THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 286

2017 No. 485

Finlay Geoghegan J.
Peart J.
Hogan J.

IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN/

J.A. (CAMEROON)

APPLICANT /

APPELLANT

- AND -

THE GOVERNOR OF CLOVERHILL PRISON

AND THE ATTORNEY GENERAL

RESPONDENTS /

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of October 2017

1. This motion presents an application for an interlocutory injunction in which the applicant, Mr. J.A., ("Mr. A.") seeks an order restraining his deportation to his native Cameroon. The deportation is scheduled to take effect on this coming Sunday, 29th October 2017. The appeal in which the application is made is an appeal from orders of the High Court made on 20th October 2017 dismissing the application for the release of Mr.J.A. pursuant to Article 40.4.2 of the Constitution and refusing an injunction restraining his deportation pending determination of an appeal.

2. The applicant had originally arrived in the State in April 2008 whereupon he then applied for asylum. That application was refused and a deportation order was then made on 9th December 2010. There was no challenge to the deportation order. On the 11th January 2011 the applicant failed to present to the Garda National Immigration Bureau ("GNIB") and he evaded deportation for a period of over three years. In October 2011 he made a further application (while still an evader) for re-admission to the international protection process under s. 17(7) of the Refugee Act 1996. That application was refused on 7th November 2011. Mr. A. presented afresh to GNIB in April 2014 and in September 2014 he made an application for the revocation of the December 2010 deportation order in accordance with s. 3(11) of the Immigration Act 1999 ("the 1999 Act"). That application was then refused on 8th September 2016.

3. As it happens, the applicant made a further application under s. 3(11) of the 1999 Act on 7th September 2017. On 13th September 2017 the applicant was informed that arrangements had been made for his return to the Cameroon. On the same day Mr. A. made a further application for admission to the international protection process under s. 22 of the International Protection Act 2015 ("the 2015 Act").

4. The applicant was then arrested by members of An Garda Síochána on 14th September 2017 pursuant to s. 5 of the 1999 Act on the ground that he had failed to leave the State within the time specified in the deportation order. He was then conveyed to Cloverhill Prison where he currently remains in custody. On 22nd September 2017 Creedon J. made an order directing an inquiry into the legality of the applicant's detention pursuant to Article 40.4.2 of the Constitution. The substantive hearing of the Article 40 application was then heard by Humphreys J. on various dates in late September and October 2017.

5. In the first of three judgments which were to be delivered in this matter by Humphreys J., that judge rejected the principal contention advanced by Mr. A. to the effect that the s. 22 application had suspensive effect on his deportation so far as he was concerned, principally because he concluded on the facts of this case that this belated s. 22 application was itself abusive. Matters have since moved on since this first judgment was delivered on 25th September 2017 in that the s. 22 application was refused by decision dated the 28th September 2017. The s. 3(11) application was refused by decision dated 11th October 2017.

6. Returning now to the present litigation (the Article 40 inquiry), the applicant had also challenged the constitutionality of the arrest and detention powers contained in s. 5 of the 1999 Act as substituted by s. 78 of the 2015 Act and hence the legality of his detention. As is well known, s. 5 of the 1999 Act had been previously amended by s. 10 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act"). The constitutionality of this amended provision had been upheld by the Supreme Court following an Article 26 reference: *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. While it is true that the s. 5 powers (as thus amended by the 2000 Act) then enjoyed an immunity from further constitutional challenge by virtue of Article 34.3.3 in view of the Article 26 reference, the applicant contends that the Article 34.3.3 immunity no longer obtains in view of the fact that that version of s. 5 has been repealed and a new (albeit in many respects quite similar) version has been replaced by substitution by s. 78 of the 2015 Act.

7. In a comprehensive judgment delivered on 20th October 2017 Humphreys J. rejected a challenge to the constitutionality of s. 5 of the 1999 Act (as thus amended by substitution), albeit that he did hold with the applicant that the Article 34.3.3 immunity no longer obtained in view of the enactment of the 2015 Act and the replacement by substitution of the version of s. 5 which had been considered by the Supreme Court in the Article 26 reference. So far as the principal substantive constitutional argument was

concerned, Humphreys J. rejected the argument that the new version of s. 5 was not hedged in with sufficient safeguards. He further rejected the argument that the effect of the Supreme Court's decision in Damache v. Director of Public Prosecutions [2012] 2 I.R. 266 was to require that any arrest for the purposes of the eight week detention period prescribed by s. 5 of the 1999 Act (as so substituted) be accompanied by independent supervision. He held the detention of Mr. A to be lawful.

8. On the same day Humphreys J. rejected an application for an injunction in respect of the deportation order pending an appeal from his decision in the Article 40 inquiry. . The applicant has now lodged an appeal from the decisions in the Article 40 inquiry and sought an injunction restraining deportation pending determination of the appeal. Whilst the Attorney General had been joined by order of the High Court, the Minister for Justice and Equality is not a party to the proceedings. Notwithstanding, Counsel for the respondents indicated to the court that no objection was being taken to the application for an injunction on that ground.

9. This application presents a particular problem for the applicant in that there is no challenge to the validity of the deportation order; no challenge to any decision relating to his entitlement to remain in the State and the issues raised by the appeal no matter how resolved will not affect his entitlement to be in the State.

10. The leading authority in respect of the grant of injunctions pending appeals (albeit in the context of a judicial review of a deportation order) remains that of Clarke J. in *Okunade v. The Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152. The step by step approach to be adopted in an applications of this kind is helpfully summarised thus in paragraphs 4-6 of judgment in the headnote to *The Irish Reports*:

> "4. 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:-
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> (a) the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
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> (b) the court should consider where the greatest risk of injustice would lie. In doing so the court should:-
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> (i) give all appropriate weight to the orderly implementation of measures which were *prima facie* valid;
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> (ii) give such weight as was appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,
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> (iii) give appropriate weight (if any) to any additional factors which arose on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,
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> (iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;
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> (c) the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,
>
> (d) subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case."
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> "5. That significant weight needed to be attached to the implementation of decisions made in the immigration process which were *prima facie* valid. There was importance to the exercise by the State of its right to control its borders and implement an orderly immigration policy. *Meadows v. Minister for Justice* [2010] IESC 3,[2010] 2 I.R. 701 considered."
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> "6. That the disruption of family life which had been established in Ireland for a significant period of time was a material consideration for the court in deciding whether to grant a stay or an injunction restraining deportation pending the hearing of leave to seek judicial review. All due weight needed to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of the proceedings or any other process, the children concerned might be allowed to remain in or return to Ireland. On the facts, the trial judge erred in failing to afford sufficient weight to that factor."

11. If one endeavours to apply these principles to the present case, it must first be acknowledged that the applicant has raised weighty and important issues concerning the constitutionality of s. 5 of the 1999 Act (as so substituted) and the extent to which the Article 34.3.3 immunity continues to apply to that section as so substituted. To that extent it must be acknowledged that the applicant therefore satisfies the first limb of the *Okunade* test, namely, that of arguability of the appeal.

12. It must nevertheless be recalled even if s.5 were found to be unconstitutional in the manner alleged by the applicant or his detention unlawful for any other ground advanced, this would not affect the validity of the deportation order which is sought to be restrained in this application. This is a particularly important consideration in the present case because at the hearing of this appeal. Counsel for the applicant furthermore confirmed that there were no live immigration issues in play. The s. 22 and the s. 3(11) applications have already been determined by the Minister. An appeal has been lodged to the International Protection Appeals Tribunal from the s.22 decision, but it was not contended this entitled him to remain in the State.

13. Faced with this difficulty, counsel for Mr. A contended that it was important that he secure access to justice and that his constitutional right of access to the Court might while be jeopardised if he were not physically present in the State while his appeal was being prosecuted. She also submitted that there is a risk that the proceedings would be rendered moot if the applicant were to be deported pending his determination of the constitutional issue on this appeal.

14. There are, I think, several answers to these concerns. First, it is not necessary that the applicant - who is represented by a solicitor and counsel - should physically remain in the jurisdiction to prosecute this appeal. Second, there are many contemporary instances of where the Supreme Court and this Court has decided important points of law in immigration cases even though the cases were technically moot by the times such appeals were heard. Both the decision in *Okunade* and, more recently *N.H.V. v. The Minister for Justice and Equality* [2017] IESC 35, [2017] 2 I.L.R.M. 105 provide examples of where the Supreme Court determined important

points of immigration law even though the cases were otherwise technically moot. In *P. (I.) v. The Governor of Cloverhill Prison* [2016] IESC DET 145 ,the Supreme Court accepted an appeal in an Article 40 inquiry whilst refusing an injunction to restrain deportation of the applicant. The underlying reality is that given the shortness of the eight week detention period sanctioned by s. 5 of the 1999 Act, it is very unlikely that any challenge to the constitutionality of that legislation could finally be resolved within that statutory timeframe. This, in turn, along with the attitude taken by the Supreme Court in cases such as *P. (I.)*, *Okunade* and *NHV*, makes the risk that the courts would decline to pronounce on the merits of the substantive appeal rather unlikely, even if the appeal were otherwise to be rendered moot by reason of the applicant's release from custody.

15. A further consideration which must be mentioned is that Mr. A has no family ties in this jurisdiction. There are, accordingly, no third parties such as a spouse or children whose interests might otherwise deserve some consideration in this balancing exercise.

16. Weighing these factors in the round, I find myself concluding that in line with *Okunade*, the State's interest in pursuing the orderly deportation of this applicant is strong and has not been outweighed by other countervailing factors. No challenge has been brought to the underlying deportation order. If the applicant's compelled departure by deportation were to be delayed by the making of the order requested, there would be a real risk that the statutory deadline would expire on the 9th November 2017 without deportation and create significant practical difficulties for future deportations. All of these factors weigh against the granting of a stay or other similar order pending the outcome of his appeal.

17. No other factors which might weigh in the opposite direction are particularly strong. As I have already observed, it has been confirmed that the applicant needs to stay only for the purpose of securing access to the Courts. This, however, is scarcely a decisive factor in the present case as, since as I have already pointed out, the appeal can be pursued by his legal team even after the deportation order is put into effect.

18. In the course of the appeal it was explained that the applicant also intended to apply for a "leap frog" appeal from the High Court decisions of Humphreys J. directly to the Supreme Court pursuant to Article 34.5.4 of the Constitution. It does not seem that the applicant needs a stay to enable such an application to be pursued on his behalf by his legal representatives.

19. One final matter should be mentioned. It is true that in P*. (I.) v. The Governor of Cloverhill Prison* [2016] IESC DET 145, the Supreme Court indicated that in this type of case the State authorities should consider not executing a deportation order or, if they do, they must then "explain and justify such a decision". In the present case the respondents have explained why they are unwilling now to postpone the deportation in view of the realities of the 8 week time period and the applicant's previous poor immigration history of evasion and non-compliance with binding orders whose validity has not been disputed.

20. For my part, for all of the reasons set out in this judgment, I consider that the respondents have both explained and justified their decision to insist on proceeding with the planned deportation in the particular circumstances of this case.

Conclusions

21. For all of the reasons, I would refuse to grant the applicant an order restraining his deportation pending the outcome of his appeal