Neutral Citation 2012 [IEHC] 529

THE HIGH COURT

[2010 No. 1508JR]

BETWEEN

MM (GEORGIA)

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 19th September, 2011

1. In this application for leave to apply for judicial review, the applicant, a Georgian national, seeks to challenge the validity of a deportation order made on 27th July 2010. There is but a single ground of challenge, namely, that there is no evidence that the applicant was ever properly served with any proposal to deport him pursuant to s. 3(3) of the Immigration Act 1999 ("the 1999 Act")

2. The applicant arrived in the State towards the end of 1999. He then made an application for asylum in January, 2000. This application was ultimately refused by a decision of the Refugee Appeals Tribunal in July, 2003. At the end of October, 2003 the applicant received notice from the Minister for Justice, Equality and Law Reform of a proposal to deport him. For some reason there was a hiatus between the notification of this proposal and the ultimate making of the initial deportation order in July, 2007. This order was the subject of a challenge in judicial review proceedings, but these proceedings were ultimately settled. In the wake of this the applicant was given permission to remain in the State, but this permission expired in April 2010.

3. In the meantime the applicant was convicted of a theft offence by the Roscommon District Court in December, 2009 and he was sentenced to nine months' imprisonment. The net issue now is whether the applicant was properly served with a fresh proposal to deport dated the 12th May, 2010, while he was serving this prison sentence at Cloverhill Prison in May, 2010. If he was never properly served with the proposal to deport, then, in principle at least, the deportation order which was ultimately made on 27th July, 2010, cannot stand, not least since a statutory perquisite to the valid making of a deportation order has not been complied with.

Section 3(6) of the 1999 Act

4. The rules regarding the services of notices under the 1999 Act is contained in s. 3(6) of that Act. This provides:-

> "Where a notice is required or authorised by or under this Act to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in some one of the following ways:
>
> (a) where it is addressed to him or her by name, by delivering it to him or her, or
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> (b) by sending it by post in a prepaid registered letter, or by any other form of recorded delivery service prescribed by the Minister, addressed to him or her at the address most recently furnished by him or her to the Minister or, in a case in which an address for service has been furnished, at that address."

5. Section 25 of the Interpretation Act 2005 ("the 2005 Act') is also of potential relevance:-

> "Where an enactment authorises or requires a document to be served by post, by using the word "serve", "give", "deliver", "send" or any other word or expression, the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

6. It is for the Minister to establish on the balance of probabilities that the notice proposing to deport him was served in the manner prescribed by law. It is not in dispute but that the applicant was serving a custodial sentence in Cloverhill Prison at the time. Accordingly, the question is whether the evidence establishes that one or other of the statutory modes of service was complied with.

7. It is clear that the Minister sent the letter of 12th May, 2010, to two separate addresses, namely, Cloverhill Prison and Refugee Legal Services, as they were the last known legal advisers of the applicant. The Refugee Legal Service returned the correspondence immediately, saying that they were no longer authorised to act for the respondent.

8. So far as the letter to Cloverhill Prison is concerned, it is agreed that the letter was not delivered personally to him. The applicant maintains that he never received the letter, whereas the evidence from the Prison Service is to the contrary effect. Mr. John Tobin, who is the Chief Officer at Cloverhill Prison, has sworn an affidavit in which he exhibits the delivery docket for the letter at the prison. He also pointed to the fact that the letter is on the applicant's own prison file and he continued by saying:-

> "I am personally familiar with the procedures for dealing with post for prisoners at Cloverhill Prison. I believe that a copy would not appear on the file unless the original had issued to the inmate concerned, i.e., the applicant concerned."

Can the Minister rely on section 3(6)(a)?

9. The first question is whether the Minister can demonstrate that the applicant was served in the manner envisaged by s. 3(6)(a). ft seems clear from the actual language of the sub-section ("....by delivering it to him or her..."), taken together with the contrasting

language used in s. 3(6)(a) and s. 3(6)(b) that the former contemplates and requires proof of *personal service* on the person affected by the notice.

10. Nor is any provision made by s. 3(6)(a) for any form of substituted service or for some alternative means of service. In these circumstances, in order to come within the terms of s. 3(6)(a), it would be incumbent upon the Minister to show that it was actually delivered to the applicant in person. Even if one takes the Minister's case at its highest, this cannot actually be established. The respondent can at most demonstrate that it is probable that this occurred and that the applicant received the letter as a result. But there is no evidence which would satisfy the requirements of s.3(6)(a) to show that the applicant was actually served with that document in person in accordance with the requirements of that sub-section.

11. Nor has s. 25 of the 2005 Act any relevance to the construction of this subsection, since the former provision deals with the service of documents by *post*. Section 3(6)(a) on the other hand deals with the service of documents *in person*.

Can the Minister rely on s. 3(6)(b)?

12. Turning now to a consideration of s. 3(6)(b), it is necessary for the Minister to show that the letter of the 12th May, 2010, was sent to the most recent address furnished by the applicant or, alternatively, to an address for service which was furnished by him by way of alternative. So far as can be ascertained, the last place of address of the applicant which was furnished by him within the meaning of this subsection was one which was supplied by him to the Refugee Applications Commissioner on the 24th March, 2003, namely, Flat 1, 38 New Cabra Road, Phibsboro, Dublin 7.

13. This address was furnished by the applicant by means of a change of address form. The proposal to deport letter of the 12th May, 2010, was not, however, sent to that address. It is true that the applicant availed of at least one subsequent address namely, 34 Annesley Place, Fairview, Dublin 3. The Minister had corresponded with the applicant at that address then by letter of the 27th April, 2009, when he was informed that he had been given permission to remain in the State for one further year. It may be, of course, that by engaging in correspondence with the Minister in this fashion, the applicant- perhaps tacitly or impliedly- might be taken to have furnished an address for service to the Minister for the purpose of s. 3(6)(b). The fact remains that the letter of the 12th May, 2010, was never sent to that address.

14. There is, of course, no doubt that an applicant for refugee status may designate the address of his solicitor as the address for service for the purpose of s. 3(6)(b). There is, however, no evidence to suggest that the applicant had ever so designated the Refugee Legal Services for this purpose. Even if there was - which I frankly doubt - this was immediately contra-indicated by the fact that the Refugee Legal Services immediately wrote back to the Minister on the 13th May, 2010, stating that they had no instructions to act on behalf of the applicant. That letter ought to have put the Minister on notice of the fact that the applicant had not designated the Refugee Legal Service as an alternative address for service within the meaning of s. 3(6)(b) or, at least, that service at this address could no longer be so regarded for that purpose.

15. In the circumstances, it seems to me that the Minister cannot establish that the notice of intention to deport - which was to be communicated by letter dated the 12th May, 2010- was ever served on the applicant in the manner required by either s. 3(6)(a) or s. 3(6)(b). Proof of service according to the terms of s. 3(6) is, of course, an integral feature of the entire deportation system. This is underscored by complementary provisions of the 1999 Act itself. Thus, for example, s. 3(3)(a) provides in relevant part that:-

> "...where the Minister proposes to make a deportation order he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it..."

16. Given that a deportation order is of fundamental and far reaching importance to any applicant, it is vital that there is fundamental compliance with these procedural requirements as prescribed by statute. For these reasons, failure to demonstrate that an applicant had been served with a notice of an intention to deport in accordance with s. 3(6) is so fundamental that this Court could not permit any subsequent deportation order to stand, at least absent quite special circumstances.

17. The *locus classicus* so far as the effect of any failure to comply with the procedural requirements of this nature rescribed by statute is, of course, the judgment of Henchy J. in *Monaghan UDC v. Alf-A-Bet Promotions Ltd*. (1980) I.L.R.M. 64, at 68-9, where he held as follows:-

> "...when the (Local Government (Planning and Development) Act 1963] prescribed certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or a1lowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with." (Emphasis added)

18. As we have already observed, proof of service of a document as central to the deportation process as a notice of a proposal to deport the applicant is deemed by the 1999 Act to be mandatory. In these circumstances, it is hard to see how the failure to comply with this requirement can be regard as trivial or insubstantial when measured against this statutory context. This is underscored by contemporary Supreme Court authority which stresses the importance of adhering to such procedural requirements in cases with implications for personal rights: see, *e.g.*, the judgment of Denham J. in *Fitzwilton Ltd v. Mahon* (2007) IESC 27, [2008] 1 I.R. 712 and the judgment of Fennelly J. in *Walsh v. Garda Siochana Complaints Board* [2010] IESC 2.

Should the applicant be granted an extension of time?

19. It is not in dispute but that notice of the making of the deportation order was received by the applicant on 16th August, 2010. By this stage he had been released from custody. On the applicant's version of events he was taken aback by the making of the order of which - he contends - he had no prior notice. He immediately sought the advice of the Refugee Legal Service who then commenced correspondence with the respondent regarding copies of the applicant's file. Some further short delay ensued and at one point the wrong deportation order (*i.e.*, the order of 2003 rather than the order of 2010) was copied to the Refugee Legal Service. In late

October, 2010 a legal aid certificate was refused and the applicant was obliged to seek assistance from another firm of private solicitors. The applicant's file had to be copied and counsel instructed. The proceedings commenced on 2nd December, 2010.

20. To my mind, the applicant moved as quickly as was reasonably possible in the circumstances of his own case. Objection is, however, taken that the applicant did not expressly aver that he formed the intention of challenging the deportation order within the 14 day period. Counsel for the Minister, Ms. Stack stressed in her submissions that the applicant had not demonstrated that he had formed any intention to challenge the order on the basis of the non-receipt of the proposed letter.

21. I cannot, however, interpret the applicant's conduct from the moment he received the deportation order on 16th August, 2010, as anything other than a determination to challenge the validity of that order on such grounds as he might be advised. In these circumstances, I consider that the applicant had formed the requisite intention to take appropriate proceedings within the 14 day period. I will accordingly make an order extending time in favour of the applicant Conclusions

22. For these reasons, I consider that the applicant has established substantial grounds within the meaning of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, to challenge the validity of the deportation order made by the Minister in August, 2010.