Neutral Citation [2013] IEHC 186

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 286 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999, THE CONSTITUION, THE ECHR AND THE CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

BETWEEN

MOHAMMAD KHAN AND VICTORIA KHAN (NEE ASHMORE)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND GOVERNOR OF CLOVERHILL PRISON

RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 23rd day of April, 2013

This is an interlocutory application to restrain the deportation of the first named applicant in these proceedings, Mr. Mohammad Khan, who is married to Mrs. Victoria Khan, the second named applicant.

This case first came before me on Friday 19th April by way of an application for an interim injunction to restrain a deportation pending the outcome of an application pursuant to section 3 (11) of the Immigration Act 1999, to revoke the deportation order in suit. I granted an *ex parte* interim order returnable to today and I also granted leave to seek judicial review. I will attach that ruling and the reasons for the grant of that interim injunction and the concerns I had about the nature of the proceedings to a typed version of this decision.

At that stage, as at this stage, there was no application before the court to challenge the validity of the deportation order. The matter, when it came back before me today, was accompanied by an application to amend the proceedings (in respect of which I granted leave last Friday) to include the respondent's decision taken yesterday to refuse to revoke the deportation order. Having heard counsel over a number of hours, both in respect of the merits of his application for interlocutory relief and on the application to amend his proceedings, I have granted leave to seek judicial review of the decision to refuse to revoke the deportation order. I think it is on the back of that leave application, as a matter of procedural propriety that the interlocutory relief was moved.

The applicant in this case was born in Pakistan in 1985, and he arrived in Ireland in February 2007. He had permission to remain in the State to pursue educational endeavours until 1st January, 2009. He claimed asylum in Ireland on 26th May, 2009, and his asylum claim was rejected by a decision dated 14th December, 2009, which was communicated to him on 28th January, 2010. On the same date, and I think by the same letter, it was indicated to the applicant that the State proposed to deport him but he was invited to make submissions in respect of this matter.

The applicant subsequently applied for subsidiary protection. This application was refused by a decision dated 5th October, 2012. In the intervening time, there had been some significant developments in Mr. Khan's life. The first and most important of these is that he met and formed a romantic relationship with Mrs. Khan. According to his affidavit and to letters sent to the Minister in support of the revocation application from two of his friends, he has been romantically involved with Mrs. Khan since the summer of 2010. That is some time after he had made his original reply to the proposal by the State authorities to deport him. Therefore, there was a significant change in his circumstances in the summer of 2010.

In the summer of 2012, his relationship with Mrs. Khan had advanced to such a state that they became engaged and made an appointment with the Registrar of Marriages for the purposes of seeking a date for their marriage. That happened in the late summer of 2012, and by late September or early October 2012, they had been informed that their wedding date would be 11th January, 2013. They were therefore aware of their wedding date prior to 1st November, 2012, that being the date on which the Minister informed the applicant that his submissions in respect of the proposed deportation were to be refused and that he would be deported.

The applicant married the second named applicant on 13th January, 2013, and approximately two weeks later, an application was made to revoke the deportation order.

The application to revoke the deportation order was made by the Refugee Legal Service and one of the grounds they identified as the basis for the revocation is that there was an error of law and an error of fact in the decision of the Minister. This referred to the finding by the Minister and/or his officials that Mr. Khan was single and that he had a particular set of family circumstances. The Minister does not refer in any way to his romantic relationship with Mrs. Khan.

The first named applicant insists that he informed the Refugee Legal Service of the relationship with the woman who is now his wife and that he also informed the Refugee Legal Service that he was engaged to be married to an Irish citizen. For reasons which are not explained to this court at this stage of the proceedings, the Refugee Legal Service did not make clear to the Minister in an amended submission of any sort that the applicant's situation had dramatically changed and that he was now engaged to be married. A letter was sent to the Minister indicating that he was to be married or that he had a fiancé, but not that he was to be married on a particular date and not that he was getting married to an Irish citizen.

It is a peculiar feature of this case that when Mr. Khan received the decision to deport him dated 1st November, 2012, that three months elapsed before an application for revocation was made. I say that it is a peculiar circumstance of the case because the single most important circumstance which could possibly have been entertained by the Minister in considering his deportation appeared not

to have been addressed by the Minister. One cannot but wonder why immediate action of some sort was not taken, either by him or by his legal advisors when this error was noted. Instead, a lengthy period of three months elapsed before anything was done about what was, according to Mr. Khan, a significant mistake, either on the part of his lawyers who had failed to tell the Minister, or by the Minister who had ignored a submission made to him based upon his new personal and family circumstances. Either way, the error was dramatic and nothing was done about it for three months. Instead, Mr. Khan got married. It was only subsequent to that event that he raised, for the first time with the Minister, the allegation that a dramatic mistake had been made.

Those are the background facts which have led to the application this evening to restrain the deportation of Mr. Khan. I emphasise that there is no challenge to the deportation order before the court.

In deciding at an interlocutory stage whether an injunction should be granted to restrain deportation, the High Court has the firm guidance of the Supreme Court in a decision entitled *Okunade v. Minister for Justice* [2012] IESC 49. This is a recent decision of the Supreme Court where it examined the principles which apply on an application for interlocutory relief in the context of judicial review proceedings. The court has set out the fundamental principles which apply. These are a fresh take on the standard *Campus Oil* principles which govern injunctions in the private law sphere. The matter was put, pithily, by Clarke J. when he said at para. 9.42, as follows:

> "As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-
>
> (a) The court should first determine whether the applicant has established an arguable case; if not, the application must be refused, but if so, then;
>
> (b) The court should consider where the greatest risk of injustice would lie."

Clarke J. goes on to say that when undertaking that particular exercise a number of different factors are set out for consideration.

In the case which the Supreme Court was dealing with, the matter which was sought to be enjoined was also a deportation order. In applying the principles that the Supreme Court itself had just addressed as the applicable ones in such circumstances, the Supreme Court concluded with reference to the immigration field, and in particular with respect to deportation orders as follows:

> "10.5 The default position is, therefore, that an applicant will not be entitled to a stay or an injunction [of a deportation order]. 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."

Therefore, the balancing exercise which IS required on an application for interlocutory relief in a judicial review context, and in particular where a restraint of a deportation order is sought, has already been carried out by the Supreme Court and it has held in clear terms that the default position is that deportations are not to be restrained pending the outcome of *inter partes* hearings on the validity or otherwise of the deportation order.

There is an exception to that default position. That exception is one which is expressed by the court as embracing, for example, a situation where there might be a disruption of family life "which has been established in Ireland for a significant period". This is at para. 10.8 of the Supreme Court judgment.

On the facts of the case before the Supreme Court, Clarke J. had regard to the impact that a deportation order would have, in particular, on one of the applicants for judicial review in that case: a four-year old child, born in Ireland, but a Nigerian citizen. Clarke J. expressed the matter as follows:

> "11.2 However, I feel that it is not possible, on the facts of this case, to overlook the fact that one of the applicants is a child of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial lapse of time involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and of sufficient resources. As pointed out earlier a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in favour of the granting a stay or an injunction."

My understanding of the law, as explained by the Supreme Court, is that in order for this particular deportation order to be restrained, strong countervailing arguments need to be addressed to the court. Where one is relying on disruption of family life, an applicant for an injunction must establish a significant disruption of family life and it must be of sufficient weight to tip the balance.

In this case, the special factors or the countervailing factors which counsel for the applicant has urged upon me as being sufficient to justify an injunction are, in the first instance, that the applicant and the second named applicant are married. In respect of that matter, I do have regard to Article 41 of the Constitution and the duty upon the State to have regard to the marital status of the applicants and the obligation to protect that relationship. However, I am not of the view that the mere fact that one is married is a sufficient countervailing factor to restrain a deportation order.

The other factors urged upon the court, were that the first named applicant has developed a close relationship with the children of his wife, who are not his own children and who are eight and ten years of age today. In particular, he has a close relationship with his stepson, Joshua.

The third factor urged upon the court is that Mrs. Khan has indicated that she is deeply distressed at the prospect of her husband being deported and feels at her wits end when she contemplates the circumstances that might follow his deportation. A short medical report has been submitted indicating anxiety and difficulty with sleeping on the part of the second named applicant. I understand that a sedative has been prescribed to the second named applicant to help her deal with this emotional distress which her General Practitioner has described. It has also been said to the court that these children enjoy a good relationship with their father from whom the second named applicant has been separated for a considerable number of years.

I bear in mind certain factors when I seek to answer the question whether sufficient countervailing circumstances have been addressed or have been explained to the court: first, the length of the marriage, and this marriage, it must be said, is not of long duration. Secondly, I bear in mind that unlike a situation in *Okunade*, there is no question of any children being deported in this case. There will, undoubtedly, be disruption to the relationship the children have formed with their mother's new husband, but they will not be deprived of their father.

I also bear in mind that it is a natural consequence of any deportation that people will be deeply upset at the disruption that such deportation will cause. I have regard to the manner in which such disruption was addressed by the Supreme Court in *Okunade*, where at paragraph 10.6, the court said as follows:

> "Furthermore, if an applicant can demonstrate that deportation, even on a temporary basis, would cause more than what one might describe as the ordinary disruption in being removed from a country in which the relevant applicant wished to live, such a particular risk to an individual or a specific risk of irremediable damage then such factors, if sufficiently weighty, could readily tilt the balance in favour of the grant of an injunction or a stay."

I have come to the conclusion that the disruption and the disadvantage which has been urged upon the court as being the countervailing circumstances which should displace the default position are not sufficiently weighty and are not of the order which would warrant this court interfering with a deportation, the legality or validity of which has never been challenged before this court.

In those circumstances, I refuse the application for an interlocutory injunction.

I have asked the parties how quickly it might be possible to bring these proceedings on for hearing. It seems to me that in a case which will involve legal argument in the main with no great dispute as to facts, that this is a matter which could be determined in little over a day and that the matter could be listed for hearing in between ten days and two weeks time. That is a factor which I have also borne in mind in deciding to refuse the application for the interlocutory relief, in that the disruption could be minimised provided an expeditious trial and delivery of judgment is achieved.

In order to minimise the disruption, if disruption there be, this court is willing to keep *seisin* of the matter to ensure expeditious determination of the proceedings so that if it be the case that a revocation order was unlawfully refused, that the disadvantage of that can be reversed in short order.

Stay Application Following Decision on Interlocutory Application:
Having given my judgment in this matter in the late evening, I am now asked to put a stay on the effect of my refusal pending an application for an appeal to the Supreme Court. This application was made in circumstances where I am informed that arrangements are in place to deport the applicant to Pakistan tomorrow morning.

It seems to me that there are certain principles which govern an application for a stay. The court's jurisdiction is discretionary. That discretion always has to be exercised in accordance with the principles of constitutional justice.

I have had regard to the decision of Clarke J. in *Dankse Bank v. Niall McFadden* [2010] IEHC 119 which is a decision dated 27th April, 2010, where he sets out the principles which apply on an application for a stay on a decision of the High Court, not on an interlocutory matter, but on a full hearing. Clarke J. sets out the principles which apply in those circumstances which are that a process analogous to the balance of convenience test on an interlocutory application is to be applied when deciding whether or not to grant a stay. This, in itself, is an interlocutory application and it seems to me that it would make a nonsense of what I have just been doing all day, namely assessing the balance of convenience and observing the law of the Supreme Court on an application for an interlocutory injunction, if I were to apply the same principles to whether my judgment should be stayed.

I have indicated in the judgment given that the Supreme Court has indicated what the default position is. I have decided that those principles effectively tie my hands and ensure that the effect of the deportation order, the validity of which has never been challenged and which has been extant since 1st November, 2012, should not be restrained.

I have decided that I must not undo the judgment I have just given.

I reject the argument made on behalf of the first named applicant that if I refuse a stay, his access to the Supreme Court will be set at nought. There is access to the Supreme Court whether I grant a stay or not, and if the Supreme Court, on hearing an application, takes the view that a mistaken interpretation of the law has been applied by me, then the effect of the deportation order can be undone. It is a matter of journeys and that is balanced against the arrangements which the State has put in place to deport the applicant on foot of a deportation order that was first mooted in 2010 to the applicant. So he has been fully aware of the possibility of deportation for many years at this stage. Nonetheless, having received a final decision on deportation, he decided to proceed with the marriage. Therefore, if there is difficulty and *extremis* caused by those circumstances, they are circumstances entirely of his making. But they can be undone if the Supreme Court takes the view that I have misapplied the law.

Therefore, I refuse the application for the stay.