Neutral Citation: [2015] IEHC 506

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 494 J.R.]

BETWEEN

F.D. (ALGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 31st day of July, 2015

1. This is a decision on a preliminary point raised by the Respondents to the application herein which was to quash the deportation order made by the first named Respondent dated the 9th May 2012.

2. The history of these proceedings was set out usefully in a chronology provided by counsel for the Applicant, Mr Forde SC, and added to by Ms Brennan BL, who appeared on behalf of the Respondents. When the proceedings were issued the reliefs sought were:-

> 1) An order of *certiorari* quashing the decision of the first named Respondent refusing the application for subsidiary protection made in respect of the Applicant.
>
> 2) An order of *certiorari* quashing the decision of the first named Respondent to make a deportation order in respect of the Applicant dated the 3rd May 2012.
>
> 3) A declaration of a lack of an interview during the subsidiary protection decision-making process and/or the lack of an appeal mechanism (including an oral hearing) against the decision herein to refuse subsidiary protection as a breach of the principle of equivalence under EU Law.

3. By the time the case was set for hearing on the 21st July 2015, the only reliefs sought were those seeking an order quashing the deportation order.

4. It was agreed by counsel that a preliminary issue arose as to whether or not the Court should entertain these proceedings.

5. It is noted that on the 27th April 2015, by way of notice of motion, the Respondents applied for an order to dismiss the proceedings on the grounds of want of prosecution and abuse of process. It was further sought to dismiss the proceedings on the grounds that the Applicant was seeking to frustrate the asylum and deportation process. No written material was provided by either side to MacEochaidh J. and he indicated that he was not satisfied that the judicial review application was an abuse of process. He accordingly fixed the matter for hearing indicating that these issues could be more fully outlined to the court dealing with the application.

6. The proceedings were grounded on the affidavit of the Applicant sworn on the 16th June, 2012 and in that affidavit the facts are detailed chronologically.

7. The Applicant is a national of Algeria. He arrived in Ireland on the 17th August 2009 and applied for asylum. He had travelled to Ireland from the United Kingdom where he had unsuccessfully sought asylum. On the 18th August, 2009 he applied for asylum by completing an ASY1 form and completed a questionnaire on the 25th August, 2009. On the 5th October 2009 information about him was requested from the United Kingdom Authorities by the Irish authorities. On the 12th November, 2009, a request was made by the Irish authorities to have the United Kingdom authorities take back the Applicant in accordance with Council Regulation EC/343 of 2003, On the 11th December 2009 the United Kingdom authorities refused this request. Despite a further application by the Refugee Applications Commissioner to the United Kingdom authorities, the United Kingdom authorities maintained their refusal to take him back into that jurisdiction. The Irish authorities then proceeded to examine his asylum application.

8. The Applicant was interviewed by the Refugee Applications Commissioner under s. 11 of the Refugee Act 1996 (as amended) (hereinafter referred to as 'the Act of 1996') in March 2010, October 2010 and December 2010. On the 16th February, 2011 the Refugee Applications Commissioner indicated that the Applicant had not established a well-founded fear of persecution as required by s. 2 of the Act of 1996. The Applicant appealed this decision to the Refugee Appeals Tribunal. The appeal took place on the 7th July 2011 and by letter dated the 6th September 2011 he was notified of the negative decision on his appeal.

9. On the 18th October, 2011, the Applicant submitted to the first named Respondent a subsidiary protection application and a leave to remain application based on humanitarian grounds. By letter dated the 2nd May, 2012, the first named Respondent refused the Applicant's subsidiary protection application. By letter of the 9th May 2012, the Applicant was informed that the first named Respondent had made a deportation order against him. This deportation order was made on the 3rd May, 2012. These proceedings were initiated on the 16th June 2012.

10. The next relevant affidavit is that of Pat Carey who is the Assistant Principal Officer of the first named Respondent and he notes that under s. 3(9) (a) (i) of the Immigration Act 1999 (hereinafter referred to as 'the Act of 1999'), the Applicant was required to present himself to the member in charge of the Garda National Immigration Bureau on the 30th April, 2013 and the Applicant failed to present himself. He said that on the 17th April, 2013, the first named Respondent received a take back request from the United Kingdom authorities under the Dublin Two Regulations. This request sated that the Applicant had applied for asylum in the United

Kingdom on the 28th January, 2013. In his asylum screening interview in the United Kingdom the Applicant stated he left Dublin on the 12th December, 2012 and travelled to Belfast by bus and then claimed asylum in Belfast. By letter dated the 9th July 2013, the Office of the Refugee Applications Commissioner wrote to the United Kingdom authorities refusing the take back request because the Applicant had first claimed asylum in the United Kingdom in 2008. By letter dated the 2nd August 2013 the United Kingdom withdrew their take back request.

11. The Applicant was served with correspondence from the first named Respondent dated 9th May, including a deportation order made by the Minister who confirmed that the Applicant left Dublin on 12th December, 2012 and travelled to Belfast by bus, where he claimed asylum. The United Kingdom authorities sought to return the Applicant to Ireland, but on 9th July 2013 the Refugee Applications Commissioner wrote to the United Kingdom authorities refusing this request as the Applicant had first claimed asylum in the United Kingdom in 2008. By letter dated 2nd August, 2008 the United Kingdom authorities withdrew their take back request.

Submissions of counsel for the Respondent
12. Counsel for the Respondent said that any challenge to the deportation order is now moot, futile and/or academic as the Applicant had voluntarily chosen to avail of an alternative remedy. Counsel further stated that judicial review was a discretionary remedy and relief should not be granted where such would be futile and would confer no appreciable benefit on the Applicant. She pointed to the fact that the Applicant's only affidavit was that sworn on the 1st June, 2012 and that the Applicant has not set out the basis for indicating that it would be a real benefit to him in having it quashed by an order of *certiorari*. A person who has had a deportation order against him can apply for revocation or amendment of the deportation order under s. 3(11) of the Act of 1999.

13. Counsel for the Respondent further argued that the right of the Applicant to remain in Ireland prior to the issue of a deportation order was inextricably linked with his right to seek asylum and subsidiary protection. Any future right to re-enter on the basis that his decision to apply again in the United Kingdom would be subject to the discretion of the Minister.

14. Counsel for the Respondent said that the doctrine of mootness was explored comprehensively by the Supreme Court in *Lofinmakin v. The Minister for Justice Equality and Law Reform* [2013] IESC 49, the facts in that case were different but the applicable principles remain the same. In that case a deportation order had been revoked therefore the application to quash the deportation order provided no basis upon which to proceed. Counsel argued that there are no longer live issues between the Respondents and the Applicant.

15. Under a peculiar heading in her submissions entitled "Procedural Gambling/Forum Shopping and the Conduct of the Applicant" the real submissions in relation to this are the discretionary powers in respect of judicial review, counsel quoted from *Odulana & Ors v. The Minister for Justice Equality and Law Reform* (Unreported, Clark J., High Court, 25th June 2009). She also quoted from Butler J. in *The State (Conlon Construction Company Ltd) v. Cork County Council* (Unreported, High Court, 31st July 1975).

16. In response, counsel for the Applicant said that MacEochaidh J. had ruled that he was not satisfied that the proceedings were an abuse of process and said that the matters could be dealt with at the hearing of the application for *certiorari*. In relation to the question of the matters being moot he argued that the only place in which an application could be made to quash the order was in the State and specifically in these proceedings. He argued that the issues relating to forum shopping and procedural gambling came under the heading of "abuse" which had been already dealt with. He argued that if the Respondent had wanted to find out further about the Applicant, the notice of particulars should have been sought and that the Respondent could have applied to cross examine the Applicant from his affidavit.

17. In response to this, counsel for the Respondent argued that these were not plenary proceedings but judicial review proceedings and the issues relating to particulars and cross examining the Applicant were not relevant

Discussion
18. An application for judicial review is a solemn process and there is thus a heavy onus on Applicants when seeking to invoke this jurisdiction to place all material and relevant facts before the court.

19. The Applicant's argument is that in effect the fact that the Minister has made a deportation order limits him in exploring his options for example, applying to the US for a visa and argues general issues relating to failed asylum seekers returning to Algeria. However a deportation order is unlimited in time. In the Supreme Court decision of *Sivsivadze & Ors v. The Minister for Justice Equality and Law Reform & Ors* [2015] IEHC 53 the Applicants were seeking declarations that s. 3 of the Act of 1999 was unconstitutional and that a declaration be made pursuant to s. 3 (1) of the European Convention on Human Rights Act 2003 (as amended), that the aforementioned s. 3 was incompatible with Ireland's obligations under the Convention. The decision of the Supreme Court was given by Murray J. on the 23rd June, 2015. The Supreme Court were satisfied that the appeal from the decision of the President of the High Court should not be dismissed primarily on the grounds of an egregious abuse of process and outlined that the status of the fourth appellant (who had been deported) was that of an alien (a non national or a person who is not a national of any EU or EEA State) who had no right to be, or remain in the State. He quoted the Supreme Court decision of *Goncescu & Others v. Minister for Justice Equality & Law Reform* [2003] IESC 49:-

> *"… upon a refusal of refugee status the appellants had no entitlement to remain in the State for any purpose and the Minister was entitled to make a deportation order pursuant to section 3 of the Immigration Act, 1999. … Once an Applicant's application for a declaration of refugee status has been refused even that persons limited authority to remain in the State ceases."*

20. Murray J. then stated:-

> *"All of the foregoing demonstrates that the deportation order made in respect of the fourth appellant in December, 2001 was an executive decision within the powers of the State, exercised by the Minister, as authorised by statute, to deny to the fourth appellant permission to enter or remain in the State. The judicial authorities to which I have referred make it quite clear that no alien has a right to enter or to remain in the State without lawful permission. So an alien who presents himself or herself at a point of entry to the State may be refused leave to land, or if found unlawfully within the State may be deported by order of the Minister on foot of an existing deportation order or a new one. Deporting an alien, such as the fourth named appellant, in those circumstances, is no more than the application of the law and the exercise of sovereign powers to protect the integrity of the borders of the State by refusing permission to land or to stay. It is not in any sense a punishment or sanction, administrative or otherwise."*

21. Murray J. then dealt with the appellant's emphasis on the indefinite and potentially lifelong duration of a deportation order and he stated:-

> *"It is the case of course that the appellants have placed particular emphasis on the indefinite and potentially lifelong duration of a deportation order in the form which it is required to be made by virtue of section 3(1). The order must require the non-national concerned to leave the State and 'remain thereafter out of the State'. The learned President found that the making of such an order in that form placed the non-national or alien in the same position as any other non-national, restoring the deportee to the position he previously stood as a non-national under s.5 of the Act of 2004 (cited above). That is the section which prohibits any non-national entering the State without permission. I also think the President was correct in adopting that approach. A person who is being deported, because he is a non-national without any right to enter or remain in the State, once deported cannot re-enter the State unless the deportation order is amended or revoked by the Minister. A non-national, say for example from Georgia like the first and fourth appellants, who has not previously entered the State may not ever enter the State unless, pursuant to s.5 of the Act of 2004, he or she has obtained permission from the Minister to do so."*

He continued:-

> *"It would be incongruous to expect a deportation order of such a nature to have a defined or limited period within which the obligation to remain outside the State would end..."*

22. It is my view that in this case where the Applicant left the State and invoked the asylum process of another State prior to the execution of the deportation order it puts himself in exactly the same position as the fourth named Applicant in the *Sivsivadze* case. Murray J. has indicated that the proposition that a deportation order is a sanction is unsustainable.

23. *Lofinmakin* (supra) deals with the question of whether proceedings are moot. In this case the original proceedings in the appeal arose out of a deportation order that no longer existed. Denham CJ stated as follows:-

> *"13. The current proceedings, insofar as they relate to the deportation order against the third named appellant, are moot, as that deportation order has been revoked.*
>
> *14. As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this Court would be based on a hypothesis, and would be an advisory opinion. It has long been the jurisprudence of this Court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the Court.*
>
> *15. Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case."*

24. Denham CJ quoted the dictum of the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 S.C.R. 342:-

> *"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercised its discretion to depart from it."*

Decision of the Court

25. In this Court's view the Applicant, by his actions in leaving the State in circumstances where he had instituted proceedings against the Minister renders these proceedings moot.

26. I also turn to the issue of judicial review being a discretionary remedy and I note that in the middle of the proceedings challenging the issues in relation to the subsidiary protection and to the deportation orders, the Applicant left the State and engaged in an asylum process in the United Kingdom. In exercising my discretion it seems to me that the first thing to which I should have regard to is the Applicant's conduct. O'Higgins CJ stated in *State (Abenglen Properties Ltd) v. The Corporation of Dublin* [1984] IR 381:-

> *"In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing. The court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief."*

It appears to this Court that the Applicant's application should be refused because his conduct has been such as to disentitle him to relief.

27. Having regard to the above, and as this is a telescoped hearing, I am refusing the application for leave in respect of the application for *certiorari*.

Michael Forde SC and David Leonard BL Instructed by John Gerard Cullen Solicitors

for the Applicant

Eilish Brennan BL Instructed by the Chief State Solicitor

for the Respondent