Neutral Citation: [2016] IEHC 401

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 103 J.R.]

BETWEEN

S. B.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 11th day of July, 2016

Background facts:
1. The applicant is a national of Bangladesh. He initially sought asylum in the State on the 11th September, 2009, on the basis of his alleged fear of persecution as a member of the Buddhist faith in Bangladesh. He further stated that he feared wrongful prosecution in Bangladesh on foot of a charge of murder.

2. His application for refugee status was refused in July, 2010. He was invited to make an application for leave to remain in the State. He did not apply for subsidiary protection.

3. The applicant was informed of the respondent's decision to deport him from the State on the 4th February, 2015. He applied for leave to seek an order of judicial review quashing the deportation order and an injunction restraining the respondent from deporting him pending the conclusion of his judicial review proceedings, citing the principle of *non-refoulement.*

Procedural history before this Court:
4 Leave to seek judicial review was granted by this Court following an *ex parte* application by the applicant on the 9th March, 2015. The Court further granted an interim injunction that the applicant not be deported. That injunction lasted until the 27th April, 2015. The grounds on which leave was granted were:-

> "i. The Respondent erred manifestly in law and acted unreasonably and irrationally in reaching a decision that the return of the Applicant to Bangladesh would not be contrary to section 5 of the Refugee Act, 1996 (as amended). The Respondent acted irrationally in arriving at the decision and no reasonable decision-maker could have arrived at the conclusions arrived at on the basis of the information available.
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> ii. The Respondent erred manifestly in law and acted unreasonably and irrationally in reaching a decision that the return of the Applicant to Bangladesh would not be contrary to section 5 of the Refugee Act, 1996 (as amended) on foot of a statement in circumstances where it was clear that police protection is not in fact available to the Applicant
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> iii. The Respondent erred manifestly in law and acted unreasonably and irrationally in reaching a decision that the return of the Applicant to Bangladesh would not be contrary to section 5 of the Refugee Act, 1996 (as amended) on foot of a statement that although there were significant injustices facing those charged with criminal offences that these would of course apply to all persons charged with an offence and not just the Applicant. The said finding was entirely irrational in circumstances where the Applicant's entire contention was that he would face and has faced these accusations of criminality on account of his religion."

5 The motion seeking judicial review was then adjourned from time to time in the asylum list of the High Court with the respondent providing an undertaking not to deport the applicant. On the 6th July, 2015, the respondent informed the applicant that it would no longer provide him with an undertaking not to deport him.

6 On the 13th July, 2015, the applicant applied for an interlocutory injunction which was opposed by the respondent. During that application it was submitted that the applicant had already satisfied the Court that there were substantial grounds to impugn the legality of the deportation order, as evidenced by the grant of leave to seek judicial review on the 9th March, 2015.

7 I informed the parties of a decision this Court had delivered earlier that day (13th July, 2015), in *E.M.O. v. Minister for Justice* [2015] I.E.H.C. 444 and referred to comments therein as follows (at para. 15):-

> "This Court has granted the applicant leave to seek judicial review. That decision was based upon the existence of substantial grounds for contending that the decision ought to be quashed. In view of the grant of leave at the higher threshold, arguable grounds as to illegality required in accordance with the *Okunade/Campus Oil* rules are thereby established."

8. I have reviewed the Digital Audio Recording of 13th July, 2015, and having heard the parties, I asked to be addressed on an issue which I expressed as follows:-

> "So, in particular, what I wish to be addressed on (I am going to ask for written submissions on the point) is in what way is the Court to apply para. 10.7 of the unreported version of *Okunade*. And the decision in *K.O.* and the decision in *I.D. [I.D. v. M.J.E.* [2013] IEHC 281] where irrational refoulement is alleged and where substantial grounds are made out for the grant of leave. That is the particular question which is of concern to me which hasn't been fully addressed in the application so far. And I am concerned that the law is unclear on it and I think that whatever I do on it, it's likely to go

somewhere else to get clarity. So we may as well have the fullest possible decision here."

9. Further submissions were then made by the parties, both orally and in writing, on the 21st October, 2015. All of those submissions have been considered.

10. In the meantime there have been some developments in this area. The Court has had regard to the decision of the Court of Appeal in *Chigaru v. Minister for Justice and Equality* [2015] I.E.C.A. 167 (delivered on the 27th of July 2015) where the learned Hogan J. considered whether to grant an injunction to restrain deportation of parents and their two young children. He considered, at para. 15, whether the applicants "had established a fair case" and found that the applicants crossed this hurdle because the legal complaint seemed to echo statements of the relevant law made by the E.C.J. in *M.M. v the Minster for Justice (*Case C-227/11, [2012] E.C.R.I-000).

11. Hogan J. further assessed the application for an injunction by asking "where does the balance of convenience lie?" (at the end of para. 22 of the judgment). He said that had the application been based on the circumstances of the parents, he "would not have been in favour of granting them any discretionary relief" (c.f. para 36 of the judgment) but because the removal of the children from the State "would be massively disruptive for them ... this is a factor which weighs heavily when determining where the balance of convenience lies" (c.f. para. 37).

12. As far as I can tell, no injunctive relief had been sought in the High Court where leave to seek judicial review of deportation orders had been refused following an *inter partes* hearing. The refusal of leave was appealed and the Court of Appeal granted an interlocutory injunction restraining deportation pending determination of the appeal which must await the decision of the E.C.J. in the *M.M.* case.

13. It seems to me that there may be a difference of approach as to the principles governing deportation injunctions as between the decisions in *Chigaru* and *Okunade*.

14. The Minster for Justice and Equality sought and was granted leave to appeal *Chigaru*. On the 20th of January, 2016, in its published Determination in respect of the leave application, the Supreme Court said:-

> "The essence of the application is that the Court of Appeal "significantly misapplied and impermissibly extended the decision of the Supreme Court in *Okunade v. Minister for Justice* [2012] IESC 49". *Okunade* as was accepted by the Court of Appeal sets out the criteria regarding the grant of interlocutory relief in immigration/asylum cases. The difference between *Okunade* and the present case is that the principles set out in *Okunade* arose in the context of applications to enjoin the Minister from enforcing deportation orders against non-nationals pending a leave hearing or as the case may be a post-leave hearing by way of judicial review before the High Court whereas the respondents were refused leave to appeal before the High Court and then sought an injunction pending an appeal. The Court of Appeal found that there was "at least an arguable case regarding the validity of the subsidiary protection decision". It is not suggested that the Court of Appeal did not have regard to the *Okunade* principles in the present case but rather the argument is that the Court of Appeal misapplied the decision of the Supreme Court in *Okunade*.
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> 42. The Court considers that an issue of general public importance as to the test to be applied after a full post-leave hearing in circumstances where the High Court has found against the respondents and has upheld the decision determining that the respondents were not eligible for subsidiary protection and has upheld the validity of the deportation orders and whether the test in *Okunade* is the appropriate test to apply in respect of a post-leave decision.
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> Accordingly, the Court will grant leave to appeal to this Court on the following grounds:
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> 1. That the Court of Appeal erred in identifying the test in *Okunade* as being applicable to a post-leave decision upholding the decision determining that the respondents were not eligible for subsidiary protection and upholding the validity of the deportation orders.
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> 2. That the Court of Appeal erred in identifying the appropriate test to be applied."

15. The Supreme Court has recently heard this appeal and reserved its judgment. The decision of the Supreme Court is likely to be important in relation to applications to restrain deportations following a decision on an application for leave to seek judicial review.

Substantial grounds and fair issue to be tried:

16. Where substantial grounds have been established to challenge the legality of a deportation order and the Court has accordingly granted leave to seek judicial review of the measure, it seems to me that such finding should, in most cases, dispose of any question on a later application for an interlocutory injunction as to whether a fair case to be tried has been made out. It would be inconsistent for the Court to grant leave to seek judicial review on the basis of the existence of substantial grounds for contending that a deportation order is invalid and then to find, on a later application for an injunction, that a fair case to be tried has not been made out.

17. This view could not prevent the respondent Minister from seeking to persuade a court on an *inter partes* hearing for an injunction that findings made at the earlier *ex parte* application for leave to seek judicial review (that substantial grounds for contending illegality exist) are unsustainable or not relevant or somehow inapplicable in respect of the application for an injunction.

18. I agree with the respondent that a finding of substantial grounds sufficient to grant leave on an *ex parte* application could not, without more, justify an injunction to restrain deportation. Lest the matter be in any doubt, a grant of leave to challenge a deportation order does not operate as a stay on the impugned order.

19. The parties have advanced competing arguments as to whether (having regard to *Okunade* principles that deportation orders are not to be enjoined notwithstanding the existence of a fair issue to be tried –"the default position") countervailing circumstances or other good reasons exist in this case to justify departure from that default position.

20. Having regard to the published determination of the Supreme Court as to the issues of public importance embraced in the appeal (see para. 14 above) a refusal of an injunction at this stage would, it seems to me, inevitably be appealed, and such appeal would involve duplication of argument recently heard by the Supreme Court. Any decision from the Court of Appeal might well lead to a further application for leave to appeal to the Supreme Court on issues recently argued there. All of this would be wasteful of judicial resources.

21. In view of the anticipated decision of the Supreme Court on the principles which apply in these applications, I have decided to grant interlocutory relief to restrain deportation until the hearing of the application for judicial review without deciding which of the parties has the better side of the argument. I considered granting further interim relief pending the decision of the Supreme Court and then permitting the parties to make submissions in the light of that decision but this too would have been wasteful of judicial resources and burdensome on the parties.

22. It is in those special circumstances that I grant the relief sought without assessing the merits of the application. I will now assign an early hearing date for the underlying proceedings but if the Supreme Court delivers judgment before the decision in the underlying proceedings, the respondent has liberty to apply to discharge the injunction on 48 hours notice to the applicant.