Neutral Citation [2016] IEHC 761

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 121 J.R.]

BETWEEN

B.I.

APPLICANT

AND

MINISTER FOR JUSTICE & LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of November, 2016

Introduction

1. The within matter came before the Court on 18th of October, 2016 by way of telescoped hearing wherein the applicant was seeking leave to apply for judicial review as well as judicial review by way of an order of *certiorari* quashing the decision refusing the application for subsidiary protection against the applicant made on 13th December, 2010 and quashing the deportation order made against the applicant on 16th December, 2010 together with an application for a necessary injunctive relief together with an application to extend the period within which the within application might be made.

2. The proceedings are based upon a notice of motion, statement grounding the application and affidavit of the applicant all dated 9th February, 2011.

Background

3. The applicant is a pharmacist and Bangladeshi national born in December, 1961. He is married with two sons and these two sons, together with his wife, continue to reside in Bangladesh.

4. The applicant arrived in the State on 24th December, 2007 and on same date applied for refugee status. The applicant gave a history of being attacked in 1990, 2006 and December 2006 as a result of political involvement and in 2007 of the threat to his family, who thereafter escaped.

5. By recommendation bearing date 12th July, 2008 it was recommended that the applicant would not be afforded refugee status and this recommendation was notified to the applicant under cover letter of 30th July, 2008.

6. The applicant appealed the refusal aforesaid on 11th August, 2008. On 29th October, 2009 the recommendation of the Commissioner was affirmed and this negative decision was notified to the applicant by a letter received on 20th November, 2009.

7. The applicant was advised by a letter of 30th December, 2009 as to his options including the possibility of applying for subsidiary protection. The said letter advised the applicant that should he apply for subsidiary protection the order in which his case would be dealt would be to the effect that the Minister would make a decision on eligibility for subsidiary protection first and if the application is not successful the Minister would decide on his representations to remain temporarily in the State. If the Minister decides that the applicant should not be allowed to remain temporarily in the State, the applicant will be made the subject of a deportation order.

8. The applicant lodged an application for subsidiary protection under cover letter of 7th January, 2010 and on the same date the applicant also applied under s.3 of the Immigration Act 1999 for leave to remain in the state.

9. By letter bearing date 13th December, 2010 the applicant was advised that he was not eligible for subsidiary protection and by further letter bearing date 22nd December, 2010 the applicant was advised that the respondent had made a decision to make a deportation order against the applicant (such decision made on 16th December, 2010).

10. The applicant effectively seeks to condemn the sequence of the decision making process in that he has complained that on 28th October, 2010 Ms. Merrigan, Executive Officer, prepared a determination for subsidiary protection and on the same day also prepared a determination on deportation. On 6th December, 2010 Ms. Lee, Higher Executive Officer, approved the determination in respect of subsidiary protection and further on the same day approved the determination in respect of the deportation. On 10th December, 2010 Mr. Carroll, Assistant Principal, made the final approval of the decision in respect of subsidiary protection and subsequently on 13th December, 2010 Mr. Carroll approved of the decision in respect of deportation. Ultimately, on 16th December, 2010, the Minister signed the deportation order.

11. It is asserted on behalf of the applicant that the decision of refusing him subsidiary protection was reached in breach of fair procedures and was tainted by bias and prejudgment or the appearance thereof. Further and in the alternative it is argued that the respondent acted in the breach of Regulation 4(5) of the 2006 regulations which provides:-

> "Where the Minister determines that an applicant is not a person eligible for subsidiary protection, the Minister shall proceed to consider, having regard to the matters referred to in section 3(6) of the 1999 Act, whether a deportation order should be made in respect of the applicant."

12. The respondent effectively argues that the entire process was fair and is valid on the basis that with regard to the application for subsidiary protection a recommendation was made on 28th October, 2010 which was agreed with by a Higher Executive Officer on 6th December, 2010 and the determination at Assistant Principal level was made on 10th December, 2010 agreeing with the recommendation. It is asserted that there was no decision to deport until the deportation order was signed by the Minister on 13th December, 2010. The respondent argues that this sequence is entirely consistent with the Minister's obligation under Article 4(5) aforesaid. The respondent further argues that the applicant has made no complaint concerning either the quality or reasonableness of either the subsidiary protection decision or the analysis of his s. 3 application of leave to remain in the State completed prior to the respondent's decision of 16th December, 2010.

Applicant's submissions
13. The applicant submits as follows:

> a. The manner in which the subsidiary protection and the deportation matters were dealt with, in that considerations overlapped, involved objective bias and was therefore tainted by illegality.
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> b. The manner in which the subsidiary protection and the deportation matters were dealt with is in breach of Regulation 4(5) of the European Communities (Eligibility for Protection) Regulations, 2006.
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> c. The decision of Cooke J. in the case of *N.D. v. Minister for Justice* [2012] IEHC 44 and in the case of *O.O. v. Minister for Justice* [2011] IEHC 165 has been superseded by the case of *M.M. v. Minister for Justice etc*. [Case No. C-277/11] being a judgment of the European Court of Justice, and the subsequent decision of Hogan J. in the case of *N.M v. Minister for Justice* [2013] IEHC 9.
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> d. In the alternative to no. 3 above, the decision of Cooke J. in the *N.D.* and *O.O.* cases was quite simply wrong insofar as the issue as to timing is concerned, and insofar as his assessment of the *Carltona* principles is concerned which views are not supported by the Supreme Court in the case of *W.T. v. Minister for Justice* [2015] IESC 73, a judgment of 31st July 2015.
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> e. The sequence did not accord with the letter written by the respondent to the applicant of 30th December, 2009.

14. In support of the foregoing, the applicant argues that the preparation of a determination in the deportation matter by Ms. Merrigan, Executive Officer, and the subsequent approval of such determination by Ms. Lee, Higher Executive Officer, did in effect involve a consideration within the meaning and application of Regulation 4(5) aforesaid as they were in effect preliminary steps in the Minister making a decision as to deportation and accordingly if these officials were affected by prejudgment or bias, so too was the Minister. In this regard the applicant relies on the case of *Devanney v. DPP & Ors*. [1998] 1 I.R. 230 which in turn refers to the *Carltona Ltd v Comrs. of Works* [1943] 2 All ER 560 decision of 1943 where it was acknowledged that the duties imposed upon ministers and powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department and the Minister is responsible. The applicant further relies on the authority of *R. v. Romsey Justices* [1992] 156 JP 567 as to the circumstances when objective bias might arise.

15. The applicant further argues that because of the European Court of Justice ruling in *M.M.* and the subsequent judgment of Hogan J. in that case effectively condemned or overturned the order of Cooke J. in the *N.D.* matter.

16. The applicant further relies on the decision of *The State (Shannon Atlantic Fisheries Limited) v. McPolin* [1976] I.R. 93 to the effect that, although acknowledging that identical facts do not arise, that the acts of officials acting on behalf of the Minister are effectively the acts of the Minister.

17. It is suggested that the wording of Regulation 4(5) aforesaid does not admit of ambiguity and therefore the interpretation placed upon this regulation by Cooke J. in the aforesaid cases is without foundation and runs contrary to the *Carltona* principles. Further, it is suggested that the words "proceed to consider" should not be construed as meaning "resume considering". It is argued that administrative efficiency is not a justification for considering a deportation before the subsidiary protection claim is dealt with as this would suggest that there was no open mind on the matter of the issue for subsidiary protection.

18. The applicant accepts the authorities mentioned on behalf of the respondent including the *Worldport Ireland Limited (in liquidation) & Companies Acts* [2005] IEHC 189 judgment of Clarke J. delivered on 16th June, 2005 to the effect that it is well established as a matter of judicial comity that a judge of first instance ought usually follow a decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. In that case Clarke J. indicated that there might be a number of appropriate reasons to differentiate from an earlier judgment, for example:

> (a) there was a not a review of significant relevant authority,
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> (b) there was a clear error in the judgment,
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> (c) a sufficient length of period had passed so that the court should have regard to more updated jurisprudence.

19. Although the applicant does accept this line of authority, nevertheless the applicant does suggest that the reasoning and rationale of Cooke J. in the two cases of *N.D.* and *O.O.* should not be followed by this Court as they were plainly wrong.

Submissions on behalf of the respondent
20. The respondent submits as follows:-

> a. The respondent argues that the applicant had not criticised the substance of the decisions made in the subsidiary protection application or under s. 3 of the 1999 Act but rather the sole issue raised is that of timing of considerations.
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> b. The difficulty experienced by Hogan J. in the *M.M.* decision as to the finding of Cooke J. in the *N.D.* case was confined to the importation of credibility from the refugee application to the subsidiary protection application and that the *M.M.* decision did not involve any discussion as to the timing between the subsidiary protection application and the Section 3 leave application.
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> c. The respondent argues that the case of *Mc Polin* aforesaid and the English case of *Ramseys* are not relevant or helpful to the applicant's position as both of these involved bias or an appearance of bias on the part of the relevant decision maker as opposed to officials making recommendations which have no standalone authority.
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> d. The respondent argues that Cooke J.'s analysis of the *Carltona* principles is accurate in that he distinguishes between decisions or acts by a particular decision maker on the one hand and acts on the part of an official who is not making a decision but is merely preparing ground work, on the other hand.
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> e. The respondent's argument is to the effect that the consideration of deportation was first communicated to the respondent in a letter of 30th December, 2009 and therefore consideration as to a deportation effectively commenced at that earlier time. It is argued on behalf of the respondent that the words "proceed to consider" in Regulation 4(5) does

not cover preparatory work by officials with no decision making function.

f. The respondent argues that it would be a mischaracterisation of the judgment of Cooke J. to suggest that he stated that administrative efficiency would forgive a breach of the statutory scheme – it is argued rather that administrative efficiency is not a departure from the statutory scheme.

Decision

21. Both parties agree that the final decision in respect of a refusal of subsidiary protection was made on Friday, 10th December, 2010 and the final decision in respect of making a deportation order was made on 16th December, 2010. It is also agreed between the parties that preparation work in respect of both the subsidiary protection and a possible deportation order was undertaken by Ms. Merrigan on 28th October, 2010 and approval of both considerations was made by Ms. Lee on 6th December, 2010 prior to Mr. Carroll making the final approval on the subsidiary protection decision on 10th December, 2010 and the Minister signing the deportation order on 16th December, 2010.

22. Having considered the European Court of Justice ruling in *M.M.* in 2013 and the subsequent order of Hogan J. in *M.M.* I am not satisfied that either case deals with the views expressed by Cooke J. in the case of *M.D.* or *O.O.* concerning the timing of the applications contemplated in Regulation 4(5) and I am not satisfied that the case of *M.M.* has any impact on the findings as to timing made by Mr. Justice Cooke in those cases.

23. In his *O.O.* decision Cooke J. dealt with and considered the *Carltona* principles and the *Devanney* case and was satisfied that it did not follow from these cases that the fact that a statutory decision taken by an official will be treated as having been made by the Minister that everything done by an official in the course of routine duties must be treated as if it had been done personally by the Minister. He was of the view that in that case (as in the instant case) what was being considered was the preliminary and preparatory work laying the ground for the ultimate taking of the decision and he admitted that the *Carltona* doctrine might well be applicable if the executive officer in the case before him had purported to make the deportation order.

24. It is not intended to now reproduce in this judgment the discussion of Cooke J. in his judgment in the case of M.D. However, I am of the view that the opinion expressed by Cooke J. between para. 34 and para. 41 inclusive of his judgment are compelling and I am not satisfied that there was any clear error in his judgment sufficient to encourage me not to follow his decision.

25. I do not accept that Cooke J.'s overview of the *Carltona* principles is not supported by the subsequent decision of *W.T. v. Minister for Justice & Ors*. [2015] IESC 73, being a decision of the Supreme Court delivered on 31st July, 2015. In that case Charleton J. indicated that:-

> *"The core of the Carltona principle is that as a matter of statutory construction responsible officials may exercise some of the statutory posers of a minister. The officials would not consult him but may yet recite words such as "I am directed by the minister". They are the alter ego of the minister. They exercise devolved power."*

In the matters which came before Cooke J., (being identical to the matters raised in the within proceedings) the *Carltona* principles were not in fact engaged as the work under review was the preparation and approval of reports prior to any final determination and did not involve the exercise of a statutory power but rather involved officials carrying out routine duties which carried no weight or authority until such time as same might have been acted upon namely, by the ultimate decision to refuse subsidiary protection.

25. I find no evidence of bias in the procedure adopted and the sequencing of the events. I accept that there was a correct chronology which did not run counter to Regulation 4(5) or the letter of 30th December, 1999.

26. In light of the foregoing the following orders will be made:-

a. An order extending the time within which the applicant might seek leave to bring judicial review.

b. An order affording the applicant leave to apply for judicial review in the terms of the notice of motion of 9th February, 2011.

c. An order refusing to quash the decision of the respondent of 13th December, 2010 and the decision of 16th December, 2010.