Neutral Citation Number: [2011] IEHC 95

THE HIGH COURT

JUDICIAL REVIEW

2009 881 JR

BETWEEN

M. A. U., A. M. U., O. A. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), E. A. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), A. O. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), AND A. A'A. O. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM (NO.2)

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 9th day of February, 2011

1. In a judgment delivered by me on 13th December, 2010, I refused the applicants leave to apply for judicial review: see *MAU v. Minister for Justice, Equality and Law Reform* [2010] IEHC 492. The net question which arose for consideration in that judgment concerned the interpretation of s. 3(1) of the Immigration Act 1999 ("the 1999 Act") and the effect of a deportation order made under that sub-section. I held that it was clear beyond argument that the effect of s. 3(1) was that once the deportation order takes effect, the subject of that order must endure a life long exclusion from the State, subject only to the mitigating effects of s. 3(11) and the power of the Minister for Justice, Equality and Law Reform to revoke a deportation order already made. In those circumstances, since the applicants had effectively abandoned all other points and as the statutory interpretation issue had been resolved against them, I ruled that I had no alternative but to refuse leave to apply for judicial review insofar as their challenge to the validity of the deportation order was concerned.

2. Subsequent to the delivery of this judgment, the applicants then applied to amend their pleadings to enable them to challenge the constitutionality of s. 3(1) of the 1999 Act on the ground that it effects a disproportionate interference with their constitutional rights by reason of the life long ban.. In the alternative, they also seek leave to enable them to seek a declaration of incompatibility under s. 5(1) of the European Convention of Human Rights Act 2003.

3. The questions which now arise are (i) does this Court have jurisdiction to permit an amendment of pleadings at this stage and (ii) if the answer is in the affirmative, whether such leave to amend the pleadings should be granted? I propose to consider these questions in turn.

Does the Court have a Jurisdiction to Amend the Pleadings at this Stage?

4. Although judgment has been delivered, the order has yet to be perfected, since the twin issues of costs and the question of whether this Court should grant a certificate of leave to appeal to the Supreme Court under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 remain to be determined. This Court is nonetheless *functus officio* so far as the questions raised in the first judgment are concerned.

5. This brings into focus the question of the Court's jurisdiction in the matter. Ord. 28, r.1 of the Rules of the Superior Courts provides that:-

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

6. The word "proceedings" is one which has no fixed meaning, even in a legal context. The term is rather one which falls to be interpreted by reference to the specific context in which it appears, since, for example, the word is capable of being applied to both an appellate court such as the Supreme Court (*e.g.*, "…the proceedings are pending in the Supreme Court") as well to certain types of non-judicial adjudications (*e.g.*, "….disciplinary proceedings pending before the Fitness to Practice Committee of the Medical Council…"). Depending on the context, therefore, the reference to "proceedings" in the Rules of the Superior Courts could refer either to the proceedings at first instance (*i.e.*, from the commencement of the action up to the point where it is determined by the High Court) or to proceedings in the broader sense of the term, namely, the progress of the action before the courts generally, including an appeal to the Supreme Court.

7. It must be noted, however, that Ord. 28, r.1 refers to "the Court". This phrase is defined by Ord. 125, r.1 in the following terms:-

> "'the Court' means either, as the context requires, the High Court or a Judge or Judges thereof, and includes the Master, the Examiner and the Probate Officer where they respectively have jurisdiction…"

8. It follows from this that the reference to "proceedings" in Ord. 28, r.1 must be to proceedings in the High Court or proceedings before a judge of the High Court. This means that a judge of the High Court has the jurisdiction to permit an amendment of the pleadings at any point during the currency of the proceedings before him or her. The reference in Ord. 28, r.1 is not, however, to "proceedings" in the wider sense of the term (such as would, for example, be apt to apply to an appeal pending in the Supreme Court), but it is confined to the jurisdiction of the High Court alone.

9. In passing, it may be noted that in her judgment for the Supreme Court in *Wildgust v. Bank of Ireland* [2001] 1 I.L.R.M. 24, 39 McGuinness J. stated with specific reference to Ord. 28, r.1 that "it was not impermissible for pleadings to be amended *during the*

course of a trial" (emphasis supplied), albeit that this was not a practice which "should frequently be permitted." While the question of a possible amendment of pleadings post-judgment was not before the Court, it may nonetheless be significant that McGuinness J. spoke of a possible amendment *during the course of a trial*, *i.e.*, thereby, perhaps, implicitly suggesting that the power to amend did not obtain once judgment had been delivered.

10. While it is true that in *Wildgust* the Supreme Court upheld the decision of the President of the High Court to permit a late amendment to the pleadings, that application to amend was made *before* the then President had delivered judgment. The amendment, in any event, was no more than an amplification of a claim already well made in the course of the proceedings - permitting the plaintiff to add a claim of negligent misstatement to an existing claim in contract and negligence - and, unlike what is urged in the present case, did not involve a totally new and entirely different cause of action.

11. It is true, of course, that the Supreme Court itself has a jurisdiction to amend the pleadings, but this power derives from Ord. 58, r. 8. This latter rule provides that that Court has "all the powers and duties as to amendment and otherwise of the High Court." Thus, while the Supreme Court enjoys a full power to direct an amendment of pleadings, it does so in the context of "appeals actually pending in the Supreme Court" by ensuring that "the powers and duties of the Supreme Court in dealing with pending appeals shall be no less than those of the High Court in dealing with the matter at first instance": see *Hughes v. O'Rourke* [1986] ILRM 538 at 540-541, *per* Henchy J.

12. In my view, however, these proceedings are no longer current before me. I accept that the order still remains to be perfected and, as we have noted, the issues of costs and a certificate remain outstanding. But the proceedings so far as they concern the validity of the deportation order have been disposed of by this Court and they cannot be said to be current in any real or meaningful sense. It follows, therefore, that I have no jurisdiction to permit an amendment at this juncture which would bear on the validity of the deportation order given that I am *functus officio* on that very issue. It is true that, in the event that the appropriate certificate for leave to appeal was given and there was an appeal to the Supreme Court, that Court would have a jurisdiction to amend the pleadings, but this power would derive from Ord. 58, r.2 and not from Ord. 28, r.1.

13. In any event, it is clear from the Supreme Court's decision in *Cox v. Electricity Supply Board (No.2)* [1943] I.R. 231 that an amendment at this juncture is not permissible where it would it would lead to an entirely new cause of action and possibly a different judgment from that already delivered. Here the plaintiff was originally granted a declaration that the manner in which he had dismissed from his employment was unlawful. He later applied to amend the pleadings post-judgment so as to include a claim for damages. The Supreme Court, reversing the decision of Gavan Duffy J., held that such an amendment was not permissible. Murnaghan J. rejected the argument ([1943] I.R. 231 at 236) that the power of amendment was this extensive:-

> "But I do not think that any of the authorities go to the length of suggesting that when an action has proceeded to trial and judgment has been given, it is open to the Court to allow an amendment of the pleadings which, while the original judgment stands, may introduce a new cause of action and possibly lead to a different judgment."

14. These comments are particularly apposite so far as the present case is concerned. The original judgment upheld the validity of the deportation order. The proposed amendment of the pleadings would effectively introduce a new cause of action (*i.e.*, namely, the constitutionality of s. 3(1) of the 1999 Act) which, if it succeeded, would lead to a new judgment on the validity of the deportation order. In these circumstances, it would appear that I am, in any event, bound by the Supreme Court's decision in *Cox* and thus cannot permit an amendment of the kind now sought to be permitted.

15. I appreciate that the English Court of Appeal has taken the view that there is a power to amend the pleadings post-judgment, albeit that this jurisdiction is confined to exceptional cases and there are "stringent limits" to the exercise of this power: see *Stewart v. Engel* [2000] 1 W.L.R. 2268 at 2275 per Sir Christopher Slade. That jurisdiction was described in *Stewart* by Sir Christopher Slade as a rule of practice which had survived the introduction of the (English) Civil Procedure Rules 1998. That is doubtless so, but this, of course, cannot affect the view which I have taken of the limits of the power to amend in Ord. 28. Even if I am wrong in that, I am not persuaded that the kind of quite exceptional circumstances envisaged by English cases such as *Stewart* are present here such as would justify me making an order to amend the pleadings at this stage post-judgment.

Conclusions

16. It follows, therefore, that for the reasons just stated, I have no jurisdiction to grant the amendment sought.