principles concerned and it is unnecessary to reiterate them for the purpose of the present ruling. Amongst the factors to be considered is that the point of law must be one which arises in an area where the law stands in a state of uncertainty.

6. As counsel for the applicant candidly acknowledged, the present application faces the particular hurdle that the proposed point of law has already been the subject of consideration and rejection for the purpose of a certificate of leave to appeal in the judgment in the *O.O. and B.O* case. Furthermore, in its judgment of the 2nd February, 2012, in the present case, the Court has explicitly followed its earlier ruling and stated:-

> "In its judgment, there is no ambiguity about the phrase used in Regulation 4(5) and the explicit placing of the subsidiary protection process within the scheme of the deportation process in s. 3 of the (Immigration Act 1999), demonstrates a clear intention that an application for subsidiary protection, when made, must be determined before a deportation order is made, but does not 'impose a strict statutory requirement' that no preparatory work by officials may be done on the deportation file until after the subsidiary protection determination has been finalised."

7. As counsel for the respondent has urged, it would be obviously inconsistent for the Court to now accept that there was a necessary degree of uncertainty about the point of law having ruled that the phrase in the Regulation admitted of no ambiguity.

8. Counsel for the applicant, however, has submitted that notwithstanding the Court's apparent confidence in its own view of the correct interpretation, it should not exclude the possibility that the Supreme Court might come to a different view. While the Court would have no difficulty in summoning the necessary degree of modesty to accept this submission in an appropriate case, there remains the difficulty that the Court must also be satisfied that it is desirable that the particular proposed appeal on this point of law be taken in the public interest.

9. In the judgment of the Court, it cannot be said that it is desirable in the public interest that the proposed appeal be taken in this particular case because it is clear that such an appeal is unnecessary. This is so because, as mentioned above, the Court has been informed that an appeal will be taken against the refusal of leave to challenge the determination of the subsidiary protection application. The Court has also been furnished with a draft of the proposed notice of appeal in that regard. It is clear from this that the point of law now proposed to be raised in relation to the deportation order can ru1d will be capable of being advanced for the consideration of the Supreme Court in any event by reference to the subsidiary protection determination.

10. Insofar as the point of law turning upon the correct construction of Regulation 4(5) can be said to be more than an academic point of legal interpretation and to have practical consequence in vitiating the validity of the relevant decisions, it is because it is argued that when officials in the hierarchical chain responsible for preparing the subsidiary protection and deportation files, prepared summaries of facts and submissions and composed draft recommendations, they were necessarily making judgments which are recorded in the respective memoranda. Accordingly, where an official who is working on the subsidiary protection file has already worked on the deportation file there is, it is argued, necessarily an element of bias or prejudgment on the part of that official by virtue of the fact that he or she will have committed to taking a particular approach in the deportation file and thus will not come to the subsidiary protection file afterwards with an open mind.

11. The Court notes that several of the grounds proposed to be advanced in the notice of appeal articulate this essential proposition from a number of different angles. Clearly therefore the issues that are said to arise out of disputed interpretation of Regulation 4(5) will be before the Supreme Court in the proposed appeal albeit in the context of the impact of the provision on the validity of the subsidiary protection decision.

12. In the judgment of the Court, it is not therefore necessary to grant a certificate of leave to appeal upon the proposed point in law and where it is clear that it is not necessary that the appeal be taken, it cannot be said that it is desirable to allow it to be taken in the public interest.

APPROVED: Cooke, J