

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 131 J.R.]

BETWEEN

C.W. a.k.a U.E.M

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 3rd day of July, 2015

1. By way of notice of motion on the 10th March 2014 the Applicant sought:-

- 1) An interlocutory injunction restraining the deportation of the Applicant pending the outcome of these proceedings.
- 2) An order of *certiorari* quashing the amended deportation order directed to the Applicant and dated the 12th June 2014.
- 3) A declaration that the Respondent is required to comply with the provisions of sections 3(1) and 3(6) of the Immigration Act 1999 (hereinafter referred to as "the Act of 1999") prior to making an order further to the provisions of s. 3(11) of the Act of 1999 amending a deportation order.
- 4) An order extending the time for applying for judicial review.
- 5) Such further and other orders the Court may deem meet and just.

2. An *ex parte* application was made on behalf of the Applicant to MacEochaidh J. on the 9th March 2015 and MacEochaidh J. ordered that the Applicant have liberty to issue and serve the notice of motion seeking the aforementioned reliefs on the Chief State Solicitor on behalf of the Respondent by the close of business on the same date, and the notice of motion to be returnable before the Court on the 10th March 2015.

3. On the 10th March 2015 MacEochaidh J. directed the Applicant to file a verifying affidavit confirming the facts set out in the statement of grounds and that the interim injunction made restraining the Respondents and their servants or agents to continue up to and including Wednesday the 11th March 2015 and that further consideration would be given on the 11th March 2015 to the proceedings.

4. On the 11th March 2015 after reading the documents and hearing counsel on behalf of the respective parties in respect of the motion seeking the injunction restraining the deportation of the Applicant at para. 1 of the notice of motion, he refused to grant an injunction and the Court directed that a single combined telescoped hearing of the Applicant's application for leave to apply by way of application of judicial review and the Applicant's substantive judicial review application stand adjourned.

5. On the 24th June 2015 this telescoped hearing of the application for judicial review came before this Court.

6. Counsel on behalf of the Respondent in both her written submissions had made two preliminary points:-

1) An affidavit had been sworn by one Margaret Stephen on the 18th June 2015 in support of the Applicant's application. Ms Stephen avers that she has been in a relationship with the Applicant for over two years. The Respondent objected to this affidavit first of all on the grounds that the affidavit was filed without the leave of the Court and secondly that the contents of the affidavit were never disclosed to the Respondent. She further makes the point that this Court in exercising its jurisdiction in judicial review matters is confined to the facts which were before the decision-maker and/or were disclosed to the decision-maker at the time of the making of the impugned decision.

2) An application was also made for a dismissal of the proceedings on the grounds that the within proceedings had been issued outside the permitted time limit under rule 21 (1) of S.I. 691 of 2011 Rules of the Superior Courts (Judicial Review) 2011 which came into operation on the 1st January 2012. An application for leave to apply for an order of *certiorari* shall be made within three months of the date on which the grounds for the application first arose.

7. She noted that the Applicant had not addressed this jurisdictional point in the legal submissions prepared on his behalf on the 15th June 2015 and served on the Respondents on the 16th June 2015. She also made the point that the Applicant had not sought an extension of time to bring the within proceedings and the reliefs sought in the statement of grounds dated the 9th March 2015.

8. It is clear from the notice of motion that an order extending the time for applying for judicial review was included in the notice of motion dated the 10th March 2015 filed on the 9th March 2015.

9. S.I. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011 which came into force on the 1st January 2012 provide as follows:-

"21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

(2) Where the relief sought is an order of *certiorari* in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by

the Applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a Respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the Applicant which shall set out the reasons for the Applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the Applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a Respondent or third party."

10. In these circumstances counsel for the Respondent sought the dismissal of these proceedings on this point.

11. Counsel on behalf of the Applicant argued that this ground was not raised before MacEochaidh J. on the application for an interlocutory injunction which he refused on the 11th March 2015 and they could not now raise this argument.

12. In relation to the Respondent's complaint in relation to the affidavit of Margaret Stephen sworn on the 18th June 2015 he argued that there was an obligation on the Minister for Justice and Equality (hereinafter referred to as "the Minister") pursuant to s. 3(6) of the Act of 1999 to have regard to, *inter alia*, the family and domestic circumstances of the person. In answer to the Court's question as to whether either of the solicitors acting on behalf of the Applicant (at the same time) made representations in relation to this arrangement he indicated that neither solicitors appear to be aware of this matter but that in any event the Minister was statutorily obliged to consider that they were dealing with an application to amend or revoke an order made pursuant to s. 3 (11) of the Act of 1999.

13. Counsel on behalf of the Respondent also produced legal submissions on behalf of the Respondent which were made in response to the application for the injunctive relief before MacEochaidh J. that the issue of the Applicant being out of time was raised in para. 12 of her legal submissions. Counsel on behalf of the Applicant said that nevertheless this application was not argued before MacEochaidh J.

14. MacEochaidh J.'s decision of the 11th March 2015 reviews the history of the Applicant and at para. 14 he states:-

"The slightly unusual feature of this case is that the decision which has given rise to the proceedings is a decision prompted by the Minister who received certain information about the Applicant from the UK and who decided that it might be appropriate to amend a pre-existing deportation order. That proposal was put to the Applicant and his legal representatives and were received on behalf of the Applicant and those were fully considered."

15. MacEochaidh J. continues at para. 15:-

"In my opinion, an application to amend a deportation order complies with fair procedures where the proposal to amend is fully and carefully explained to an Applicant or where an Applicant has every opportunity to reply to that proposal. It is not in my view that the law requires an application to amend a deportation order to revisit all of the issue which would be required to be considered on a proposal to make a deportation order in the first instance."

16. At para. 16 he continues:-

"I accept the argument that there is a requirement to comply with a non-refoulement obligation pursuant to s. 5 of the Refugee Act on any proposal to amend a deportation order where such amendment would have as a consequence the removal of a person to a place which had not previously been considered in the context of a s. 5 refoulement analysis. If the effect of the amendment is to consider a removal from the State of a person to a territory not originally considered when making the original deportation order it is incumbent upon the Minister on an application or a proposal to amend a deportation order to revisit that issue."

17. At para. 17 he continues:-

"I find that as a matter of fact the Minister has fairly considered the refoulement issue in the context of the proposal to amend."

18. At para. 18 MacEochaidh J. states:-

"I cannot identify any want of due process in the making of the amended deportation order. The Applicant was given extensive opportunity to deal with the proposal and he seems to have engaged two forms of solicitors to respond the Minister's proposal to amend the order. The allegation that refoulement was not considered by the Minister is not made out."

19. MacEochaidh J. did touch upon the issue of delay in para. 19 in which he said:-

"In addition, no explanation has been offered as to why the amended deportation order is challenged nine months after it was made well outside the time limits for these proceedings."

20. MacEochaidh J. also mentions the suggestion that the Applicant is in a romantic relationship but that this was not stated on affidavit and the fact of the relationship was never mentioned in any of the multiple contacts the Applicant has had with the State in respect of his status in the country.

21. In relation to the preliminary issue of the Respondent that the proceedings have been issued outside the permitted time limit I am satisfied as follows:-

- 1) In the notice of motion dated the 9th March 2015 and returnable for the 10th March 2015 there was an application for an order extending the time for applying for judicial review.
- 2) However, it was not contained in the statement grounding the application for judicial review by way of the reliefs sought. There was a general description of "further and other orders the court deemed fit and just".
- 3) No attempt has been made to persuade this Court that there is a good and sufficient reason for extending the period within which an application for leave for judicial review may be made. Certainly there is no suggestion that the circumstances that resulted in the failure to make the application for leave were outside the control of the Applicant or could not reasonably have been anticipated by the Applicant.
- 4) Further, in the affidavit of John Gerard Cullen, solicitor, no attempt has been made to set out the reasons for the Applicant's failure to make the application for leave within the prescribed period by sub-rule (1) and verifying any facts relied in support of reasons.

22. This Court does not agree that the Minister is obliged to seek to trawl the social activities of a person against whom a deportation is made as suggested by counsel for the Applicant. There is clearly an onus on such a person to give this information to the Minister personally or through his solicitor. Counsel for the Applicant has accepted that neither of the two solicitors acting (at the same time) for this Applicant were aware of this relationship.

23. The Court is satisfied that these proceedings were not made within the 14 day period (as required by section 5(2) of the Illegal Immigrants (Trafficking) Act 2000) from the date when the grounds for the application first arose. There has been no attempt made to satisfy this Court that there is good and sufficient reason for extending the time and no application for an extension of time has been grounded upon an affidavit sworn by and on behalf of the Applicant which sets out the reasons for the Applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and verifying any facts relied in support of those reasons.

24. In those circumstances the Court proposes to dismiss these proceedings in favour of the Respondent.

Counsel for the Applicant: Killian McMorrow B.L., instructed by John Gerard Cullen, Solicitors

Counsel for the Respondent: Cindy Carroll B.L., instructed by the Chief State Solicitors Office