Neutral Citation [2016] IEHC 472

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 123 J.R.]

BETWEEN

E.M.O. AND CAROLINE GREENE

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The first named applicant was born in Nigeria on 2nd October, 1990. He says that his father was a Dutch national who was present in the State between 2007 and 2008. At that point, the father apparently left the State and has not been back since.

2. The first named applicant arrived in Ireland 28th August, 2008, aged 17, on a visa which was issued to him as the son of an EU national. However, there is no evidence that the father was, in fact, present in the State at the time of the son's arrival. A permission to be in the State for a period of one month was endorsed on the first named applicant's Nigerian passport on arrival in the State.

3. His permission to be in the State expired on 9th September, 2008 and has not been renewed.

4. On 11th September, 2008, the first named applicant made a fraudulent application for asylum claiming to be a Mr. Kingsley Chucks from Sierra Leone.

5. On 18th December, 2008, his passport was seized by Gardaí.

6. In January, 2009, the fraudulent asylum application was withdrawn.

7. The first named applicant met the second named applicant, who is an Irish citizen, in or about May, 2009. The first named applicant received a proposal to deport him on 10th June, 2009, and lodged submissions by way of application for leave to remain on 30th June, 2009.

8. A relationship between the applicants began in September, 2009, and I am told that they have cohabited since around that time. They became engaged in early 2011. On 29th April, 2011, the applicant applied for permission to be in the State under the *de facto* relationship scheme. The Minister replied on 12th December, 2011, to inform him that this would be considered in the deportation order context. In the s. 3(11) decision, the INIS website was referred to, which stated that those who do not have permission to remain in the State or those who are awaiting an asylum decision are not eligible to apply for this scheme.

9. In May, 2012, the parties (belatedly) informed the Minister that they had become engaged. I am told that the applicants' position was that they were unable to marry without the necessary documentation.

10. On 21st October, 2013, the first named applicant commenced a first judicial review [2013 No. 764 J.R.] which sought *mandamus* to determine his application for leave to remain made in June 2009.

11. On 13th December, 2013, a deportation order was made against the first named applicant, thereby rendering the first judicial review moot, save as to costs.

12. On 20th December, 2013, the first named applicant commenced a second judicial review [2013 No. 972 J.R.] to seek *certiorari* of that deportation order.

13. On 30th January, 2014, the decision in *Gorry v. Minister for Justice and Equality* [2014] 2 I.L.R.M. 302 (Mac Eochaidh J.) was handed down, upon which the applicants now rely.

14. On 9th October, 2014, the issue of costs in the first judicial review and the merits of the second judicial review were compromised, on the basis that the proceedings were struck out with costs to the first named applicant, and the first named applicant was to make a s. 3(11) application.

15. The s. 3(11) application was submitted on 4th November, 2014, and was based primarily on the first named applicant's long residence in the State and the *de facto* relationship.

16. This application was refused in December, 2014, and notice of refusal was sent 13th February, 2015.

17. On 9th March, 2015, leave in the third and present judicial review was granted to challenge the s. 3(11) refusal decision.

18. On 13th July, 2015, an interlocutory injunction in the present proceedings was granted following a contested hearing: *E.M.O. v. Minister for Justice and Equality (No. 1)* [2015] IEHC 444 (Unreported, High Court, Mac Eochaidh J., 13th July, 2015).

19. Shortly after that decision, the first named applicant's passport was returned to him. At that point it had expired, but on presentation of the expired passport a renewed and current passport was granted to him by the Nigerian Embassy in September, 2015.

20. The current position as of the date of the hearing on 3rd June, 2016, was that the applicants have not given any notice of their intention to marry. Mr. Ian Whelan B.L., in the course of a very able submission for the applicants during which every point that reasonably could have been advanced on their behalf was made, says that this is because they are concerned that the Civil Registration (Amendment) Act 2014 could be applied to them. Ms. Cindy Carroll B.L., for the respondent says that no application has been made for a P.P.S.N. necessary for the notice of intention to marry. Mr. Whelan says that this is because the first named applicant attended the offices of the Department of Social Protection and was informed that he was not entitled to a P.P.S.N. No action appears to have been taken to challenge this decision, if it was a decision.

Does the fact that the original proceedings challenging the deportation order had been compromised furnish an exception to the general principle that matters appropriate to the deportation stage cannot be revisited at the s. 3(11) stage?
21. For the reasons set out in my judgment in *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016) at paras. 54 to 61, an applicant is generally precluded from seeking to advance, at the s. 3(11) stage, a point which he or she could have advanced when the deportation order was under consideration. Much of the argument at the hearing revolved around whether the particular circumstances of this case furnish an exception to that general principle.

22. Caselaw establishes an extremely restricted scope of matters that can legitimately furnish grounds for a challenge to a s. 3(11) decision: see *Smith v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) per Clarke J. at paras. 5.12 and 5.17, and *Irfan v. Minister for Justice, Equality and Law Reform* [2010] IEHC 422 (Unreported, High Court, Cooke J., 23rd November, 2010).

23. Mr. Whelan relies particularly on the Supreme Court decision in *Smith,* where Clarke J. comments at para. 5.4 that a change of circumstances must be considered by the Minister in the s. 3(11) context, or otherwise that there must be a "*compelling explanation*" (para. 5.6) for a point being raised at that stage which could have been dealt with at the deportation order stage.

24. Mr. Whelan relies on the fact that *Smith* discusses a case where a challenge was not made, or failed, but does not refer to a case where a challenge was made and compromised. This is to read the words of a judgment as if they were those of a statute, a practice which is simply not appropriate: see *North East Pylon Pressure Campaign Ltd. and Maura Sheehy v. An Bord Pleanála and the Minister for Communications, Energy and Natural Resources* [2016] IEHC 301 (Unreported, High Court, 12th May, 2016) at para. 120; *Woodland v. Essex County Council* [2013] UKSC 66; [2014] 1 A.C. 537 *per* Lady Hale at para. 28; *Cox v. Ministry of Justice* [2016] UKSC 10 *per* Lord Reed at para. 42.

25. A decision by the Minister to compromise a judicial review on a basis such as that here is not to be interpreted as a concession that the deportation order was legally infirm (see *O.O. v. Minister for Justice and Equality* [2015] IESC 26 (Unreported, Supreme Court, 19th March, 2015) *per* Charleton J. (Clarke and Laffoy JJ. concurring) para. 11). The applicants in supplementary submissions state that the first named applicant *"assumed that this [offer] was very favourable to him, particularly given that the respondent was giving leave to remain to persons who were in a similar position to him… [he] decided to accept the offer in good faith where he was of the very rational view that the Minister would only be settling the proceedings where she was unhappy about the lawfulness of the deportation order".* The formation of that view is unfortunately a matter purely for the applicant and such a view has to be regarded as a calculated risk. Maybe it was a rational calculation at the time but the applicant's hopes as to what would happen next cannot be converted into some form of legal constraint on the Minister's position.

26. By agreeing to strike out his proceedings challenging the deportation order, the first named applicant thereby in effect waived all of the points which he could have made attacking the legality of that order. He was then primarily confined in any subsequent s. 3(11) application to the following issues:-

> (a) changes of circumstance since the deportation order was made; and in particular
>
> (b) submissions that his deportation would be substantively unlawful by reason of such changes of circumstance, for example, by reason of *refoulement.*

27. If the applicant went beyond this to argue points which were, or could have been, argued at the deportation order stage, the Minister was entitled to consider those points again but if she considered them negatively, there would be no legal basis for challenge to the s. 3(11) refusal.

28. The mere fact that proceedings challenging the deportation order were compromised does not furnish grounds to permit an applicant to reopen, at the s. 3(11) stage, points which were available to him at the deportation stage.

Is it lawful for the Minister to decline to consider, at the s. 3(11) stage, procedural illegalities in the deportation order, where these issues could have been raised in judicial review of the original deportation order?
29. Mr. Whelan submits that in deciding on a s. 3(11) application, the Minister is obliged to exercise her power in accordance with the Constitution, on the authority of the judgment of Murray J. in *Sivsivadze v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 73 at para. 52, and is thus not confined to the sole issue of a change of circumstances.

30. He submits that flaws in the deportation order of a legal nature were identified in the second judicial review proceedings so the Minister would have been aware of them and should have been obliged to address those at the s. 3(11) stage.

31. Included in the flaws are the proposition that the deportation order was arrived at on a conjectural basis, involving speculation as to the capacity of the couple to move to Nigeria, a failure to consider the conditions which Ms. Greene would face in Nigeria; the proposition that the decision involved conjecture that the Nigerian Government would give Ms. Greene permission to go to Nigeria; the suggestion that there was inadequate reasoning regarding *refoulement* (relying *on Mulholland v. An Bord Pleanála* [2006] 1 I.R. 453 per Kelly J. at 464); and a suggestion that the incorrect test was applied in making the deportation order.

32. The fundamental difficulty with all of these propositions is that they allege procedural illegality in the making of the deportation order, rather than substantive illegality in the sense that the order inherently and necessarily breaches substantive rights of the applicants. Procedural illegality such as the illegitimate use of conjecture, the failure to consider matters, an incorrect test or lack of reasoning is simply not the sort of illegality that the Minister is required to reconsider or bear in mind at all at the s. 3(11) stage.

Is it lawful for the Minister to decline to consider, at the s. 3(11) stage, substantive illegality in the deportation order?
33. The only type of illegality which the Minister has a continuing obligation to avoid is substantive illegality. On making a decision under s. 3(11) affirming a deportation order, the Minister must be under a continuing obligation to be of the view that the deportation of the applicant would not substantively breach his rights. The only heading of Mr. Whelan's argument that even potentially engages this obligation relates to the allegation that deportation would breach art. 8 of the ECHR.

34. Mr. Whelan relies on a reference in *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 192 (Unreported, Court of Appeal, 30th July, 2015) *per* Finlay Geoghegan J. at paras. 27 and 28, whereby it is said of an applicant in that case that he "*never lawfully lived*" in the State. Mr. Whelan seeks to distinguish such a situation from that of the first named applicant here, who did have permission to be in the State for a brief period initially (the implied "permission" during the period of the asylum application cannot be relied on for any legal purpose, for the obvious reason that it was procured by the fraud of the first named applicant).

35. Again, however, the language in *C.I.* cannot be read as if it were that of a statute. The present applicant only has permission to be in Ireland for approximately one month. That is an entirely ephemeral state of affairs and one which engages no art. 8 rights whatsoever. The remaining period of his presence in the State was one of illegality. His art. 8 rights in that period are, therefore, clearly either minimal or non-existent (see *Dos Santos v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 483 (Finlay Geoghegan J.) and my judgments in *K.R.A. (No. 1),* at paras. 62 and 88, and *Li v. Minister for Justice and Equality (No.1)* [2015] IEHC 638 (Unreported, High Court, 21st October 2015) at para. 65.)

36. I do not see any defect in the original deportation order, in any event, and certainly none that the Minister was required to revisit at the s. 3(11) stage. Insofar as Mr. Whelan takes issue with the test for the engagement of art. 8 and the manner in which the Minister considered that issue, these are procedural matters and could not be a basis for quashing the s. 3(11) decision unless the substance of art. 8 rights was interfered with. That has not been established.

37. In short, the Minister would be obliged to consider a substantive breach of an applicant's rights (including a breach of art. 8) at the s. 3(11) stage if such a breach existed, even if that consideration included matters which could have been ventilated when the deportation order was made. Here, there is no such breach and accordingly even if the Minister failed to consider art. 8 at the s. 3(11) stage, any such failure is not a basis to quash the s. 3(11) decision.

Where the law changes between a deportation order and a s. 3(11) decision, is the applicant entitled to revisit the original decision?
38. Mr. Whelan relies on the Supreme Court decision in *Smith* at para. 5.8 to the effect that a change in circumstances for the purposes of s. 3(11) could include a change in the law. He submits that the decision in *Gorry* constituted such a change in the law after the making of the original deportation order, and that the s. 3(11) decision is flawed because it fails to consider *Gorry* or alternatively is incompatible with it. In particular, because the use of the concept of "*insurmountable obstacles*" is said to conflict with the finding in *Gorry* that there is no insurmountable obstacles test (in line with the position in the U.K. in *E.B. (Kosovo)* [2008] UKHL 41 and *V.W. (Uganda) v. The Secretary of State for the Home Department* [2009] EWCA Civ 5).

39. *Gorry* decided that there was no insurmountable obstacles "test", in the sense of a pass or fail test determinative of deportation. To say that there is no such "test" is very different to saying that the concept of "insurmountable obstacles" can never be referred to at all. The presence or absence of insurmountable obstacles to relocation to the country to which a person is to be deported is simply one factor among a range of factors which the Minister may consider. It should not be elevated into an all or nothing test (as *Gorry* decided) but that does not mean that it cannot be considered at all. There is no illegality in the Minister's decision insofar as it had regard to the question of insurmountable obstacles exist.

40. Thus, while in principle, the applicants could have revisited the deportation order under the heading of change of circumstances in the event of a change of the law, the *Gorry* decision did not constitute a change in the law which would have affected the validity of the deportation order. The order was not invalid even having regard to the *Gorry* decision.

Order
41. For the foregoing reasons, I will order:-

(i) that the application be dismissed;

(ii) that the injunction herein be discharged with effect from the oral pronouncement of this judgment; and

(iii) that the matter be adjourned in order to enable the applicants to consider any application for leave to appeal, which if made must be accompanied by written submissions including the text of any proposed questions.