Neutral Citation Number: [2011] IEHC 444

THE HIGH COURT

JUDICIAL REVIEW

2011 1005 JR

BETWEEN

K. I. K.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY, AND LAW REFORM

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 25th day of November 2011

- 1. This is one of a large number of applications which have been made to the Court during the last fortnight for injunctions restraining the respondent Minister implementing deportation orders pending the hearing of the applications for leave to apply for relief by way of *certiorari* in respect of those orders.
- 2. It is difficult at times to avoid the impression that at least some of these applications are brought upon an assumption that because what is sought is the restraint of expulsion of a person from the State and because the applicants have expressed fears of personal harm in their country of origin, some special approach to interlocutory relief is appropriate. It appears to be believed that once such a possibility of personal harm is mentioned, an applicant is entitled almost as of right to remain in the State until at least the application for leave to seek judicial review has been heard. It seems to be assumed that an injunction will be readily granted once a fair issue is identified because, as between the applicant and the Minister, it is always more convenient to allow the applicant to remain where he or she is at the moment. That, in the view of the court, is a mistaken assumption.
- 3. It is perhaps useful therefore to recall once more the description of the basis on which interlocutory relief is granted as given in the judgment of O'Higgins C.J. in the Campus Oil case ($Campus Oil \ v \ Minister \ for \ Industry \ and \ Energy \ (No. 2)$ [1983] IR 88).

"Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by the award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in *status quo* until the hearing. The application is made on motion supported by affidavit. ...

In cases where rights are disputed and challenged and where a significant period must elapse before the trial, the Court must exercise its discretion (to grant or refuse interlocutory relief) with due regard to certain well-established principles. Not only will the Court have regard to what is complained of and whether damages would be an appropriate remedy but it will consider what inconvenience, loss and damage might be caused to the other party and will inquire whether the applicant has shown that the balance of convenience is in his favour."

- 4. Thus, the first question the Court must ask itself is whether the applicant for the injunction raises a fair issue to be decided at the trial or, in these cases, at the hearing of the leave application. The second question the Court must consider is whether it is necessary for the Court to intervene to impose the requested restraint upon the respondent in order to preserve the *status quo* because if it does not do so, some material and detrimental change may come about in the applicant's situation by the respondent's action which cannot later be reversed by requiring the respondent to undo what has been done in the meantime, or be repaired by compensation should the applicant's substantive claim succeed.
- 5. If the answer to that second question is in the negative, no injunction will be granted. If it is in the affirmative, the Court must consider the third question as to the impact of the restraint upon the respondent's position until the rights are determined and whether, if the applicant fails, the applicant will be in a position to make good any disadvantage or loss which the respondent will have been compelled to bear in the meantime. It is only where the answer to that question is in the negative, that the Court then proceeds to assess where the balance of convenience lies as between granting or refusing the interlocutory injunction.
- 6. When these questions are transposed to the context of contested deportation orders, particular considerations arise due primarily to the character of the claim that the applicant seeks to make against the respondent and the position or status from which the claim is required to be made. Unlike the typical plaintiff seeking an injunction to restrain a trespass, a breach of contract or unlawful picketing, where the claim is based on an assertion that a right he possesses is being infringed, the applicant seeking to restrain deportation is doing so from the position of a failed asylum seeker. As such, the applicant is not in a position to assert that any existing right to remain permanently resident in the State is being violated by the deportation order.
- 7. It is an acknowledged entitlement of every sovereign state to control entry into its territory and to decide who will be permitted to enter and the terms and conditions to be placed upon any permission to enter and remain. This is given effect in s. 5 of the Immigration Act 2004, which provides that no non-national may be in the State other than in accordance with the terms of a permission given by or on behalf of the Minister. When a non-national enters the State and claims asylum he or she, as an asylum applicant, obtains permission to be in the State under s. 9 of the Refugee Act 1996,in conjunction with s. 5 (3) (a) of the Act of 2004, until the completion of the asylum process. Where refugee status is refused and the asylum process is definitively concluded, the asylum seeker has no continuing right to be present in the State for the purposes of s. 5 of the Act of 2004. Thus, when in

response to the notification of a proposal to deport under s. 3(a) of the Immigration Act1999, the failed asylum seeker makes representations as to why the order ought not be made, he or she is effectively applying for a permission to remain in the State, as the commonly used description "humanitarian leave to remain" indicates. There is however, no right to be granted such permission and the fact of a refusal does not as such or of itself, constitute the infringement of any justiciable right on the part of the person in question.

- 8. It is possible that where notification of a proposal to make a deportation is given to a failed asylum-seeker under s.3 (3) and (4) of the Act of 1999, the invitation to submit representations in the latter sub-section operates as an implied permission to remain until the representations have been considered and the deportation has been made and notified. Thereafter, however, there is clearly no continuing permission.
- 9. It cannot therefore be assumed that simply because a challenge has commenced to the legality of a deportation order or to the refusal of an application for subsidiary protection, there will necessarily follow an entitlement to restrain implementation of the order. In fact, any presumption is to contrary effect. Once the claim for asylum has been definitively concluded so that the asylum seeker is without permission to be present in the State, the *maxim omnia praesumuntur rite esse acta* would apply to require the Court to regard the deportation order as having been validly made until such time as the contrary is shown, unless, perhaps, the order is manifestly bad on its face.
- 10. It is of course the case that while the failed asylum seeker may have no permission to be present in the State, he or she is not wholly without rights, including the right derived from s. 5 of the Refugee Act 1996, not to be expelled from the State when the expulsion would infringe the prohibition of *refoulement*.
- 11. The Court draws attention to these considerations to underline the point that the intervention of the Court to restrain the implementation of a deportation order is not a matter of course simply because what is at issue is the expulsion of a person from the State. Whether or not it is appropriate or necessary for the Court to intervene to interrupt the performance by the Minister of his statutory function depends upon the particular circumstance of each individual case; on the nature and significance of the illegalities alleged and particularly, on the evidence adduced by the applicant as to why an injunction is necessary to prevent an irreversible or irreparable change in the applicant's situation occurring before the issues are determined.
- 12. The factual *status quo* may be that the applicant is physically present in the State; the legal *status quo* is that the applicant has been refused permission to remain in the State and a process presumed lawful is in train to rectify that situation as required by law.
- 13. Accordingly, where the first question is posed as to whether a fair issue is raised, it is not sufficient in the judgment of the Court to point to some interesting question of law which is proposed to be litigated. The issue raised must be one which, if resolved in the applicant's favour, will lead to the quashing of the deportation order with the result that a deportation on foot of such an order will necessarily be unlawful.
- 14. This consideration is relevant in the present case, because, as the Court pointed out recently in its judgment of the 22nd November, 2011, in the case of *O.C.O* and *Others v. The Minister for Justice, Equality and Law Reform*, some of the grounds proposed to be relied on in that case and again here will not necessarily lead to the contested decisions being quashed, even if the points of law adduced are upheld in favour of the applicant.
- 15. However in the present case, because it is not necessary to do so and because the leave applications have yet to be heard, the Court considers it preferable not to express any view on the first question as to the fair issue raised, but assume for the purpose of this motion that under at least one of the very many headings in the statement of grounds, the applicant may present an arguable case or a substantial ground as the case may be for the grant of leave.
- 16. The crucial issue in the view of the Court in this application is that posed by the second question: has the applicant established a case that it is necessary for the Court to restrain his removal from the State in order to prevent a likely alteration in his circumstances which will be irreversible or irreparable in the sense described above?
- 17. Clearly, in the most basic way the deportation will change the applicant's circumstances by removing him from the State and returning him to Pakistan. But that change of itself is not irreversible. No case has been made that his presence in the State is necessary for the purpose of prosecuting the present case. His right of access to the Court has been secured and no major difficulty has been suggested in obtaining continuing instructions from him in Pakistan, should that be necessary. Should he succeed in establishing that the deportation was unlawful, appropriate orders could be made, if necessary, directing the respondent to readmit the applicant to the State and compensate him for any losses or expense he has occurred. Whether that would be necessary or appropriate will obviously depend on the nature and effect of the illegality found. It might, for example, be appropriate in a case where it was found that refusal of subsidiary protection was invalid upon a basis that raised a likelihood that any new decision on the application would establish an entitlement to subsidiary protection.
- 18. In the present case, the Court is asked to accept that the applicant does face a risk of irreversible harm if deported, but based only upon the claim he made throughout the deportation process. What is fundamental in importance on this question, however, is that the Court must have before it, evidence that there is some reality to such a claim that he would face serious harm if deported. Here, the application is moved on the basis of the original verifying affidavit in the judicial review proceeding, with the papers exhibited from the asylum procedure and the memoranda setting out the reasons for the contested decisions. No separate affidavit supporting this application for the injunction has been sworn as might be the case in a typical action where interlocutory relief is sought. All that is said in the verifying affidavit in this regard is as follows:

"I say that my family suffered greatly at the hands of the Taliban, including the killing of family members. I was considered an informer by the Taliban and while the first information report was filed in respect of my perceived association with the Taliban, thereby incurring the wrath of the state authorities, I believe I would be killed if I remained in or returned to Pakistan. I fled in fear of my life and arrived in Ireland on the 4th August, 2009".

That account, however, has been rejected as incredible by the asylum decision makers and that finding of lack of credibility has been adopted by the Minister in refusing subsidiary protection and leave to remain.

19. Moreover, so far as concerns his claim to be at risk of violence from the Taliban, any reliance on the prohibition of refoulement is clearly untenable because, quite apart from the fact that the claim has been disbelieved, it has also been found and the applicant himself has accepted, that he will be protected from that risk by relocating elsewhere within Pakistan.

- 20. So far as his claim to fear mistreatment by the Pakistan security forces is concerned, it is significant that even on his own account, he has never in fact experienced any actual mistreatment in the past. He was not at the family hotel when he claims that the Pakistani army conducted a raid and arrested his brother. He appears to have left Pakistan without ever having made further contact with his family. He has contact with a friend who sends him documents. If there was any reality to his fear of arrest and mistreatment by security forces if he now returns to Pakistan, why has no information been sought from this friend as to what has happened to his family since he left. Where is his father now? Was he ever detained by the security forces? Has he been mistreated? What happened to his brother after his arrest? His own immediate family of his wife and children are said to be safe in their home village.
- 21. In the judgment of the Court, if an interlocutory injunction is to be granted to restrain the otherwise ordinary course of the performance of the statutory functions by the Minister, it can only be on the basis of credible evidence that there is a real and current risk that the applicant will be exposed to some irreparable harm if deported before the application for leave is heard or that for some other reason it is necessary that the applicant remains present in this jurisdiction until that date in order to avoid depriving the applicant of the effective exercise of his right of access to the Court.
- 22. In the judgment of the Court neither of those conditions has been met in the present case and it is necessary to refuse the application for interlocutory relief.