Neutral Citation [2015] IEHC 657

THE HIGH COURT

[2015 No. 596 J.R.]

BETWEEN

GINTAUTAS BAGDONAS

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

DEFENDANT

JUDGMENT of Mr. Justice MacEochaidh delivered on the 20th day of October, 2015.

1. This is a judgment of the court on an *inter partes* application for injunctive relief to restrain the removal of the applicant. The applicant is due to be removed at approximately 4 pm today. This application was commenced yesterday evening and continued this morning.

2. The applicant is a national of Lithuania who arrived in Ireland in 2006 or 2007. Between 2007 and 2010 the applicant was convicted of very many criminal offences. The respondent counts these at approximately 23. He received significant terms of imprisonment in respect of these offences. The most noteworthy of these was a prison sentence of twelve years with three years suspended (1st March, 2012, was the date of sentencing). He was convicted of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 and an offence of false imprisonment contrary to s. 15 of that Act . The sentencing Judge noted that the crime was " [a] sinister, premeditated, degrading and sadistic attack to enforce their authority through fear in the murky drug underworld from which they crawl".

3. The Minister made a removal order against the applicant on the 3rd May, 2013, pursuant to reg. 20(1)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006) and 2008 (S.I. No. 310 of 2008). More than two years elapsed between the making of that order and action by the State to effect the removal. Due to this lapse of time a further administrative process was required by the State in respect of the removal order as required by reg. 20(1)(e) of the above mentioned regulations which provide that:-

> *"A removal order made on grounds referred to in subparagraph (d) which has not been enforced after the expiry of more than 2 years from the date it was made shall not be enforced unless the Minister is satisfied that the circumstances giving rise to the making of the order still exist."*

4. This further administrative process is the subject matter of the intended judicial review proceedings before the court and that review was dated the 9th June, 2015. The review asserts that the deciding officers received correspondence from An Garda Síochána dated the 27th May, 2015, indicating that the circumstances under the original removal order have remained unchanged.

5. The applicant informed the court that certain circumstances were changed between the date of the original removal order and its affirmation. In particular the applicant appealed the original sentence to the Court of Criminal Appeal. The result of that appeal was a reduction in sentence to be served by the applicant from twelve years to ten years. The same period of suspended sentence was decided by the Court of Criminal Appeal but a significant new condition was attached to the grant of period of suspension; that being that the applicant agreed to a post release period of supervision for eighteen months.

6. The principle argument as to illegality advanced by the applicant is that the manner in which the review of the original order was conducted by the Minister and her officials was unlawful in that it failed adequately to take account of the change of circumstances of the applicant. That being the fact that he would be required to undergo a period of supervised release following the end of his sentence and that there had been a reduction in the sentence. It is also said that his period of detention had brought about certain character changes and improvement as attested by letters from a probation officer indicating certain progress on the part of the applicant.

7. On the documentation available to this court I accept that it is made out to the required standard that an inadequate review of the applicant's circumstances took place in this case and there is no evidence that the Minister was aware of any in-prison progress, or was aware that the Court of Criminal Appeal had reduced the sentence from twelve years to ten years, or was aware that the Court of Criminal Appeal had ordered a period of supervised freedom following release. In those circumstances I find that the first threshold to be met on an application such as this has been made out by the applicant.

8. That, however, is not the end of the matter because in accordance with the dicta of the Supreme Court in the decision of *Okunade v The Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 certain rules apply to the manner in which injunctive relief against deportation orders are processed by this court. As a matter of principle there can be no difference between a removal order and a deportation order with respect to the consideration which the court brings to bear upon whether a deportation or a removal should be enjoined. I say this notwithstanding the difference in the rights available to non-nationals and to nationals of the European Union or their relevant family members in accordance with the Citizenship Directive. But none of that appears to me to have any great bearing upon whether the rules in *Okunade* should apply or not. Indeed the European Union rules themselves provide for the removal of persons who otherwise would have a right of residence and the general free movement rights in the Union. In respect of the general rules, therefore; what this court must examine are the principles set out in paragraph 109 and 110 of the decision of the Supreme Court in *Okaunade.* In particular I refer to paragraph 110 which says that:-

> *"The default position is, therefore, that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side. If, for example, (and it should be made clear that no such consideration arises on the facts of this case) there was a serious risk of criminality or other activity contrary to the public interest then that would be a factor to which*

significant additional weight would lie on the side of refusing an injunction."

9. The court cannot ignore the fact that the applicant in this case was found guilty of extremely serious criminal offences; although, I accept that the applicant has served his sentence and paid the price in respect of that matter. But the Supreme Court does appear to direct this court to give significant additional weight to factors such as the criminal track record of the person in respect of whom a removal order is sought to be enforced. The Supreme Court goes on to say that notwithstanding the default position an applicant might persuade the court that exceptional factors apply which should persuade the court not to apply the default position.

10. Exceptionality might be indicated by proof of a real risk of serious harm to a proposed deportee because of the circumstances which pertain in the country of origin. Exceptionality might apply in circumstances where the removal of a person would have overwhelmingly negative effects on an innocent child. This became the basis upon which the court in *Okunade* itself departed from the default rule and granted a pre-leave injunction restraining deportation.

11. In this case the exceptionality which is advanced is based upon the argument that the applicant has made significant progress with the assistance of the State services whilst in prison and will make further progress post release in the court ordered care of the probation services as attested to by the letters submitted to the court by the applicant's probation officer.

12. I have two concerns in this case. The first is whether there is an incompatibility between the decision of the Court of Criminal Appeal which decided on a very particular sort of a sentence involving a requirement on the part of the applicant to cooperate with the probation services in a period of supervision following release. On one reading of the order the suspended three years of the sentence is dependant upon fulfilment by the applicant of that requirement such that if he failed to cooperate the suspended sentence would be reversed and he would be taken back into custody. Though this part of the order is addressed to the applicant, it would appear to create duties on the part of the State to ensure that there is a period of supervised release. The court is concerned about the possible incompatibility between the State seeking to remove the applicant prior to the commencement of supervised release and the order of the Court of Criminal Appeal making the early release, dependant upon such supervision.

13. The second concern the court has is as to the nature of the argument advanced in favour of the application of the exceptionality rule here. Essentially it is argued that that the need of the applicant to be under supervision is a ground for not having him removed from the State. The probation officer stated that significant improvement has been achieved by the applicant in prison but that further improvement might be possible during post release supervision. The possibility that further character improvement/rehabilitation might be attained if the applicant is allowed to remain in the State does not the constitute exceptionality which *Okunade* requires in order for a *prima facie* valid order of the State not to be respected.

14. I have no doubt that the applicant and his social worker do believe that further progress can be made but I do not believe that that is enough to tilt the balance in favour of not respecting a prima facie valid removal order of the State and, therefore, on that ground I find that the argument in favour of restraining the removal of the applicant must fail.

15. In relation to the interaction of the order of the Court of Criminal Appeal and the removal order; my view is that the order in respect of post release supervision is not of such hard edge detail and direction as to make it unambiguously clear that what is required is a regular structured personal interaction between the Probation Service and the applicant. Indeed when I read the correspondence from the probation officer I find that what she intends to happen over the next eighteen months is really that there be a "keeping an eye" on the applicant's progress. There is not a structure of regular meetings with goals and objectives and particular problems to be addressed. It is really in the vaguest terms and though eloquently and well phrased by the probation officer when you drill down into it what you find is that it is intended that the applicant will be able to be at the end of a phone call if help is needed and perhaps to talk in general terms with a supervising officer.

16. Had it been the case that the Probation Service were of the view that a structured detailed goal orientated interaction between the Service and the applicant was what was needed the case might be a little bit different. But I simply do not get that impression from the documents which are before me.

17. I direct that the respondent mention this matter forthwith to the Court of Appeal for the purposes of seeking clarity as to whether the removal of the applicant from the State cuts across the order of the Court of Criminal Appeal. I wish to make it clear that I am not restraining the removal of the applicant pending that event. If the Court of Appeal indicates that post release supervision in Ireland is required and that that is what it intended by its order and that there is an incompatibility between the removal order and the sentencing order the applicant can be brought back from Lithuania to the State. Inconvenience will have been endured by the applicant but no irremediable harm will have been suffered by his removal and subsequent return, if that is what transpires.

18. This is not a case where the applicant is going to known danger or harm. The worst that can happen on the making of this order is that the commencement of what appears to be fairly gentle supervision might be delayed for a short period of time.

19. In those circumstances I am refusing to make the order restraining removal and the direction I gave to the State to mention the matter to the Court of Appeal is not something which is going to stop the removal happening even though I have ordered it forthwith; it is not an event which will stop the deportation happening.