Neutral Citation [2016] IEHC 733

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 8 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, AS AMENDED

BETWEEN

R.G.

S.G.

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of November, 2016

Issues

1. The issue before the Court is as to whether or not s. 4(1) of the Immigration Act 2004 applies to the instant applicants as, if it does; insufficient reasons were afforded by a decision of the respondent of the 8th January, 2016. However, if s. 4(1) does not apply, the reasons afforded in the letter of 8th January, 2016 are satisfactory. In the event that I find that a valid application was made under s. 4 of the 2004 Act then it is agreed I must go on to consider whether or not I will exercise my discretion having regard to the activities of the applicants.

Background

2. The applicants are a married couple from Mauritius. The second named applicant has not contended that she was ever within the jurisdiction prior to in or about August, 2013 when both parties arrived in the jurisdiction via Belfast without a visa or without permission anticipated under s. 4 of the 2004 Act. Subsequently they each applied for permission under s. 4 as aforesaid by letters of 20th October, 2015. Both applications are grounded upon the affidavit of the first named applicant sworn on 8th January, 2016.

3. The first named applicant was previously validly in the jurisdiction as and from January, 2007 until in or about 3rd February, 2012 when his leave expired. He returned to Mauritius in February, 2012 and in November, 2012 married the second named applicant. It appears from the affidavit that the parties intended to emigrate to Canada but ran into some difficulty. Because of an unsatisfactory residential circumstance within Mauritius they resolved to go to Europe and they did so, as aforesaid, in or about August, 2013. The respondent complains that there are no documents whatsoever to establish the veracity of the content of either the first named applicant's affidavit aforesaid or the applications on behalf of both applicants of 20th October, 2015. As part of his application under the heading of "employment prospects" in the letter of 20th October, 2015 on behalf of the first named applicant it is suggested that his former employer would have no hesitation in reemploying him should his application be successful. In addition the preceding paragraph states: "Mr. Gunnack has demonstrated a desire to aid his employment prospects …" Certainly the impression afforded from a perusal of the documentation on behalf of the first named applicant suggests that notwithstanding that he is in the jurisdiction since August, 2013 he has not been working. The foregoing notwithstanding it appears from a letter from the Department of Social Protection that in fact he had been working for a full 19 weeks in 2013 and full-time in both 2014 and 2015.

4. By an application bearing date 20th October, 2015, each of the applicants herein separately applied to the respondent for a change in their respective immigration status and to have permission to remain regularised on Stamp 4 conditions. The heading of both applications is an application for permission to remain pursuant to s. 4 of the Immigration Act 2004. The respondent responded to the applications aforesaid by a letter of 8th January, 2016 to the effect that the position was that the provisions of the Act were not applicable to the applicants' cases as they were not originally permitted to land in the State under s. 4 of the Act when they entered the State in 2013. The letter went on to state that the position of the applicants in the State would be dealt with under s. 3(6) of the Immigration Act 1999, as amended and s. 5 of the Refugee Act 1996, as amended. The letter states that all representations submitted would be considered before a final decision is made.

5. The applicant asserts that the application was properly made under s. 4 of the 2004 Act and specifically under s. 4(1) thereof and that insufficient reasons were afforded by the respondent for rejecting the application. The respondent suggests that s. 4(1) was not engaged in all of the circumstances and therefore the reasons afforded in the letter were sufficient.

Section 4 Considerations

6. In submissions the applicants state that they have never claimed to have been lawfully residing or have lawfully entered the State since thy arrived in August, 2013. The submissions in writing afforded in advance of the hearing in the main concentrated on the obligation to give reasons. Such an obligation in the context of a proper application under s. 4 is not denied by the respondent. The respondent's position is simply that s. 4 is not engaged in the circumstances of the applicants' coming to and residing in Ireland since August, 2013 without permission and without a visa which would be required for nationals from Mauritius.

7. Section 4 (1) of the Act provides:-

> "Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission")."

8. Under s. 4(7) a permission may be renewed or varied by the Minister or by an Immigration Officer on his or her behalf.

9. Section 5(1) provides:-

> "No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister."

Subsection 2 goes on to provide that a non-national who is in the State in contravention of subs. 1 is unlawfully present in the State.

10. Counsel on behalf of the applicant suggested that, save for the exceptions provided by the legislation (which would not cover the instant applicants); all non-nationals require permission under the Act. In this regard the applicant relies on two judgments of Cooke J., namely *O'Leary v. Minister for Justice* [2012] IEHC 80 and *Saleem v. Minister for Justice* [2011] 2 I.R. 386 to support the proposition that because of the provisions of s. 5(1) aforesaid permission must be within the confines of the 2004 Act.

11. When pressed on the matter as to whether or not it was being asserted on behalf of the applicant that there was no executive power outside the scope of the Act to afford permission the applicants' counsel admitted that residual executive power did remain. Indeed the applicant also acknowledges the respondent's contention to the effect that several permissions are afforded to non-nationals outside the scope of the 2004 Act (notwithstanding that they do not come within the exceptions therein identified) for example parties with rights identified by EU jurisprudence (including a non-national parent of an infant Irish citizen where the infant is dependent emotionally or financially on that parent). Furthermore the applicant acknowledges that in the case of *Sulaimon v. Minister for Justice* [2012] IESC 63 it was indicated that it would be interesting to ascertain the extent of the remaining executive power vested in the Minister outside the scope of the 2004 Act. This in and of itself acknowledges that not all permissions for non-nationals, excluding the excepted categories, are derived under the provisions of the 2004 Act.

12. The respondent refers to the case of *Hussein v. Minister for Justice* [2015] IESC 104. In that case one of the points of law certified was as to whether or not the respondent retained an executive power notwithstanding the provisions of ss. 4 and 5 of the 2004 Act to operate schemes for the grant of permission to be or remain in the State which are not subject to the said provisions. It appears that it was not possible to pursue this argument because of a lack of evidence in the case. However the respondent nevertheless relies on the case on the basis that it was held that the immigration officer's decision under s. 4(1) is one taken in advance of the non-national's first legal entry into the State whereas the Minister's decision (under s. 4(7)) relates to a decision as to whether or not to vary the conditions of permission to remain in the State.

13. In the *Sulaimon* decision aforesaid Hardiman J., at para. 81 of his judgment, states:-

> *"Section 4 certainly creates a power in an immigration officer to grant a permission "on behalf of the Minister". To judge from the context and, most obviously, the shoulder note, this envisages a permission granted by an official at a seaport or airport and in no way trenches on the Minister's inherent or statutory power to grant such permission."*

14. The respondent also refers to the Court of Appeal decision in the case of *A.B. & Ors. v. Minister for Justice and Equality & Ors.* [2016] IECA 48. Essentially the case is being relied upon in support of the proposition that just because the applicants have made an application under s. 4 on the 20th October, 2015 this does not preclude the respondent from issuing a notice of intention to deport under s. 3 of the Immigration Act, 1999.

15. In the case of *Dike and Duru v. Minister for Justice and Equality* (unreported, High Court, 23rd February 2016) Faherty J. held at para. 105 of her judgment that Sulaimon is authority for the proposition that the permission on foot of the executive function of the respondent such as that in issue in the present case is not to be found in s. 4(1) of the 2004 Act. The Court also held at para. 104 of the judgment that the decision under challenge was not one made by an immigration officer to which s. 4(1) refers. Nor did the applicant apply to the respondent for a renewal or a variation of a permission under s. 4(7) but rather sought "a formal permission to reside in the State based on her dependency on the second named applicant" which is not provided for by statute but which may be granted by the respondent in the exercise of her executive power as already referred to.

16. I am satisfied therefore that based on the foregoing the Minister does retain certain executive powers to grant permission and not all permissions for non-nationals, even excluding the excepted categories referred to in the 2004 Act, will be given to a non-national under the provisions of the 2004 Act.

17. Furthermore, I am satisfied that having regard to the foregoing and in particular the Court of Appeal decision in A.B. & Ors. referred to above that just because the applicants made an application on 20th October, 2015, this did not in fact suspend the right of the Minister to issue an intention to deport letter under s. 3 of the 1999 Act. The respondent makes the valid point that if such an application were to suspend the right of the Minister under s. 3, theoretically it might be the case that the Minister might never make a deportation order because of successive applications brought notwithstanding that they may be unmeritorious.

18. The respondent refers to the long title of the Immigration Act 2004 which commences with:-

> "An Act to make provision, in the interests of the common good, for the control of entry into the State …"

19. Under s. 4(2) of the 2004 Act it is provided that a non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.

20. Under s. 4(5)(a) it is provided that an immigration officer may, on behalf of the Minister, examine a non-national arriving in the State otherwise than by sea or air for the purpose of determining whether he or she should be given a permission.

21. It appears to me having regard to the foregoing that clearly a non-national, other than the accepted categories within the provisions of the 2004 Act arriving in the State by sea or air is obliged on arrival to present himself or herself to an immigration officer and apply for a permission. Furthermore, I am satisfied that having regard to s. 4(5)(a) where a party is arriving in the State otherwise than by sea or air, that is the time when an application might be made for the relevant permission provided for by s. 4(1). In this regard I am persuaded that by using the phrase "arriving in the State" being the present tense, s. 4(5)(a) is not dealing with a set of circumstances where the non-national is in the State without permission for in excess of two years such as in the instance case.

22. Given the foregoing, therefore, I am of the view that any permission which the instant applicants might in fact apply for and secure is not the type of permission anticipated under s. 4(1) of the 2004 Act.

The Discretionary Nature of Judicial Review

23. Arguments were presented by both parties as to whether or not I should exercise my discretion in favour of the applicant even if I was of the view that the applicants were correct in applying under s. 4(1) for the permission they would require to remain in the State. In this regard it was accepted by the State that if the procedure and application undertaken by the applicants was correct the reasons for rejecting the application was insufficient (the State merely suggested that the reasons afforded in the letter of 8th January, 2016 were sufficient in circumstances where the Minister was correct to say that s. 4 was not engaged in the

circumstances).

24. The applicant argues that neither have a criminal offence, the first named applicant has a job and if refused permission the applicants would be left in a limbo situation for years (this latter mentioned argument put forward notwithstanding that the applicants' application did not incorporate a suggestion that they were entitled to permission under s. 4 but rather that they were entitled to a consideration of their application under s. 4(1))

25. The respondent counters by referring to the fact that the first named applicant in particular was familiar with the need to secure a visa and/or permission; that both applicants were aware of the need to secure formal authority, for example to emigrate to Canada, that the parties have in fact committed a criminal offence under s. 6(4) of the 2004 Act and are further in breach of s. 17 of the 2004 Act. Finally, the respondent refers to the fact that the first named applicant is working illegally within the jurisdiction.

26. In the circumstances I am satisfied that this is a case in which I should not afford the relief of judicial review even if the applicants were correct in their assertion that the permission required by them did fall to be considered under s. 4(1) of the 2004 Act. In this regard I adopt the views of Humphreys J. in the case of *Li & Anor. v. Minister for Justice and Equality* [2015] IEHC 638, being a judgment of 21st October, 2015. At paras. 86 – 88 the Court refers to factors which might persuade a court not to grant the relevant relief being:-

a. the applicants' disregard of the immigration system;

b. the fact that the applicants could have pursued their action quite effectively from outside of the State;

c. that the concept of continuing effect as referred to by the Supreme Court in the case of *O'Keeffe v. Connellan* [2009] 3 I.R. 643 does not arise as in the letter of 8th January, 2016 the Minister did not finally determine the position of the applicants in this jurisdiction.

Conclusion

27. In the light of all of the foregoing I am satisfied that the type of permission required by the applicants in the instant circumstances does not arise under s. 4(1) of the 2004 Act and even if it did the circumstances are such that I would exercise my discretion not to afford judicial review to quash the letter of 8th January, 2016.

28. Furthermore, I am satisfied that the application of 20th October, 2015 did not suspend the entitlement of the respondent to serve notice of intention to deport under s. 3 of the 1999 Act and therefore the applicants have failed to make out sufficient grounds to quash the decision of the 16th December, 2015 of the respondent.