THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 6)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2017

1. Where a court is considering the validity of both an original administrative decision and a later decision on review to uphold that original decision, and where the later decision is quashed, should the court then go on to deal with the challenge to the original decision or alternatively should it give the decision-maker a further opportunity to reconsider the review decision?

2. The situation raising this question follows from my judgment in *Y.Y. v. Minister for Justice and Equality (No. 5)* (19th December, 2017), when I quashed a decision under s. 3(11) of the Immigration Act 1999 in respect of the applicant and left over for further consideration the question of the validity of the original deportation order. This present ruling should obviously be read in conjunction with the previous judgments in this matter. The options essentially are for me to move on to consider whether to quash the original deportation order, or alternatively to park consideration of the original deportation order for now and remit the s. 3(11) issue to the Minister for fresh consideration.

3. The theoretical framework for such an approach has already been discussed in my judgment in *Y.Y. v. Minister for Justice and Equality (No. 4)* [2017] IEHC 690 [2017] 10 JIC 1706. What happens at this point is discretionary and that discretion should be informed by a number of considerations, which I will now deal with in turn.

Considerations favouring the applicant

4. Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.) for the applicant in an able submission suggests firstly that the original deportation order should be quashed because there have now been three decisions in this matter and that three, in effect, is too many. The situation "*cannot continue with the matter continually remitted to the Minister*". It seems to me that the number of previous decisions is potentially one factor to which regard can be had, but that there can be no arbitrary limit on the number of opportunities to consider a decision. Regard must be had to all of the circumstances. By way of an example in a different area, in *Walsh v. The Governor of Wheatfield Place of Detention* [2017] IEHC 680 [2017] 9 JIC 2903 I recently held that to allow five versions of a certificate justifying detention under Article 40.4 was not an excessive amount of indulgence.

5. The second matter on which Mr. Lynn relies is the fact that the applicant is in detention, and also the length of that detention, and that it is undesirable that should continue further. That is certainly something I do consider and I have attempted to deal with this matter as expeditiously as possible, although I think there is some validity to the submission made by Mr. Remy Farrell S.C. (with Ms. Sinead McGrath B. L.) for the respondent that one of the reasons the matter has taken so long is that the applicant, as found by the Supreme Court, pursued a somewhat generalised approach up until relatively recently, and that for example, there is no reason why his expert report from Professor Joffé could not have been put in originally. Mr. Lynn was at pains to emphasise that he is not suggesting that the detention would become unlawful if the deportation order was not quashed and it seems to me that is an absolutely necessary concession given the undertaking not to challenge the legality of his detention. While on the one hand the applicant's detention is largely his own responsibility due to his breach of immigration law, on the other hand if the matter is remitted to the Minister the impact on the applicant can be mitigated by specifying a limited time for the s. 3(11) decision.

6. The third factor relied on by Mr. Lynn is that events have overtaken the original decision with both further information in the mix and also a new analysis and approach and view of certain issues being taken by the Minister. However, it seems to me that it is in the nature of any review in general, or a s. 3(11) application in particular, that new matters can come into focus and a certain amount of that is the applicant's responsibility for having put forward additional and different material in the s. 3(11) context.

7. The fourth issue for consideration raised by Mr. Lynn is the availability of an alternative procedure. Mr. Lynn submits that the "*only sensible course of action*" (if there is to be any action, which obviously he is not encouraging) should be by way of reinitiating the s. 3 procedure following the quashing of the original order. He says that a "*flawed procedure cannot be allowed to continue".* However, it seems to me that it has not been established that the procedure is flawed and in some respects the procedure is somewhat conventional. The question that arises at this point is simply the question of whether a quashed decision should be remitted back to the decision- maker to be reconsidered in accordance with law. It seems to me the availability of an alternative procedure could potentially be a factor to be taken into account, although again some realism must be brought to the matter in the context of the facts of the present case given that, as previously found, the applicant is clearly a serious flight risk. Quashing the deportation order would result in his immediate release and more likely than not disappearance and the consequent rendering of the proceedings moot. Of course, that is not in itself a reason not to quash the deportation order if and when we get to that point. However, it is a factor to be taken into account in assessing whether the alternative procedure is equally effective and appropriate.

Considerations favouring remittal to the Minister

8. The first issue relied on by Mr. Farrell is the procedural nature of the problems that have occurred in this case. The first s. 3(11) decision was quashed for largely procedural reasons, namely the failure to specify the reasons why the Minister took a different view from the Refugee Appeals Tribunal (see para. 80 of the Supreme Court judgment, *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61.) In the second s. 3(11) decision, the reasons were spelled out and that matter was resolved relatively simply. However, the second s. 3(11) decision was quashed for a different reason, which was also procedural rather than substantive, namely the failure to give notice of a particular document relied on (see *Y.Y. No. 5*).

9. The second consideration, related to the first, is the fact that it has not been established that the Minister would not have been

entitled to come to the decision refusing to revoke the order: see para. 81 of the Supreme Court judgment where O'Donnell J. says that it has not been shown that this is a case where no reasonable Minister could have come to that view.

10. Mr. Lynn makes the fair point that the reasonableness or otherwise of the finding regarding the disuse of Antar Barracks has not yet been determined so essentially he will be contending in due course that this was a decision that no reasonable Minister could have come to. That may or may or may not be shown to be so. That will have to await subsequent developments, but the point is that it has not at this point in time been demonstrated that the Minister was not entitled to come to the conclusion that the order should not be revoked.

11. The next consideration is the public interest. This seems to me to be a very pertinent consideration in any exercise of discretion, and Mr. Farrell relies on the applicant's various convictions in this regard which seems to me should be factored in as relevant under this heading.

12. A related issue is the conduct of the applicant. Given that the applicant has, as set out in previous judgments, essentially defrauded the immigration system with a bogus asylum claim and sought to flee the country on false papers it seems to me he is not a person that can too strongly expect any discretion to be exercised in his favour. Obviously, the examination under art. 3 of the ECHR (as implemented by the European Convention on Human Rights Act 2003) is a separate matter, and not one that is going to be affected by discretion; but insofar as this particular applicant seeks the exercise of discretion in his favour he seems to me to be in a very weak position indeed.

Order

13. Weighing the factors against remittal back to the Minister with those in favour it seems to me that the latter are considerably stronger for the reasons outlined. Accordingly, I will order:

> (i). that the s. 3(11) application be remitted back to the Minister, pursuant to O. 84 r. 26(4) of the Rules of the Superior Courts (as amended by the Rules of the Superior Courts (Judicial Review) 2011), for fresh consideration;
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> (ii). that subject to hearing counsel, I will fix times for that process, including any further submissions on behalf of the applicant; and
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> (iii). that the issue in these proceedings of the validity of the original deportation order be adjourned until a date to be specified following the outcome of the s. 3(11) process.