THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 7 J.R.]

BETWEEN

Z.K.

APPLICANT

AND

RECEPTION AND INTEGRATION AGENCY,

MINISTER FOR JUSTICE AND EQUALITY,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of January, 2016

1. The applicant, who is Algerian, unlawfully arrived in the State on 6th March, 2014. He was refused asylum on 10th June, 2014, a decision which he has appealed. That appeal is outstanding.

2. He has been accommodated in the "direct provision" system at Viking House, Coffee House Lane, Waterford, since his arrival in the State. Viking House is a private accommodation centre run by a private limited company, Mill Street Services Ltd., which has a commercial relationship with the Reception and Integration Agency in order to accommodate asylum seekers. It is accepted that the accommodation is a facility provided by the State rather than a mandatory system. The applicant is not compelled as a matter of law either to utilise it or to be in the State at all. While I appreciate that he may not have the resources to fund his own accommodation, there is no analogy with prison accommodation as was suggested in the course of the application.

3. Unfortunately, the applicant's time at Viking House has not been an entirely happy one. He received a total of five written warnings in respect of his behaviour, by letters dated 27th June, 2014; 30th October, 2014; 11th November, 2014; 2nd December, 2014 and 15th October, 2015 (final warning); followed by a letter of 15th December, 2015 requiring his transfer out of the accommodation (giving rise to the present application).

4. The applicant meanwhile launched a series of complaints in relation to conditions in Viking House, particularly in relation to alleged shortcomings in the food and hygiene standards.

5. The complaint giving rise to the transfer decision was triggered by a written report from the manager of Viking House, dated 14th December, 2015, which alleged that the applicant subjected the manager and another staff member to "a tirade of verbal abuse". This was followed by the applicant going to the reception area and subjecting the manager and the chef to a "*prolonged session of abuse using every expletive imaginable, he left nothing unsaid. All of the above is recorded on the CCTV system complete with audio*."

6. Notably, in his grounding affidavit for the present application, the applicant does not deny this allegation.

7. The Reception and Integration Agency's response to this was to issue the final letter in relation to his behaviour, dated 15th December, 2015, signed by Ms. Siobhan O'Higgins on behalf of the Reception and Integration Agency, which notified him that "*your ongoing behaviour is contrary to the smooth running of the centre, is completely unacceptable to the Reception and Integration Agency and cannot continue to be tolerated under any circumstances. In order to defuse the situation it has been decided to relocate you to Richmond Court, Richmond Street, Longford.*"

8. This proposed course of action was met with a volley of correspondence from John Gerard Cullen Solicitors, on behalf of the applicant, including a letter of 18th December, 2015, in which they state "*We now intend to institute High Court proceedings against the Minister for Justice/RIA/Siobhan O'Higgins personally and An Garda Síochána.*"

9. This threat to sue a public servant personally for signing an administrative letter on behalf of a government department or agency is unacceptable in the absence of exceptional circumstances which do not exist here. The fact that the threat was not carried out is all to the good, but it needs to be stated that a threat such as this should never have been made in the circumstances. That is not to say that there are not circumstances in which a public servant could be personally liable for *mala fides*, but those are rare indeed and certainly the present case has nothing in common with such a claim. In addition, there are other circumstances where a public servant holds a particular office which is not a corporation sole, and can legitimately be sued in his or her own name in the capacity of the holder of that office. For example, where the respondent to an Article 40 application is a particular member in charge of a Garda station, or a particular prison governor, neither of which offices is a corporation sole, it is permissible to name the individual as the respondent (as has been done historically in many leading cases on habeas corpus, such as *Entick v. Carrington* (1765) 19 St. Tr. 1029; 95 E.R. 807 and *Liversidge v. Anderson* [1942] A.C. 206), but it would not be altogether accurate to say that in such cases public servants are being sued personally. They are being sued in their capacity as holders of particular offices, but it is lawful to name them because any such particular office is not a corporation sole with statutory power to sue and be sued. On the other hand, the courts have also accepted the respondent being sued in the name of such office. Both approaches are permissible in those circumstances, but nothing like that arises here. Ms. O'Higgins was not making a decision on her own behalf as holder of a specific public office. Her letter was issued as an officer of the Minister. There never was a basis to threaten to sue her, either "*personally*" or at all.

10. The applicant now seeks judicial review of the decision to transfer him and in relation to the handling of his complaints regarding food and hygiene in the Waterford accommodation at Viking House.

The transfer decision
11. Given that the applicant has not denied engaging in abusive behaviour, the Agency was clearly entitled to act urgently to defuse the situation, as they put it. The situation required immediate intervention. The applicant's complaints in relation to fair procedures fall flat in those circumstances. Such urgent action is managerial in nature and does not attract rights to fair procedures or oversight by way of judicial review.

12. In *Hosford v. Minister for Social Protection* [2015] IEHC 59, Noonan J. commented, in the employment context, that "*There is clearly a range of decisions in the context of employment that may be taken which are merely administrative or managerial in nature and do not give rise to such rights [to the full panoply of fair procedures] or which are amenable to judicial review*" (at para. 19). What goes for the transfer of a civil servant from one unit to another, as in *Hosford*, also goes for the administrative or managerial responsibility to transfer an asylum-seeker from one direct provision facility to another.

13. The applicant has claimed severe prejudice in this regard, the most significant elements of which related to his health and education.

14. Mr. Fémi Daniyan, B.L. (who originally moved the *ex parte* application on behalf of the applicant) informed me that the applicant had given instructions to his lawyers that he was getting tests in Waterford as he was concerned that he had cancer. The inference appeared to be that the alleged cancer was in some way related to the food regime at Viking House. On closer examination, it is clear that the applicant is not receiving treatment for cancer, either in Waterford or anywhere else. The applicant does not have cancer. The instructions he provided to his lawyers in this regard do little for his credibility.

15. The applicant also claims that his educational courses are being disrupted by the transfer from Waterford. A supplemental affidavit of the applicant's solicitor exhibits a letter from the Waterford and Wexford Education and Training Board, confirming that the applicant has been attending weekly English classes since September. English courses are not unique to Waterford and it has not been shown that a course of this kind could not be obtained in Longford.

16. If, which I do not accept, there is any justiciable prejudice, the applicant has brought the difficulty on himself by reason of his disruptive behaviour, which he has not denied. I would refuse the application in any event in the exercise of the court's discretion having regard to that behaviour.

Failure to deal with the applicant's complaints in relation to the Waterford Centre
17. The posture of the applicant is fundamentally contradictory. He has raised a litany of complaints in relation to the Waterford Centre, and at the same time protests by means of these proceedings against being moved from the Waterford Centre to somewhere else. It seems to me that any complaints the applicant may have had about food and hygiene in Waterford are now moot given his relocation to Longford.

18. If I am wrong about that, those matters do not appear to me to be public law issues appropriate for judicial review. Viking House is a private facility, not a public law institution. Its kitchens are staffed by private citizens, not state employees. What happens in those kitchens is at best a matter for ordinary civil action, not judicial review. As Posner J. put it earlier this week in *Babchuck v. Indiana University Health Inc*. (Appeal No. 15-1816, U.S. Court of Appeals for the 7th Circuit, 11th January, 2016): "*Government is omnipresent; that doesn't make all employees of private entities state actors*" (at p.8).

19. On that basis, the applicant's complaints that the agency's "house rules" in relation to complaint handling are legally flawed, as found in *C.A. v. Minister for Justice and Equality* [2014] IEHC 532, do not arise. In any event, *C.A.* is predicated on there being an arguable complaint to be pursued through those complaint handling mechanisms, being one that is subject to judicial review, which is not the case here. Any alleged infirmity in complaint handling procedures cannot convert complaints that are not amenable to judicial review into complaints that are so amenable.

20. Mr. Michael Conlon S.C., who also appears for the applicant, submits that to rule out judicial review in this context would be to allow the State to defeat judicial review in any given area by outsourcing its functions. I would accept that point to the extent that a genuinely public law matter does not cease to be a public law matter if the State outsources its provision to a private entity. In that sense, judicial review can be sought against private law entities carrying on public law functions. But in the absence of sufficient countervailing factors, a review of the quality of food and hygiene provided in private accommodation of the kind at issue here is not a public law matter amenable to judicial review to begin with.

Anonymity of the applicant
21. At the resumed hearing of the application, Mr. Paul Caffrey of the Irish Daily Mail asked in effect for permission to name the applicant as part of any continued reporting of the matter. There was not much I could do about that application because the restriction on naming the applicant derives not from any order of the court but from s. 19 of the Refugee Act 1996.

22. That section is not entirely free from difficulty. It imposes life-long anonymity in connection with asylum-related matters on a person who simply says "*I claim asylum*". The person does not need grounds, or valid grounds, in order to benefit. The anonymity persists even if that application has been shown to be unfounded or even fraudulent. The section deprives the court of any jurisdiction to vary or remove the anonymity. It covers not simply the details of the asylum claim but even the person's name. If an applicant is eventually returned to his or her country of origin, the authorities there will know that he or she is being deported or removed from Ireland, and if they are minded to engage in persecution of the applicant it will not be unduly difficult for them to infer that the likely legal basis of the person's presence in Ireland was an asylum claim. Thus the protection of the applicant's identity as such (as opposed to linking that identity with specific particulars of a claim against the authorities of an identified country) would seem to provide only illusory benefits for an applicant in many cases. In addition, the section applies in relation to asylum seekers from all countries, even those that do not in any way discriminate against or disadvantage returned failed asylum seekers. Its application persists despite voluntary acts on behalf of the applicant in invoking the jurisdiction of the court to challenge a refusal decision, or, as here, conditions of direct provision. Furthermore, the section confers a level of anonymity on asylum seekers, however spurious their claims, that is far in excess of the protection provided to persons, including Irish citizens, charged with criminal offences. Freedom to report court proceedings is an important right under the Constitution, the EU Charter of Fundamental Rights and the ECHR and provides important public policy benefits on behalf of the people of Ireland. However, in the absence of a constitutional, EU law or ECHR challenge to the section, there is not a great deal I can do about an application such as the one made to me in this case. A determination of whether or not s. 19 requires legal justification or is simply a policy matter for the Oireachtas, or, if such justification is required, whether it exists (see the issues discussed in UNHCR, *Advisory opinion on the rules of confidentiality*

regarding asylum information, 2005, esp. para. 9, which provides some, although perhaps not total, support for a provision such as s. 19) would have to await such a challenge.

Order
23. For the foregoing reasons, I will refuse this application for leave to seek judicial review. I will direct the solicitors for the applicant to serve the CSSO with a copy of this judgment within 7 days.