Neutral Citation Number: [2011] IEHC 346

THE HIGH COURT

2011 8 JR

BETWEEN

M. M.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL (No.2)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 5th September, 2011

1. This application for an interlocutory injunction restraining the proposed deportation of the applicant to Rwanda arises in somewhat unusual circumstances. While this judgment should really be read in conjunction with my earlier judgment in this matter *(MM v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney* General, High Court, 18th May, 2011), the gist of these proceedings is that the applicant is a Rwandan refugee of Tutsi ethnicity who has unsuccessfully sought asylum in Ireland. He has contended that if returned to his home state he may be prosecuted before a military court for openly criticising the manner in which investigations into the 1994 genocide were being carried out.

2. Mr. M. obtained a visa in order to pursue a course of post-graduate legal study. He arrived in Ireland in 2006 and later graduated with an LL.M. from the Law Faculty in NUI, Galway in November, 2007. Mr. M. applied for asylum in May 2008, but this was ultimately rejected by the Refugee Appeal Tribunal in October 2008. He then applied for subsidiary protection, but this was refused by a decision of the Minister for Justice, Equality and Law Reform on 24th September, 2008.

3. Mr. M. then applied for leave to apply for judicial review and leave was granted by Cooke J. on 18th January, 2011. The substantive application was subsequently heard by me and I decided to refer one single question arising from the interpretation of Article 4(1) of Council Directive 2004/83/EC ("the Qualification Directive") to the Court of Justice pursuant to Article 267TFEU. In essence that question asks whether the obligation cast upon Member States by Article 4(1) to decide such applications in co-operation with the applicant means that the authorities of the Member States are under a duty to communicate with an applicant for international protection during the course of the assessment of an application. Specifically, it is contended by the applicant that in the event of a proposed decision which is adverse to an applicant this duty of co-operation means that the authorities are obliged to supply a draft decision in advance to such applicant for his or her comments and that, as this did not occur, the decision on his subsidiary protection application is therefore invalid.

4. In the course of my judgment I believe that I made it clear that I did not personally accept this argument and that I instead agreed with the views expressed on this very point by Birmingham J. in his judgment in *Ahmed v. Minister for Justice, Equality and Law Reform,* High Court, 24th March, 2011. However, given that in a 2007 decision the Dutch Council of State had (apparently) taken the opposite view of this question, I considered that, in the interests of avoid potentially conflicting interpretations between the courts of different Member States, it was then appropriate to make the reference sought. (The Dutch decision had not been brought to Birmingham J.'s attention in *Ahmed*.) This was the only reason why I made the reference sought.

5. The reference was coupled with a request pursuant to Article 104B of the rules of the Court of Justice requesting an urgent hearing. This request was, as it happens, refused by the Court. I had originally granted an order staying the applicant's deportation to Rwanda pending any decision on the Article 104B request. Now that that request has been refused, the question of whether an interlocutory injunction should be granted falls to be re-considered. I propose now to re-visit this issue by applying the standard Campus Oil principles (*Campus Oil Ltd. v. Minister for Industry and Commerce (No.2)* [1983] I.R. 88). As the question, however, of damages as an adequate remedy does not arise, the case really turns on the question of whether there is, first, a fair question to be tried and, second, an examination of the balance of convenience.

Is there a fair question to be raised?

6. While the situation here is somewhat unusual in that following a full hearing I have rejected the applicant's arguments, I am nevertheless of the view that the applicant satisfies the first limb of the *Campus Oil* test and that he has demonstrated that there is a fair question to be determined. If nothing else, the fact that there are conflicting judicial views on the question of the interpretation of Article 4(1) of the Qualification Directive in (at least) two different Member States is itself evidence of the fact that the issue presents a *dubium* which requires to be determined by the Court of Justice. Nor would I have made a reference if I were of the view that the issue presented was not of substance, irrespective of any conclusions I might personally have arrived at on the issue.

Balance of convenience

7. So far as the balance of convenience is concerned, there are cross-currents of advantage and disadvantage, irrespective of whatever view is taken. Generally speaking, it would be preferable if a litigant in the situation of Mr. M. should remain in the State pending the outcome of the Court of Justice's decision. While I accept that his personal input into the preparation for the hearing is likely to be slight - even if allowance is made for the fact that he is also legally qualified - nonetheless the practice of national courts has generally been to strive to maintain the existing status quo pending the outcome of the decision on the reference. Were an applicant in such a situation to be returned to his home state by the authorities of the state in which he claimed international protection pending the outcome of such a reference, it might tend to give such a reference a certain air of unreality, which perhaps might raise the suspicion that the underlying proceedings were in reality moot or spent. Absent compelling reasons to the contrary, therefore, it is convenient that the existing position should remain undisturbed pending the outcome of the Court's decision.

8. There are, however, certain factors which pull in the opposite direction. In the first place, Mr. M.'s asylum claim has been thoroughly rejected on credibility grounds and no challenge has been taken to that decision. It bears remarking that the subsidiary

protection decision relies heavily on that earlier decision. It is also true that, judged by reference to the credibility assessment conducted in respect of the asylum claim which was never challenged in legal proceedings, there would appear to be little prospect that Mr. M. will, in fact, suffer persecution if returned to Rwanda. Of course, it would be futile to pretend that the legal and human rights protections available in practice in Rwanda come anywhere near meeting the norms to which the citizens in this State are accustomed. It may well be, as was strenuously contended during the hearing on this application, that certain prominent opposition politicians, political activists and journalists have been targeted by the Rwandan Government. One may also accept that Rwandan legislation dealing with "genocide ideology" and kindred matters may present real and pressing free speech issues. Nevertheless, in view of these adverse credibility findings concerning the applicant's asylum claim, I think that I am bound to proceed on the assumption that the applicant will not come to serious harm if so returned to Rwanda.

9. Second, there is the fact that Mr. M.'s presence here constitutes a drain on State resources, at a time when, by reason of economic factors which are all too painfully obvious, the State can ill afford such dependency. Related to this is the fact that many other similarly situated applicants are likely to raise this point. This may lead to a situation where, should this injunction be granted, many other litigants will also seek such protection.

Conclusions

10. Not without some hesitation, I have ultimately concluded that these considerations do not displace the strong presumption in favour of preserving the existing *status quo*. If no such relief were granted so far as the present case is concerned and the applicant is returned to Rwanda, there might be at least a perception that the outcome of the reference was thereby rendered somehow purely hypothetical and was reduced to the status of a moot or an advisory opinion. For that reason in particular, I will therefore grant the interlocutory relief thereby sought restraining the deportation of the applicant pending the outcome of the reference to the Court of Justice.

11. I accept that this result is in many respects unsatisfactory so far as the respondents in particular are concerned. To that end, however, I propose to transmit a copy of this judgment to the Registrar of the Court of Justice along with a request that that Court might, in view of the interlocutory relief which I have now granted, accelerate - if at all possible - the hearing of this reference, the refusal of the Article 104B request notwithstanding.