THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 332 J.R.]

BETWEEN

DANIEL MIRGA

APPLICANT

AND

GARDA NATIONAL IMMIGRATION BUREAU AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of October, 2016

1. The applicant arrived in Ireland from Poland in or about 2012 and has since then resided in the State with his four children, partner, mother, brother, sister and their extended families.

2. In 2013, he committed a series of burglaries on nine different homes in Co. Kerry. On 4th December, 2014, he was sentenced by Judge McDonagh in Kerry Circuit Court to four years' imprisonment, with two years suspended, for these offences.

3. On 10th July, 2015, the Minister made a removal order pursuant to the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. 656 of 2006), requiring him to leave the State "*within the period ending on the date specified in the notice served on or given to you under the said Regulation 20(3)(b)(ii)*" of the 2006 Regulations. This form of words was in accordance with Schedule 8 to the Regulations (although the form has since been changed by European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) to refer to a specific date).

4. On 13th July, 2015, the Minister issued a notice of the removal order to the applicant stating that "*the time allowed to you to leave the territory of the State shall not be less than one month from the date of this notification*".

5. The applicant was in custody at that time and was due to be released in May, 2016.

6. On 12th May, 2016, the present proceedings were instituted and an interim injunction granted by Faherty J. The applicant was released on 13th May, 2016. An application for an interlocutory injunction came before the court on a number of dates thereafter.

7. On 3rd July, 2016, the applicant was allegedly involved in a "*serious burglary*" in Tralee, according to the affidavit of Sergeant James Doyle of the Garda National Immigration Bureau sworn on 25th July, 2016. It appears that the applicant was at the time on bail granted by Tralee District Court until 21st September, 2016.

8. Precisely why the State had not as of the date of the hearing taken any steps to seek to review in the High Court the decision of the District Court to grant bail to this applicant, a serial burglar of residential property, in respect of an alleged further similar offence said to have been committed during the currency of his suspended sentence, was not outlined.

9. The day following the alleged serious burglary, 4th July, 2016, the injunction matter came before me. In relation to the fact that the alleged offence occurred on the previous day, Ms. Ann Harnett O'Connor B.L., for the respondents submits that this is "*not coincidental*". However, I was not made aware of that incident at the time I dealt with the injunction matter.

10. On 11th July, 2016, I heard the injunction application and discharged the interim injunction on the grounds that the balance of justice was overwhelmingly in favour of the immediate removal of the applicant from the State, having regard to the applicant's offending behaviour involving the serial criminal invasion of the homes of citizens, and having regard to the criteria as set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 by Clarke J. (criteria recently considered and applied, in very different circumstances, by Hogan J. in *C.C. v. Minister for Justice and Equality, Ireland and the Attorney General* [2015] IECA 167 (Unreported, Court of Appeal, 27th July, 2015); see now the subsequent Supreme Court decision in that case [2016] IESC 48 (Unreported, Supreme Court, Clarke J., 28th July, 2016).

11. The leave application then came before me on 29th July, 2016, for hearing on a telescoped basis.

Procedures for challenging decisions cannot be side-stepped by seeking declaratory relief

12. The proceedings, as originally drafted, sought a declaration that the applicant could not be removed without first being detained in a scheduled place. Ms. Rosario Boyle S.C. (with Mr. Anthony Lowry B.L.) for the applicant, in the course of a very able application, did not pursue that application. The remaining reliefs related to:

> (i) a declaration (relief 1A) that the applicant should be allowed a period of one month following his release from prison in order to leave the State, and
>
> (ii) a declaration *"that the notification of the applicant's removal order is defective in that it fails to specify the time allowed for the applicant to leave the State".*

13. Relief 1A, relating to the alleged entitlement to a period of one month following the release from prison, appears to me to be moot because the applicant has now had the benefit of that period.

14. But both that relief and the other remedy sought by way of declaration are clearly a collateral challenge to the removal order and the associated notification of that order. It is simply not open to an applicant to avoid the procedures for seeking certiorari of an administrative decision by simply rephrasing a challenge as one for a declaration: see *X.X. v. Minister for Justice and Equality* [2015] IEHC 377 (Unreported, High Court, 24th June, 2016) at para. 62 citing Clarke J.'s decision in *Nawaz v. Minister for Justice, Equality*

and Law Reform [2013] 1 I.R. 142.

15. Section 5(1)(k) of the Illegal Immigrants (Trafficking) Act 2000, as amended, by s. 34 of the Employment Permits Act 2014, provides that a challenge to a removal order under the 2006 regulations is subject to the strictures of s. 5. While the accompanying notice is not included, the form of the removal order is such that the order and the notice are so intertwined as not to be effectively separable. The wording of the removal order itself states that removal is to be effected by the date specified in the notice, so on that basis it appears to me that a challenge to the date specified in the notice is a collateral challenge to the removal order and, therefore, engages the provisions of s. 5.

16. Even if I am incorrect in considering that s. 5 applies to this case, the alterative applicable provisions would be O. 84, r. 21, and again one cannot avoid the time limit in that provision by re-framing a challenge as one for declaratory relief. The present application is brought long after the expiry of even the longer three month period.

17. As the proceedings collaterally challenge a decision subject to s. 5, I hold that they are out of time under that section. In any event, if I am wrong about that they are out of time under O. 84. No extension of time was sought, and therefore an extension cannot be granted, but if it had been sought, I see no basis for such an extension having regard to the strictures of O. 84, r. 21. On the contrary this is exactly the sort of last-ditch throw of the dice that both s. 5 and O. 84 are designed to prevent.

The 2006 regulations must be given a purposive interpretation

18. In case I am wrong about that conclusion, I will go on to consider the merits of the application. The provision for a removal order under the 2006 regulations envisages that the time specified in a removal order (unless certified as urgent) shall be "*not less than*" one month by virtue of r. 20(1)(b). This language reflects art. 30.3 of directive 2004/38/EC where, save in duly substantiated cases of urgency the time for removal shall be "*not less than one month*" from the date of notification of a removal order.

19. Ms. Boyle's complaint that the notice does not include a specific date and does not contain an outer limit, but merely says that the time allowed shall "*not be less than one month*" from the date of the notice, lacks substance. The language of "*not less than one month*" derives from both the directive and the regulations and amply gives the applicant notice to allow him both to put his affairs in order and to challenge the decision, which he conspicuously failed to do. A purposive interpretation of the directive and the 2006 regulations does not preclude a form of words such as that adopted in this case. The challenge is devoid of merit.

The conduct of an applicant is relevant to the discretion of the court

20. *"Judicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes"* (*Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, per Lord Carnwath at para. 61). In this jurisdiction, in *G. v. D.P.P.* [1994] 1 I.R. 374, Finlay C.J. at p. 378, expressly recognised the discretionary nature of judicial review. It is clear that parties do not have an entitlement to withhold important information in judicial review proceedings: *Agrama v. Minister for Justice, Equality and Law Reform* [2015] IESC 94 (Unreported, Supreme Court, O'Donnell J., 9th December, 2015) at para. 33. It is also clear that the conduct of an applicant, including that during the course of the proceedings, is a matter relevant to the discretion of the court, see *D.W.G. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 231 (Unreported, High Court, Birmingham J., 26th June, 2007).

21. In the present case, the applicant failed to give his lawyers any instructions regarding the incident of 3rd July, 2016, during the course of the injunction hearing, even though that incident was potentially highly pertinent to the injunction application, and I only became aware of it in the days immediately prior to the telescoped hearing on 29th July, 2016. This withholding from the court of important information that was significantly relevant to the potential discretion in granting or refusing an injunction appears to me to constitute conduct that is also significantly relevant to the exercise of the discretion of the court in granting or refusing relief by way of judicial review.

22. Furthermore, the presumption of innocence while essential to the criminal process is not determinative of civil proceedings. If one party to civil proceedings alleges the involvement of the other in an act which also constitutes an offence, it is no answer for the other side to plead that presumption. The alleged "*serious burglary*" of 3rd July, 2016 has not been explained or denied. In proceedings of this nature, the applicant bears both the onus of proof and an onus of disclosure. The applicant was only in a position to be in the State to be allegedly involved in the undenied incident of 3rd July, 2016, because he obtained an interim injunction from Faherty J. No injunction would have meant no "*serious burglary*" on foot of the applicant's presence in the State, and no innocent injured parties, because the applicant would have been cooling his heels in Poland by then. I held at the interlocutory stage that the balance of convenience and justice was overwhelmingly against an injunction but in any event if an applicant appears on the material before the court to have used a presence in the State obtained as a result of a court order to contravene the law of the State (and in coming to that view I have regard to the lack of denial or explanation as to the incident in question), that clearly amounts to an absolute abuse of the court process.

23. On either of the foregoing bases, and certainly on both in combination, I would in any event exercise my discretion in the context of the remedy of judicial review to refuse relief to the applicant, even if I was otherwise minded to grant relief, which I am not.

Order

24. For the foregoing reasons, which while independent of each other are mutually reinforcing, I will order:-

(i) that the application be dismissed; and

(ii) that (as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to the proceedings) the applicant be heard on any consequential application in this regard.