

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 123 JR]

BETWEEN

E. M. O.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 13th day of July, 2015

1. This is an application for an interlocutory injunction to restrain the deportation of the first named applicant Mr. E.M.O.. Leave to seek judicial review was granted by this court on Monday 9th March, 2015, and an interim injunction was granted on that day.
2. The applicant's challenge the decision of the Minister sent to the first named applicant on the 13th February, 2015, which refused an application for revocation of a deportation order.
3. By letter dated 10th June, 2009, the first named applicant was informed that the Minister was proposing to make a deportation order and he was invited to make submissions in respect of this proposal which he did on the 30th June, 2009. When the Refugee Legal Service made representations for temporary leave to remain, it was indicated that he was a dependent of a European Union citizen as his father was a Dutch citizen recently resident in Ireland.
4. On the 29th April, 2011, Trayers & Co. solicitors wrote to the Irish Naturalisation and Immigration Service, using the reference number in respect of the deportation matter but applying for residency based on a romantic relationship with an Irish citizen. This letter refers for the first time to the relationship between the first named applicant and second named applicant, Ms. Caroline Greene. On the 9th September, 2011, Trayers & Co. indicated that its letters of the 29th April, 4th July and 8th August had not been acknowledged. On the 12th December, 2011, I.N.I.S. replied saying that consideration of the applicant's circumstances would be decided by reference to s. 3(6) of the Immigration Act 1999.
5. In May, 2012, Trayers & Co. made a further submission in respect of the application for leave to remain dealing with the relationship between the first and second named applicant, the relatively disadvantageous position of Ms. Greene by comparison with a non-Irish E.U. citizen living in Ireland in a relationship with a third country national and the fact that Ms. Greene was not in a position to leave the State to be with her partner should he be removed to Nigeria
6. By letter of the 18th October, 2012, Trayers & Co. submitted a letter handwritten by Ms. Greene making complaint about the fact that the state authorities had retained the first named applicant's passport for many years. Ms. Greene indicates that the couple were planning to wed but could not make progress without the passport. She also refers to the fact that she had a miscarriage in the recent past.
7. On the 30th April, 2013, Trayers & Co. wrote requesting return of original documentation submitted with the application for leave to remain which I understand to be a request for the return of the first named applicant's passport.
8. On the 3rd May, 2013, I.N.I.S. replied that the documentation would be kept on file until a decision was taken.
9. Proceedings were instituted in October 2013 compelling the respondent to issue a decision on the applicant's application for leave to remain, inter alia. These proceedings were compromised. The passport was not returned. Leave to remain was ultimately refused and a deportation order dated 29th November, 2013, issued.
10. Proceedings challenging the deportation order issued on the 27th January, 2014. These too were compromised apparently on the basis that the applicant would be given an opportunity to make an application pursuant to s. 3(11) of the Immigration Act 1999 for the revocation of the deportation order made. The Court has been unable to comprehend why these proceedings were thus compromised because the first named applicant did not need the permission of the Minister to make a revocation application.
11. By letter of the 4th November, 2014, Trayers & Co. made application for revocation of the deportation order. The letter repeats what was submitted in respect of the leave to remain application some years earlier. It asserts that the first named applicant and Ms. Greene are in a relationship, that Ms. Greene is in a comparatively disadvantageous position in comparison with a non-Irish E.U. national in a relationship with a non-E.U. third country national, in Ireland. It seems that the only new factor submitted in connection with the s. 3(11) application was that the first named applicant and Ms. Greene stated that they intended to marry in the State.
12. On the 15th December, 2014, the Minister's official recommended refusal of the revocation of the deportation order on the basis that no information had been submitted to warrant the revocation, noting that successful applicants for revocation of deportation orders "must advance matters which are truly materially different from those presented or capable of being presented ..." on the application for leave to remain.
13. On the hearing of the application for an interlocutory injunction the grounds alleging illegality in the decision in suit (as described in the statement grounding application for judicial review) were not explored. Instead, the focus of the application for an interlocutory injunction was on the exceptionality which applies in the case, having regard to the decision of Clarke J. in *Okunade v. Minister for Justice* [2012] I.E.S.C. 49.
14. In that decision Clarke J. said:-

"It seems to me that the first question arising in the *Campus Oil* test, being as to whether the moving party has established a fair or arguable question to be tried, remains the starting point in considering whether a stay or an

injunction should be granted in judicial review proceedings or ordinary plenary proceedings.” (See paragraph 9.20 at p. 40 of the unreported judgment)

15. This Court has granted the applicant leave to seek judicial review. That decision was based upon the existence of substantial grounds for contending that the decision ought to be quashed. In view of the grant of leave at the higher threshold, arguable grounds as to illegality required in accordance with the *Okunade/Campus Oil* rules are thereby established.

16. At paragraph 10.4 of the decision in *Okunade*, Clarke J. said as follows:-

“... it seems to me that, if faced simply with an assertion on the part of the Minister that it is desired that a deportation order be enforced unless and until it be found invalid and an assertion on the part of an applicant that the applicant in question does not wish to run the risk of being deported only to be readmitted if the relevant proceedings are sufficiently successful, the position of the Minister would win out...”

10.5 The default position is, therefore, that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side...

10.6 Furthermore, if an applicant can demonstrate that deportation, even on a temporary basis, would cause more than what one might describe as the ordinary disruption in being removed from a country in which the relevant applicant wished to live, such as a particular risk to the individual or a specific risk of irreparable damage then such factors, if sufficiently weighty, could readily tilt the balance in favour of the grant of an injunction or a stay...

10.8 It also seems to me that, in the context of deciding what is to happen on a temporary basis pending trial ... a disruption of family life which has been established in Ireland for a significant period of time is a material consideration. As pointed out earlier the reason why the maintenance of the status quo is considered as part of the ordinary interlocutory injunction *jurisprudence* is that the risk of injustice is increased when action is taken so that some justification for action must be found. In addition it seems to me that it has to be taken into account that part of the problem which gives rise to a risk of disruption of family life stems from the highly complicated structure of the statutory regime applicable in circumstances such as those with which the court is concerned in this case with the consequent prolongation of the process. That is a factor which is within the state's control and does often lead to situations where parties (most particularly children) have put down roots. All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of both the judicial review proceedings and any other process which might follow on, the children concerned might be allowed to remain in or return to Ireland.”

17. My understanding of the decision in *Okunade* is that the Court should respect the deportation order and not interfere with it unless some special facts or circumstances are found which tilt the balance in favour of a stay or an injunction.

18. Factors which apply in this case and which the Court is asked to weigh in favour of the applicant are the following:-

1. The respondent took four years and five months to deal with the first named applicant's application for leave to remain in the State. No explanation for this delay has been offered.

2. During that time the respondent had possession of the first named applicant's passport until July 2015.

3. The personal life factor relied upon in support of revocation of the deportation order and in support of an interlocutory injunction has developed and deepened during the delay in dealing with the applicant's application for leave to remain in the State. It is suggested that had the State determined the application for leave to remain efficiently the personal ties between the first and second named applicant would not or could not have occurred.

4. The first and second named applicant have signalled their desire to marry since May 2012 and believed, rightly in my view, that they could not marry without the applicant's original Nigerian passport. In relation to this, the applicant's solicitors wrote to the respondent on a number of occasions seeking the return of the passport. On each occasion the respondent stated that the passport would be returned once the application for leave to remain had been concluded. This did not occur. By letter dated the 15th May, 2012, the respondents sent a photocopy of the passport to the first named applicant's solicitors. The Court is informed that the respondent was maintaining possession of the original passport in order to facilitate deportation. The actions of the respondent, it is submitted, have interfered with a constitutional right to marry.

5. The second named applicant has indicated that she will not be in a position to relocate to Nigeria and that if the first named applicant is deported the relationship will be permanently sundered.

19. In my decision in *K.O. v. the Minister for Justice and Equality, Ireland & the Attorney General* (ex tempore judgment, 31st July, 2013) I said at para. 20:-

“The approach of the State to the removal of this man who was unlawfully on this island can best be described as glacial and calm. There is not the slightest urgency in respect of this matter. Therefore, when one comes to balance the various interests, it seems to me the idea of sending a young man who is barely past his minority back to a county where he knows nobody; that he has not been in since the age of six;(sic) where the State has taken such a long time to deal with his application for humanitarian leave to remain; where no explanation has been given for that delay; where all that is balanced against the State's stated desire to implement its immigration policy, in my view, the injustice that would be done to the State by not achieving an instant deportation is almost minimal if it exists at all by comparison to the potential harm and disruption that would be done to this young man who may well be a person to whom an unlawful deportation order has been addressed”.

20. Clearly the facts in *K.O.* and this case are not completely analogous. However like *K.O.* the State here is not engaged with the mechanics of deportation at present. Practical arrangements have not been put in place for his deportation. It is conceded that the passport which the State kept up until very recently is out of date and is likely to have to be renewed in order to facilitate deportation. The state made no attempt to renew the passport when it was in their possession either by asking the first named applicant to renew it or to seek its renewal by request from the respondent's officials to the Nigerian authorities. On top of that no explanation has been provided as to why it took the State four years and five months to deal with the applicant's application for

leave to remain, during which time he has formed a very strong bond with the second named applicant. I accept the evidence that she had three miscarriages.

21. The Court is not satisfied that an explanation has been given as to the circumstances in which the respondent decided to maintain possession of the applicant's passport. In particular it was indicated that the passport would be returned on the completion of the application for leave to remain but this did not happen.

22. I have not been persuaded that the State is entitled to keep the applicant's passport which has been submitted in connection with an application for leave to remain. On the balance of probabilities I accept that had the passport been returned at an appropriate time the first and second named applicant would have married and that their circumstances would have been materially different. I acknowledge that the fact of marriage would not necessarily have caused the Minister to revoke a deportation order but I have no doubt that a different revocation application would have been made had a marriage taken place between the applicants.

23. Disruption of a romantic relationship would not normally be sufficient to ground an application for an injunction to prevent deportation. Therefore I emphasise that disruption of the relationship is not the basis upon which the Court has decided in favour of the applicants.

24. I will grant an interlocutory injunction restraining deportation.