Neutral Citation Number: [2011] IEHC 491

THE HIGH COURT

2011 109 IA

BETWEEN/

DANIELLA FERNANDEZ PACHERO

AND

ROBERTH MONERO CHOMA

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND

AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 29th December, 2011

1. This intended judicial review application may be said to highlight the limitations, anomalies and, in some respects, the studied ambiguities of the manner in which the common travel area between Ireland and the United Kingdom is currently operated in practice. This application arises in the following way.

2. The applicants in these intended judicial review proceedings are a young married Bolivian couple who arrived in Dublin airport, probably on a flight from Madrid, on 14th December, 2011. They were given leave to land by an immigration officer under s. 4 of the Immigration Act 2004 ("the 2004 Act") until January 14th, 2012 pending further registration with the Garda National Immigration Bureau. It appears that they were enrolled in a course of study with an English language school in Dublin for one year and that they intended to register with the Garda National Immigration Bureau by 14th January, 2012 in accordance with s. 9 of the 2004 Act.

3. It is important to state at the outset that the applicants did not require a visa to travel to Ireland, since Bolivia is a visa-exempt country so far as Irish immigration law is concerned. This, however, is not the case with regard to Bolivian nationals seeking to enter the United Kingdom.

4. The applicants had received an invitation from an aunt of Ms. Pachero to visit her and her nine year old son in London. The aunt lives lawfully in Switzerland and she intended to join them in the UK for a few days immediately prior to the Christmas period. It would also seem that the applicants intended later to return to Ireland after a few days in London.

5. The applicants travelled first to Northern Ireland, probably on 18th December, 2011. On 20th December, 2011, they travelled from Larne to Stranraer, where they were stopped by the Dumfries and Galloway police and they were asked to produce travel papers. On presentation of their Bolivian passports, they were arrested on the basis that they had unlawfully entered the United Kingdom, since they had no visa for that country. On the evidence before me, it seems clear that they presented their papers openly and without concealment to the police authorities, believing that all persons could freely avail of the common travel area between the two jurisdictions.

6. The applicants were then returned to Northern Ireland, where they were held at a detention centre in Larne. It was proposed to transfer them by plane from Belfast to Heathrow on 23rd December, 2011, and then to deport them from the United Kingdom by sending them by plane from Heathrow to Santa Cruz on 24th December, 2012. One must not here overlook the fact that the deportation decision was taken by the UK authorities in respect of a breach of UK immigration law and practice. Quite obviously, I have no jurisdiction in relation to such matters which concern the internal affairs of the United Kingdom.

7. The Irish authorities returned to the picture on 22nd December, 2011. The applicants have little English and, thanks to the good offices of a legal officer in the Northern Ireland Law Centre, they were put in touch with Mr. Derek Stewart, a specialist immigration solicitor practising in Dublin. Mr. Stewart also happens to speak excellent Spanish.

8. Mr. Stewart ascertained from his inquiries that representatives of the UK Border Agency had been in contact with Detective Inspector Tallon of the Garda National Immigration Bureau with regard to the Irish entry stamps on the applicants' passports. The Agency in turn had sought to ascertain the exact status of the couples' entry stamp and, specifically, whether the couples' permission to be in Ireland was still valid.

9. When this application first came before me in the mid-afternoon of December 22nd, 2011 (in circumstances I will later describe), Mr. Stewart gave evidence that he understood from his inquiries that Detective Inspector Tallon had taken it upon himself to annul or otherwise cancel the applicants' entry permission for this State. Detective Inspector Tallon gave evidence before me at a subsequent hearing later on the night of December 22nd where he explained that he had not actually cancelled the entry permission. Rather, he had expressed the view to the UK Border Agency that, as a matter of law, the entry permission had lapsed by operation of the provisions of the 2004 Act once the applicants had left the State, so that the applicants presently no longer had any right of entry into the State.

10. Detective Inspector Tallon also gave evidence that there was no question of the UK authorities agreeing to return the applicants to Ireland if only we had agreed to take them. He maintained that the UK authorities had already decided that the applicants should be deported and that they had made arrangements in this regard.

11. Detective Inspector Tallon expressly confirmed in evidence that the applicants presented no security risk whatever or any threat

to public policy. He was not in a position to comment on whether they were the victims of an innocent mistake (as they claimed), but he did observe that their proposed route to London (which involved going north to Northern Ireland and across to Scotland by ferry) was a circuitous one and this was in itself a factor which might be thought to raise some suspicion.

12. The application which was actually before me was in form an application for a mandatory interlocutory injunction directing the respondents to communicate with the British authorities to the effect that the applicants still retained a right to enter the State. In substance, it amounted to an application for an interlocutory declaration that the applicant's permission to remain in the State until 14th January 2012 had not lapsed as a matter of law once they had left the State.

13. Leaving to one side for the moment the question of whether the Court has a jurisdiction ever grant an interlocutory declaration of this kind, the resolution of this basic question requires an examination of the terms of s.4 of the 2004 Act. Since this is the provision which in practice reflects the terms of the Common Travel Area agreement between Ireland and the United Kingdom it seems appropriate to say something first about that agreement.

The Common Travel Area

14. The Common Travel Area agreement is, in many respects, something of a misnomer. It is was never, I think, intended that any such agreement would be governed by international law or that any such agreement would, for example, amount to a treaty for the purposes of Article 2(1)(a) of the Vienna Convention (1969). Rather, inasmuch as there is an agreement between Ireland and the United Kingdom, it is essentially a mutual understanding to synchronise their mutual immigration laws and administrative practices so as to facilitate freedom of travel for Irish and British nationals as between the two countries: see generally, Ryan, "*The Common Travel Area between Britain and Ireland*" (2001) 64 M.L.R. 855.

15. Such freedom of movement was deemed to be essential, not least because of the fact that the island of Ireland is partitioned and there is as a result a meandering land border between Ireland and Northern Ireland. Or, as the Irish Declaration in respect of the 3rd Protocol to the Amsterdam Treaty 1997 puts it, Ireland's opt out of the Schengen system - a topic to which I will presently return - "reflects its wish to maintain the Common Travel Agreement with the United Kingdom in order to maximise freedom of movement into and out of Ireland".

16. A common travel area of sorts has accordingly existed between the two countries since shortly after the establishment of the Irish Free State in December 1922. That agreement was suspended at the outbreak of the Second World War when passport controls (including visa requirements) were introduced by the British side, with this system gradually easing in the early 1950s when the pre-existing common travel area gradually returned to normal. At its height, the common travel area operated more or less in the manner of the present Schengen system (which operates in the majority of the other EU states, along with Norway, Iceland, Switzerland and Liechtenstein) with genuine passport free travel between the two countries. When the Schengen system was brought under the umbrella of the European Union *acquis* via the Amsterdam Treaty of 1997, the right of both the United Kingdom and Ireland to opt out of Schengen was recognised in the Third Protocol to that Treaty.

17. In practice, however, the common travel area has long ceased to be a genuine passport free travel area in the way that the Schengen system is. This is essentially because the common travel area is for the benefit of two nationalities only and, furthermore, unlike the Schengen system, there is no unified visa system which would allow third country nationals possessing such a visa untrammelled access to the two jurisdictions participating in the common travel area.

18. The first significant change to the common travel area in recent times was brought about by the Aliens (Amendment)(No. 3) Order 1997 (S.I. No. 277 of 1997), which permitted the introduction of immigration controls at the border with Northern Ireland. As we shall presently see, this provision anticipates s. 4(5) of the 2004 Act. The other changes were reflected in administrative practices at airports, where passengers arriving from the United Kingdom were increasingly required to mingle with persons arriving from other destinations (instead of being segregated from travellers arriving from non-UK destinations, as had been the practice in the past). The practical result of this is that all persons arriving by air from the United Kingdom face Irish immigration controls. While in theory both Irish and British citizens are entitled to arrive here free from immigration control by virtue of the common travel area, increasingly in practice such passengers who arrive by air from the United Kingdom are required to produce their passports (or, at least, some other form of acceptable identity document) in order to prove to immigration officers that they are either Irish or British citizens who can avail of the common travel area. Whatever about anyone else, Joseph Heller certainly would have approved.

19. None of this is immediately apparent from a consideration of the 2004 Act. While the 2004 Act in theory applies to all persons other than Irish citizens, the legislation also reflects the understanding behind the common travel area, albeit in a roundabout and, it might be thought, somewhat obscure fashion. Section 1 of the 2004 Act provides that the phrase "non-national" has "the meaning assigned to it by the [Immigration Act 1999]". When one turns to the definition contained in s. 1(10) of the 1999 Act, it provides that this phrase is defined as meaning an alien:-

> "..within the meaning of the [Aliens Act 1935] other than an alien to whom, by virtue of an order under s. 10 of the 1935 Act, none of the provisions of that Act apply."

20. One further piece of legal archaeology is required to get to the bottom of this. Article 3 of the Aliens (Exemption) Order 1999 (S.I. No. 97 of 1999)("the 1999 Order") exempts citizens of the United Kingdom from the application of the Aliens Act 1935. The effect of this exemption is to exclude British citizens from the definition of "non-national" in the Immigration Act 1999 and, by further extension, from the application of the Immigration Act 2004. This, accordingly, is the legal basis for the exemption of British citizens from Irish immigration controls, subject only to the all important proviso that they can be required to establish to the satisfaction of immigration officers that they are in fact British citizens.

21. To avoid any doubt, therefore, when I refer henceforth to "non-nationals" in this judgment, this should be understood as excluding British citizens for this very reason. It should also be acknowledged that the position of nationals of other European Union and European Economic Area nationals is also different and is subject to distinct legal rules and controls. (Following the entry into force of the European Communities and Swiss Confederation Act 2001, Swiss nationals are effectively deemed to be in the same position for immigration purposes as if Switzerland was an EEA member). The import of this judgment therefore principally concerns the position of nationals from third countries other than the United Kingdom and other EU/EEA states (including, in this context, Swiss citizens).

The nature of a permission to land granted under s. 4 of the 2004 Act

22. It is against that background that we can now examine the legal situation of the applicants. At the heart of this application is the status of the permission to land which was originally granted to them on their arrival in Ireland on 14th December, 2011. Did this permission lapse by operation of law in the manner contended for by Detective Inspector Tallon and the respondents once the

applicants left the State? This requires a close examination of the provisions of s. 4(1) and s. 4(2) of the 2004 Act. Section 4(1) provides:-

> "Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his other passport or other equivalent document an inscription authorising the non-national to land or be in the State (referred to in this Act as 'a permission.')"

23. Counsel for the applicants, Mr. Mullen, contended that the original permission of 14th December, 2011, was not simply a permission to land, but drawing on the language of s. 4(1), submitted that it was also a permission "to be in the State" until 14th January, 2012. On this view, the applicants had the right to be in the State until that date and that permission did not lapse simply because they left the State in the meantime.

24. If s. 4(1) could legitimately be read in isolation, Mr. Mullen's argument would be correct. But it cannot be so read in isolation. It must be read in conjunction with s. 4(2) which provides:

> "A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission."

25. While s. 4(2) does not say so in quite as many words, the only sensible interpretation of this provision is, as counsel for the respondents, Mr. Donnelly, urged, that a permission previously granted under s. 4(1) lapses once the applicant leaves the State. This is because s. 4(2) provides for an unconditional requirement requires all persons (other than Irish citizens and, by virtue of the 1999 Order, British citizens) arriving in the State by air or by sea to apply for a permission. As s. 4(2) does not exempt from that obligation persons who have been already granted permission to be in the State, the necessary inference to be drawn from this latter provision is that any permission previously granted under s. 4(1) lapses once the traveller leaves the State and that he or she must apply afresh for permission to enter the State.

The position with regard to Northern Ireland

26. The discussion thus far has centred on the position of travellers arriving in the State by air and, for that matter, by sea. When, then, is the position with regard to persons crossing the land border with Northern Ireland? Prior to the promulgation of the Aliens (Amendment)(No.3) Order 1997, no provision was made for immigration control at the border.

27. The provisions of the 1997 Order are largely replicated (with some minor stylistic changes) by the provisions of s. 4(5)(a). This sub-section provides that:-

> "An immigration officer may, on behalf of the Minister, examine a non-national arriving in the State otherwise than by sea or air (referred to subsequently in this subsection as "a non-national to whom this subsection applies") for the purpose of determining whether he or she should be given a permission and the provisions of *subsections (3), (4)* and *(6)* shall apply with any necessary modifications in the case of a person so examined as they apply in the case of a person coming by sea or air from a place outside the State."

28. Section 4(5)(b) provides that non-nationals arriving from Northern Ireland who do not come from visa-exempt countries are required to have a visa. Section 4(5)(c) requires that non-nationals arriving in the State from Northern Ireland who plan to engage in a business, employment or profession are required to register with an immigration officer within seven days of their arrival.

29. Finally, s. 4(5)(d) requires that:-

> *"(d)* A non-national to whom this subsection applies shall not remain in the State for longer than one month without the permission of the Minister given in writing by him or her or on his or her behalf by an immigration officer."

30. The effect of this latter provision is that no non-national who has arrived here from Northern Ireland can stay longer than one month in the State without expressly having obtained a permission for this purpose.

31. All of this brings us to the critical question of whether the applicants would still need a permission to enter the State if they were to have re-entered via the border with Northern Ireland. If the answer to that question was in the negative, then Detective Inspector Tallon would have been incorrect in informing the UK Border Agency that the applicants did not currently have a permission to enter the State, since, on this basis. The permission originally granted to the applicants did not lapse once they left the State, *provided* that they re-entered the State via Northern Ireland.

32. It is true that the provisions of s. 4(2) were critical to my conclusion that an original permission to be in the State granted under s. 4(1) lapsed once the holder of that permission left the State. It is equally true that this sub-section does not apply to persons arriving from Northern Ireland. Yet it is not clear that s. 4 is workable unless the same conclusion is reached in the case of travellers arriving from Northern Ireland.

33. Certainly, s. 4(5)(a) assumes that all non-nationals arriving from Northern Ireland may be examined by an immigration officer for the purposes of ascertaining whether they should be granted a permission to enter the State. That assumption is certainly inconsistent with the suggestion that a permission previously granted under s. 4(1) did not lapse once the traveller re-enters the State via Northern Ireland.

34. If, moreover, such an interpretation were correct, it would lead to some striking anomalies. In the present case, for example, this interpretation would mean that had, for example, the applicants visited Ms. Pachero's aunt in Switzerland by travelling by air from Dublin to Geneva for this purpose, they would have been exempt from Irish immigration control on their return provided that they flew back from Geneva to Belfast and then returned overland to this State from Northern Ireland, even though this would not have been the case had the couple flown directly from Dublin to Geneva and subsequently flew back from Geneva to Dublin.

35. Of course, I agree that the conclusion which I have reached regarding the interpretation of s. 4(5) also leads to inconvenient and, to some degree, anomalous, conclusions. It would mean, for example, that an American couple who mistakenly sought to avail of the common travel area by travelling by bus from Dublin to Belfast while leaving their passports in their hotel in Dublin could - in theory, at any rate - be denied re-entry to the State on their return from Belfast in the absence of appropriate identification.

36. In these rather difficult circumstances, I find myself nonetheless obliged to choose the interpretation which best makes the section work effectively and consistently with the underlying statutory objectives, while mitigating the possibility for anomaly. To my

mind, that is best achieved by interpreting s. 4 as meaning that any prior permission granted under s.4(1) to enter the State lapses once that person leaves the State, irrespective of whether that person intends to re-enter the State by land via Northern Ireland or otherwise. Any other conclusion would effectively puncture a major hole in our system of immigration control and would lead to conclusions inconsistent with the objectives of the 2004 Act.

37. This does not quite dispose of all matters which arise before me, since there may have been a misunderstanding as to whether the applicants were now debarred from re-entering the State. Detective Inspector Tallon confirmed in evidence that he had no reason to suspect that they were anything other than bona fide travellers, save, of course, that they had entered the United Kingdom illegally. In addition, however, the fact that they had elected to go to London via the circuitous (if otherwise perfectly legitimate) route of Northern Ireland rather than, say directly, by air from Dublin to Heathrow was also regarded by him as a suspicious factor.

38. As against that, the applicants have given their solicitor clear instructions to the effect that they made an innocent mistake and nothing has been put before me to controvert this. The fact that they presented their passports openly to the Dumfries and Galloway police and without any endeavour to conceal their circumstances seems at least consistent with this account. If their story regarding the Swiss-based aunt was indeed a contrivance designed as a convenient excuse for an illegal entry into the United Kingdom, this, one assumes, could also have been readily established by the immigration authorities. While acknowledging that fuller information regarding the circumstances and travel intentions of the applicants may ultimately come to hand, yet for present purposes it seems only fair to give them the benefit of the doubt and to assume that they are hapless young travellers who made an innocent mistake.

39. This mistake is one which, after all, is, in principle, fully pardonable. Confusion abounds regarding the limits of the common travel area and foreigners unfamiliar with its ambit may possibly be justified in thinking that it is another version of the Schengen system from which all nationalities who are given leave to land in Ireland can benefit.

40. While stressing that any decision to give the applicants a new permission to land under s. 4(1) would be a matter in the first instance for an individual immigration officer, it suffices to say that, assuming that all other things being equal (which they may not be), one would expect that such permission would be granted once the officer was "satisfied" that the applicants did not intend to enter the United Kingdom illegally at any stage in the future.

41. This, of course, is one of the statutory grounds on which an immigration officer can refuse leave to land: see s. 4(3)(h). While the test here is forward looking (*i.e.,* it is directed at the future intentions of the traveller in question), the fact that there was a previous illegal entry into the United Kingdom is naturally relevant to that assessment. But if the immigration officer in question were to be satisfied that the applicants had made an innocent mistake by reason of their illegal entry into the United Kingdom and that it was one which they did not intend to repeat, then it would seem that they could not be properly refused entry by reference to s. 4(3)(h).

Conclusions

42. It follows, therefore, that as Detective Inspector Tallon was correct in his conclusion that a prior permission to be in the State given under s. 4(1) of the 2004 Act lapses automatically once the non-national in question leaves the State, no question of granting the interlocutory injunction sought in these proceedings accordingly arises. The question of whether the Court has even a jurisdiction to grant the exceptional relief of the kind thus sought in these proceedings must accordingly await another more suitable case for its resolution.