Neutral Citation [2013] IEHC 236

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 355 JR]

BETWEEN

F. O. (No.2)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 21st day of May 2013

1. The applicant was recently the plaintiff in plenary proceedings where reliefs pertaining to, and seeking to restrain, the implementation of a deportation order were sought. By judgment of this Court of 9th May 2013, the plenary proceedings were struck out as an unlawful collateral attack on a deportation order, the legality of which may only be questioned in judicial review proceedings instituted pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and O. 84 of the Rules of the Superior Courts.

2. The full background to the case is set out in the earlier judgment of the court and will not be repeated here. Insofar as it is relevant to these proceedings, it is recalled that following an unsuccessful asylum application, the applicant received a letter on 17th September 2007, inviting her to: leave the country voluntarily; apply for subsidiary protection and/or leave to remain; or be deported. This is referred to as the 'three options' letter. Permission was sought by the applicant to ignore this letter because judicial review proceedings had been instituted. In my earlier ruling, I found that this was an inappropriate response to the three options letter. The applicant, notwithstanding the request, was not entitled to ignore that letter. (The judicial review proceedings challenging the negative asylum application terminated unsuccessfully in September 2009.)

3. Since 2007 no application for subsidiary protection or humanitarian leave to remain was made, no representations pursuant to s. 3 of the Immigration Act 1999 were submitted. A deportation order was ultimately made on 17th January 2013 and communicated to the applicant by notice dated 31st January 2013. In these intended judicial review proceedings, the applicant seeks leave to quash the deportation order, and an injunction restraining deportation. (The court was informed that an application for subsidiary protection and leave to remain were submitted to the Minister on May 10th 2013)

4. The ground advanced in support of this application is that the deportation order was made in the absence of sufficient information about the applicant. The missing information is not particularised in the pleadings, and in the affidavit grounding the affidavit it is referred to as an absence of up-to-date information. (In accordance with O. 84, r. 20(3) this is a matter which ought to have been particularised, however briefly).

5. The additional material which ought to have been considered, according to the applicant, appears to be that identified in a letter written by the applicant's solicitor on 14th February 2013. That letter is pivotal to these judicial review proceedings and so I set it out in full:

> "The Repatriation Division
>
> Department of Justice and Law Reform
>
> 14-2-13
>
> Re: Our Client Ms. F. O.
>
> Dear Sirs,
>
> We refer to our above named client and your letter dated 31-1-13 [*informing the applicant of the deportation order*].
>
> We are surprised to note our client received a deportation order in circumstances where no representations were made owing to there being extant judicial review proceedings at the time the three options letter was sent. We further note we wrote to you on 18th September [07] copy enclosed [*that is the letter seeking to ignore the three options letter*].
>
> In these circumstances, please confirm within 7 days from the date hereof that you revoke our client's deportation order and allow our client to apply for subsidiary protection and leave to remain.
>
> We would also advise our client has a history of significant medical problems including TB and Diabetes. In addition, our client recently underwent surgery to have a tumour removed from her spine and we have been advised that Cairn Bolger, Consultant Neurosurgeon who carried out the operation will be monitoring our client's progress.
>
> We further advise our client has strong connections to Ireland, including an Irish Citizen sister and brother-in-law both living and working in the State. We further advise that our client is an aunt to three Irish Citizen Children and plays and important role in their lives.
>
> If you require any further information please do not hesitate to contact the writer hereof.

Yours faithfully,

Burns Kelly Corrigan."

6. If that letter is pivotal, so is the response. On 18th February 2013, the Repatriation Unit at the Irish Naturalisation and Immigration Service ("INIS") replied as follows:

"Burns Kelly Corrigan

Dear Sir/Madam,

Re: Your Client F. O.

I am directed by the Minister for Justice and Equality to acknowledge receipt of your faxed correspondence dated 14th February 2013 in relation to your above named client.

Referring to the matters raised within, please be advised that the contents have been noted. Your correspondence has been forwarded on to the relevant area for consideration. We are unable to provide your client with an undertaking in this case. Please be advised that your application is non suspensive of the deportation order made in respect of your client.

The enforcement of the Deportation Order remains an operational matter for the Garda National Immigration Bureau (GNIB). Please advise your client to continue to meet the presentation requirements of GNIB.

Yours sincerely,

Repatriation Unit."

7. From this exchange of correspondence, some observations may be made. In particular, the new facts pertaining to the applicant's situation relate to her medical history and connections to Ireland, including the presence of close family members in the State. The letter from the applicant's solicitors constituted an application for a revocation of the deportation order pursuant to section 3(11) of the Immigration Act, 1999. It is of particular relevance that although an undertaking not to deport was not sought, the response by the INIS emphasised that no undertaking would be given and that seeking revocation of the deportation order under s. 3(11) of the Act did not suspend the order. In other words, the authorities made clear that the applicant might be deported at any moment notwithstanding the application for revocation of the deportation order.

8. It is common case the deportation order was made in the absence of the new information. The issue in this application for leave to seek judicial review is whether the applicant has advanced substantial grounds for contending that a deportation order made in the absence of relevant information is unlawful, where the information was submitted after the order was made.

9. Counsel for the applicant argues that the Minister for Justice and his officials, acting reasonably and fairly, ought to have noticed the absence of any submissions in support of an application to remain in the State and the absence of an application for subsidiary protection. In addition, these circumstances should have been considered against the existence on the file of a letter from the applicant's solicitor seeking permission to ignore the requirement that such submissions be made within 15 days of mid-September 2007. A fair-minded decision maker, it is said, would have reverted to the applicant and invited submissions and an application for subsidiary protection notwithstanding the passage of many years from when the applicant was informed that she could so act.

10. In support of this general proposition, the applicant relies on the decision of Irvine J. in *E. & Anor. v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 68.

11. In *E.* a deportation order was made and thereafter, the Minister was informed of the impending birth of the proposed deportees' child. The Minister was asked to reconsider. The Minister decided not to rescind or vary his decision.

12. The issue in *E.* was whether the Minister was obliged, in the context of the s. 3(11) revocation application, to consider the rights of the then unborn infant whose father's deportation order he was being asked to revoke. The learned Irvine J. found that the unborn infant was entitled to have his or her rights considered. The judge found as a fact that the Minister had not considered the rights of the unborn child. Having ruled that the Minister was obliged to take the rights of the unborn child into account, the learned judge described the extent of the Minister's failure in the following passage:

"In this case the Court has all of the memorandum and information that was available to the Minister from which it is clear that the only thing he knew about the [unborn child] at the time of his decision under s. 3(11) was that he was about to be born and the name of his mother. He knew nothing regarding the age [of the child's mother], her financial or employment position, whether the child would be supported financially if the father was deported, whether [the unborn child's mother] had any personal or family support, whether the couple could, if they wished, maintain their family unit by moving to Nigeria together or whether the applicant's father would ever be in a position because of his financial means to visit his son in the event of his deportation being affirmed."

13. The judge concluded in the following terms:

"For the reasons stated above I am driven to the conclusion from the evidence that the respondent failed to conduct a proper inquiry into the [unborn child's] personal constitutional rights at the time he refused to revoke or vary the deportation order referable to O.E. when requested to do so under s. 3(11) of the Act, on the 15th March, 2006...Regrettably, the respondent did not have available to him sufficient facts which would have allowed him to consider in a meaningful way the effect of the deportation order on the [unborn child's] constitutional rights, so as to be in a position to balance those rights and their potential loss against the need to maintain the integrity of the asylum process or the common good. I conclude that the Minister was driven into error in the aforementioned circumstances. Accordingly, the decision made by the respondent on the 15th March, 2006 did not afford to the [unborn child] natural justice or fair procedures."

14. It will be immediately obvious to anyone reading the quoted extracts from E. or the judgment itself that the critical fact in the case was that the Minister failed to consider the rights of an unborn child whose existence he was aware of. The court found that the Minister did have a duty of enquiry because he had been told of the existence of this unborn child prior to making the decision not

to revoke the deportation order.

15. The obvious point of contrast between the decision in E. and the facts in this case is that the new information was not notified to the Minister by the applicant or her lawyers before the relevant decision was taken In *E*, information had been given to the Minister which ought to have to prompted an enquiry. In this case, no information was given to the Minister although the applicant and her solicitors were aware of the need to make submissions over many years. Therefore, it is not possible to conclude that there was a failure by the Minister to enquire about the applicant's new circumstances when there was no reason to believe or suspect that new circumstances pertained. If, on the facts of *E*, the Minister had never been told about the existence of the unborn child, my view is that the court would not have criticised the Minister for failing to make enquiry. Had it emerged after the decision that there was an unborn child involved, this new fact could not invalidate a prior decision though it would be a proper reason to seek revocation of such prior decision.

16. A number of authorities were relied upon by the respondent in respect of the nature and extent of the Minister's duty to enquire beyond the scope of information submitted or on file in respect of a proposed deportee. In *Bode (A Minor) v. Minister for Justice* [2008] 3 I.R. 663, the Supreme Court upheld a finding that an applicant for permission to reside in the State had not provided sufficient evidence of continuous residence. Denham J. said as follows:

> "88 On the face of the documents the second applicant did not prove that he came within the scheme. This was a requirement of the scheme. Thus the Minister was entitled to reach the conclusion he did on the documents.
>
> 89 While Ms. Hynes averred that a letter was normally sent to an applicant if documents were absent, there was no obligation to do so. The Minister was merely required to consider the application within the ambit of the scheme. There is no general duty on an administrative body to give the opportunity to provide additional material after the closing date for application ..."

17. This theme received more substantial consideration in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795. That case also concerned a parental application to remain in the State following the birth of an Irish citizen child under a special scheme introduced after Ireland changed its citizenship rules in 2004. Though the context related to matters to be considered when parents of an Irish born citizen child are proposed to be deported, my view is that the general approach identified by the Supreme Court is applicable to decision making in the deportation process. Denham J. said as follows at p. 822:

> "85 I set out a non-exhaustive list of matters which may assist, and which relate to, the position of an Irish born child whose parents may be considered for a deportation order. Bearing in mind the Constitution, the Convention, the statutory law and the case law, I am satisfied that the following, while not an exhaustive list, includes matters relevant for consideration by the Minister when making a decision as to deportation under s. 3 of the Act of 1999 of a parent of an Irish born citizen child.
>
> 1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.
>
> 2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances."

18. The respondent also refers to a number of High Court authorities which disdained "drip feed" of information to a decision maker. These cases suggest that one cannot complain about the quality of a decision if one has inefficiently or failed to provide information to the decision maker (see Peart J. in *Mamyko v. Minister for Justice* (Unreported, High Court, 6th November 2003), and *C.R.A. v. Minister for Justice* [2007] 3 I.R. 603, at para. 92).

19. Section 5 of the Illegal Immigrants (Trafficking) Act 2000, requires that leave can only be granted in a case such as this where substantial grounds are advanced for contending that the decision is infirm. Carroll J. in *McNamara v. An Bord Pleanála* [1992] 2 I.L.R.M 125, in a test which was subsequently approved by the Supreme Court, gave a definition of the meaning of the phrase "substantial grounds" as follows:

> "What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the Bord's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."

20. My conclusion is that there is no argument available to the applicant in support of the proposition that the deportation order is deficient because the applicant's new circumstances were not considered by the Minister before the deportation order was made. The fact that he did not consider the information is exclusively the fault of the applicant and her advisors. The Supreme Court has decided that there is no obligation on the Minister to invite applicants to supplement representations already made. There is no question of any express or implied legal obligation on the Minister to seek representations where none have been made. The law provides a proper procedure for persons who wish to place matters before the Minister which were not considered by him or her in the course of deciding on a deportation order. That process is the s. 3(11) revocation procedure. I note that the applicant has now put the new information before the Minister using that procedure. Nothing advanced by the applicant suggests that the underlying deportation order might be quashed and therefore, having regard to the need for a weighty point to be established if leave is to be granted, I must refuse leave to seek judicial review.

21. At the hearing of this matter, a further ground of challenge was identified. By letter dated 31st January 2013, the Repatriation Unit wrote to the applicant to inform her of the making of the deportation order. That letter said:

> "The reason for the Minister's decision is that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in s. 3(6) of the Immigration Act 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy in the common good in maintaining the integrity of the immigration system outweighs such features of your case as might tend to support your being granted leave to remain in the State."

22. This letter notifying the applicant (and her solicitors, to whom it was copied) of the deportation order contains an error of fact in that it asserts that she has made representations. My view is that this error could not vitiate the deportation order. The error of fact had no negative effect as the applicant and her solicitors knew well that she made no representations. Had the Minister made the deportation order on the mistaken assumption that the applicant had made representations, such circumstances would, I think, persuade a court to grant leave to challenge the resulting decision. In other words the error in the letter is benign.

As the proposed amendment is without merit I refuse the application to amend and even if I were to allow the amendment, I would refuse leave on this ground.

23. I also refuse leave because the application was not made within 14 days of the receipt of notification of the deportation as required by s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The applicant has sought an extension of time and I am constrained in extending time unless there is good and sufficient reason. The delay in this case is between the first week in February 2013 and May 15th 2013. As the application in respect of which an extension of time is sought is without merit, extending time would serve no purpose and on this basis alone I would refuse the application. In addition, I do not agree that good and sufficient reason have been made out in favour of such an extension. The applicant argues that she pursued the remedy of revocation rather than judicial review and that she also pursued plenary proceedings in this time frame. In respect of the first matter, my view is that the applicant's solicitors knew and were expressly informed on the day they received the letter from the Repatriation Unit that the administrative remedy of revocation would not suspend the deportation order. By that date, at the latest, the applicant and her lawyers were aware that she was at risk of immediate deportation which could only be averted if the validity of the deportation order were challenged and injunctive relief granted. No steps were taken to challenge the validity of the deportation order until these proceedings were initiated and pursing administrative revocation does not explain why the deportation order was not challenged. Counsel sought to explain that the applicant's lawyers believed that administrative revocation and judicial review were mutually exclusive. This is a mistaken view of the law and a mistake about the law such as this does not provide a good and sufficient reason to extend time. Counsel also said that his instructing solicitor was convinced that the Minister would accede immediately to the revocation request and reconsider the deportation in the light of the new information thus obviating the need for judicial review and injunctive relief. (It seems to me that is the real reason why judicial review was not initially pursued.) This transpired to be misplaced confidence as the Minster has sought to deport the applicant while considering the revocation application and no argument has been made that this is not permissible. The ill-conceived plenary proceedings did not commence until April 23rd 2013 and the taking of that step does not provide an explanation as to why no proceedings of any kind were instituted earlier. I do not regard the pursuit of a remedy which could not suspend the operation of the deportation order as being a justification for having delayed these judicial review proceedings and this explanation for the delay does not provide this court a proper basis to extend time.

24. Finally, the application for an injunction was dependent on a grant of leave and as this has been unsuccessful, the injunction falls with refusal of leave.