Neutral Citation Number: [2010] IEHC 110

THE HIGH COURT

JUDICIAL REVIEW

2010 171 JR

BETWEEN/

BOBBI EZEIKE

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr Justice Cooke delivered on the 15th day of April, 2010.

1. The applicant has applied to the Court to injunct her deportation from the State pending the determination of the present proceeding. The context in which the injunction is sought is as follows.

2. By order of 15th February, 2010 this Court granted leave to the applicant to seek judicial review of a decision made by the respondent on 30th November, 2009 to refuse the applicant's application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006. Leave was granted by reference to the grounds advanced for that purpose at Section (e) of the Statement of Grounds in the proceeding at paras. (i), (ii), (iii), (iv) and (v). The hearing of the substantive application is listed for 15 June next.

3. The applicant is a national of Nigeria who arrived in the State in May, 2007. Having initially lied about her age she admitted that she was 21 years old and then applied for asylum. Her application for asylum was rejected by the Refugee Applications Commissioner on 31st August, 2007, in a report which was affirmed by the Refugee Appeals Tribunal on appeal by a decision dated 18th June, 2009.

4. By letter of 28th July, 2009, the respondent informed the applicant that he proposed to deport her from the State and on 12th August, 2009, she made the application for subsidiary protection under the 2006 Regulations.

5. On 20th November, 2009, the applicant married an Irish citizen, a Mr. Patsy Sharkey. By letter dated 30th November, 2009, the application for subsidiary protection was refused by the respondent and on 8th December, 2009 an order was made for the deportation of the applicant from the State under s. 3 of the Immigration Act 1999.

6. By letter of 21st December, 2009, the respondent was informed of the applicant's marriage to Mr. Sharkey and upon the basis of that fact an application was made to the respondent for revocation of the deportation order together with representations as to why the applicant should be permitted to remain in the State on humanitarian grounds.

7. By letter of 21st January, 2010 from the Repatriation Unit of the INIS, the representations made on behalf of the applicant to remain in the State were rejected and the request for revocation of the deportation order was refused.

8. In a judicial review proceeding bearing the record number 76 JR 2010 brought by the applicant and Mr. Sharkey, leave was sought to challenge the making of the deportation order. On 12th March, 2010, Hanna J. gave a judgment in that proceeding in which he refused leave to apply for the reliefs sought but nevertheless, on an *ad misericordiam* basis, granted an injunction restraining the deportation of the applicant until 16th April, 2010.

9. The application now before this Court is, accordingly, for an interlocutory injunction restraining the deportation of the applicant pending the determination by the Court of the present challenge to the refusal of subsidiary protection. Accordingly, the usual test for the grant of an interlocutory injunction designed to maintain the status quo of the parties pending the determination of a proceeding is applicable. Has the applicant raised a fair issue to be tried in the substantive proceeding: would damages be an adequate remedy if the injunction is refused and the substantive claim is ultimately successful and, if not, where does the balance of convenience lie as between granting or refusing the interlocutory relief?

10. The application for leave to seek a judicial review of a refusal of subsidiary protection is not subject to the limitations imposed by s. 5 of the Illegal Immigration (Trafficking) Act 2000 so that the normal test for the grant of leave under O. 84 of the Rules of the Superior Courts applied when the court made its order in this case on 15th February, 2010. Although that lower threshold rather than the requirement of "substantial grounds" under s. 5 was applicable, it would obviously be inconsistent with a decision to grant leave even on an *ex parte* application, to now hold that no fair issue had been raised for trial on the hearing of the substantive application of 15th June next.

11. If interlocutory relief is refused would damages be an adequate remedy should the Minister proceed to implement the deportation order in the circumstances of this case before the present proceeding is finalised? The answer to that question is not as easy to give in the context of a possible deportation as it might be in the case of, say, a threatened trespass or breach of contract where the issue can be decided by reference to the apparent cost or loss to the respective parties if the relief is granted or refused. If this applicant is deported but succeeds in quashing the refusal decision the consequence is not necessarily the establishment of an entitlement to subsidiary protection but of an entitlement to receive a new decision on the original application. Only is she should ultimately receive a decision granting subsidiary protection would she be in a position to assert that she ought never to have been deported and that she should be compensated for the disruption to her private and married life. Notwithstanding the apparent remoteness of that consideration it is at least arguable that an unnecessary interruption of the married life of a newly married couple is not capable of being remedied adequately by pecuniary compensation. The time lost together cannot be relived.

12. Where then does the balance of convenience lie in the circumstances? The strength of the Minister's position lies in the fact that there is a valid deportation order in force and no immediate legal impediment exists to its execution. Furthermore, the applicant's presence in the State has been unlawful since the definitive rejection of her asylum application and that illegal status is not altered by the fact of her marriage to Mr. Sharkey. The Supreme Court held in its judgment of 10th July, 2006 in *Cosma v. MJELR* that the grant of an injunction in analogous circumstances would thwart the operation of a perfectly valid deportation order and ought therefore to be refused.

13. Notwithstanding these important considerations, however, the Court considers that there are a number of features to the present case which weigh the balance of convenience in the applicant's favour and distinguish the case from that of the *Cosma* judgment.

14. First, unlike the situation in *Cosma*, there is outstanding here a judicial review proceeding for which leave has been granted in respect of the decision to refuse subsidiary protection. Although, being on affidavit, the presence of the applicant within the State for the hearing of that claim is not indispensable, the Court considers that it is not unreasonable that a litigant who has invoked a right of access to the High Court should be entitled to be present at the hearing of the case. It is not impossible that queries will arise at the hearing for which it would be in the interest both of the Court and of the parties that immediate instructions should be available to solicitor and counsel from the applicant present in court.

15. Secondly, the substantive issue is fixed for hearing on 15th June, 2010 some ten weeks from now. The applicant has been in the State and going through the asylum process since May 2007. On balance the inconvenience and possible cost to the State in postponing her deportation for ten weeks is clearly outweighed by the likely disruption to the applicant's personal circumstances should she be deported and subsequently be held to be entitled to return.

16. Thirdly, although counsel for the respondent has complained of the general approach adopted by the applicant and, her husband, to these various proceedings particularly to the "drip feeding" of information amounting to an implied opportunism behind the litigation, no compelling reason has been put forward as to why this particular applicant should be immediately deported prior to 15th June, 2010 on the basis that she might, perhaps, abscond or otherwise constitute some form of risk to the integrity of the asylum and immigration system. On balance, therefore, the circumstances favour the preservation of the status quo of the applicant as living with her Irish citizen husband pending the determination of the outstanding proceeding notwithstanding the undoubted subsistence of the respondent's entitlement to implement a valid deportation order. For these reasons an interlocutory injunction will be granted to restrain implementation of that deportation order pending the hearing of the substantive application on 15th June next and thereafter pending the final determination of the proceeding.

The costs of this application will be reserved.