Neutral Citation [2016] IEHC 669

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 778 J.R.]

BETWEEN

A.P.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. The applicant arrived in the State in 2003 from Pakistan. He had work permits for limited periods, firstly up to June 2004, then from February to April, 2006; then from May, 2006 to May, 2007;from September to December, 2008; and finally from July to November, 2010. Thereafter however, he has been unlawfully present at all times.

2. A first deportation order was made against the applicant on 19th February, 2013.

3. The applicant was arrested and detained on foot of a deportation order on 19th April, 2013. His response to that development was to apply for asylum on 20th April, 2013. That application resulted in the revocation of the deportation order and the release of the applicant.

4. The application for asylum was refused by the commissioner and, on appeal, by the tribunal, on the basis of a lack of credibility on the part of the applicant.

5. On 28th January, 2014, he applied for subsidiary protection.

6. On 26th January, 2015, the applicant's solicitors wrote to the Minister and the commissioner, withdrawing the application for subsidiary protection and applying for leave to remain. Mr. Conor Power S.C. (with Mr. Paul O'Shea B.L.) on behalf of the applicant submits that this step was taken on the understanding of the applicant's solicitors that the policy was that such an application for leave to remain would be granted. If there was such an understanding, it was a unilateral one and not something that can visited upon the Minister.

7. On 14th April, 2015, the applicant completed and submitted a form entitled "*Withdrawal of Application for Subsidiary Protection*".

8. On 6th August, 2015, the Minister refused the application for subsidiary protection (a formal requirement where it has been withdrawn) and made a proposal to make a deportation order.

9. The second deportation order was made on 1st December, 2015, together with a refusal of the leave to remain application.

10. On 15th January, 2016, the applicant requested revocation of the deportation order, and contended that he was being treated differently from "*many persons in a like circumstance*". That correspondence confirmed that the advice to withdraw the application for subsidiary protection came from his solicitor and a number of members of his community.

11. On 29th June, 2016, the applicant sought to re-enter the subsidiary protection process.

12. On 11th July, 2016, the Minister referred that correspondence to the Commissioner who informed the applicant that he had no authority to reopen the process.

13. On 27th September, 2016, the applicant was arrested and detained by the GNIB on foot of the deportation order.

14. Simultaneously, the Minister wrote on 27th September, 2016, refusing the s. 3 (11) application. At 4.15 pm on 27th September, 2016, the applicant brought an Article 40 application [2016 No. 1053 S.S.] seeking an inquiry into his detention. The order directing an inquiry was granted, and ultimately the applicant was released on bail. The *ex parte* application was brought before Moriarty J. on 27th September, 2016; the substantive hearing was assigned to Twomey J. on 30th September, 2016, and then due to scheduling commitments was reassigned to MacEochaidh J. At the time of the making of the present application for leave to seek judicial review, the Article 40 inquiry was ongoing.

15. When the application for leave to seek judicial review of the s. 3 (11) decision and the present proceedings came before me, I directed that the respondents be put on notice and I have now also heard from Ms. Marjorie Farrelly S.C. (with Mr. Anthony Moore B.L.) on their behalf.

16. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

Section 5 of the Immigration Act 2000 cannot be circumvented by reframing a case as declaratory

17. In the applicant's amended statement of grounds as filed, eight separate reliefs are sought. Leaving aside an injunction, further and other relief and costs, the applicant seeks *certiorari* of the s. 3(11) decision and two declarations relating to an alleged entitlement to be notified of the date of deportation, and relating to a contention that the Minister is obliged to publish the principles on policies relating to leave to remain or revocation of deportation orders. The other two declarations, reliefs D (iv) and (v), were not pursued.

18. However it seems to me that declarations which have the effect of undermining the validity of a decision which of itself is subject

to the 2000 Act must also be made subject to the provisions of the Act. A party cannot circumvent the legislation simply by reframing his or her claim in declaratory terms (see my decision in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016). In fairness to Mr. Power, he did not dispute this proposition.

Are there substantial grounds to contend that the Minister is obliged to publish criteria for leave to remain decisions?
19. In June, 2015 the Working Group on Subsidiary Protection made a number of recommendations regarding outstanding long-term illegal immigrants. It appears from the Minister's decision in this case that the manner in which the recommendations of the working group are being interpreted by the executive is that the requirement for five years' presence in the State is being applied in terms of a requirement for five years' presence in the protection system. In the case of this applicant, he has been in the State for thirteen years, but in the protection process only for two years.

20. Mr. Power says that he only first understood that this was the interpretation being adopted when he received the s. 3(11) decision. He submits that by virtue of the U.K. Supreme Court decision in *Lumba v. Secretary of State for the Home Department* [2011] UKSC 12 and the High Court decision in *Luximon v. Minister for Justice and Equality* [2015] IEHC 227 (Unreported, High Court, Barr J., 20th March, 2015), currently under appeal to the Court of Appeal, there are substantial grounds for contending that the refusal to revoke the deportation is invalid. He submits that he would not have made the decision to withdraw his subsidiary protection application if he knew that he could defend it.

21. However there are a number of difficulties with this submission. Firstly the applicant is engaged in the last ditch attempt to prevent a deportation that arises in the s. 3(11) context. The applicant did not challenge the deportation order dated 1st December, 2015, and cannot under the guise of s. 3 (11) seek to revise by way of judicial review any point that could have been pressed at that stage. Any infirmity with the transparency of the scheme is just as relevant then as it is now.

22. Secondly it is not apparent that there is any valid jurisprudential basis to suggest that a person whose presence in the State is wholly unlawful and irregular and is relying on an *ad misericordiam* discretionary scheme has any entitlement to make the best possible case. The applicant was given notice of the intention to deport him and the opportunity to make submissions. He is not in a position where detention is being imposed on an unclear basis as in *Lumba* or where he has been granted a permit and is seeking to change permit status as in *Luximon.* This applicant also had the opportunity to make submissions seeking to revoke the order. Admittedly his submissions would have been better informed if he had more detailed information, but a person in the unlawful situation of the applicant is not engaging in a right- based process when seeking the revocation of a deportation order. That is a discretionary privilege (leaving aside issues such as the ECHR or *refoulement*). Under those circumstances, it has not been shown that there are substantial grounds to contend that there was any illegality in the refusal decision by reference to an absence of publication of criteria.

23. Finally, it is not the case that no criteria had been available. The working group report is a public document albeit that the applicant was not aware of the Minister's precise interpretation of it. While he may say that he has not been able to make the best possible case, he has not shown substantial grounds for the proposition that there is a legal entitlement to make the best possible case in a situation such as this.

Are there substantial grounds for contending that the applicant is entitled to notice of the specific time of his deportation?
24. The proposition that an applicant is entitled to notice of the precise time of his deportation was considered and rejected by me in *I.R.M. v. Minister for Justice and Equality*[2016] IEHC 478 (unreported, High Court, 29th July, 2016).

25. Mr. Power complains that the applicant was brought to the airport before he was notified of the revocation decision, but that is irrelevant because the s. 3(11) decision is not suspensive and therefore an applicant can be deported before such a decision is made.

26. In affidavit sworn on 1st November, 2016, at para. 25, Mr. James Boyle assistant principal in the department avers that

> *"I fear that were the Minister or the GNIB whose responsibility it is to enforce deportation orders oblige to notify non nationals subject to deportation orders of the date on which they intended to enforce those orders, the rate of evasion would increase and it would become difficult, perhaps impossible, to enforce proper immigration controls in respect of such persons".*

27. Mr. Power describes this as a bald assertion, but the risk referred to in that averment is only common sense. No substantial grounds have been shown to contend otherwise, or to displace the reasons given by me in *I.R.M*.

28. The applicant has been in the State for thirteen years and has been on notice of the deportation order since December, 2015. He did not apply to court for any purpose until 27th September, 2016. He has had ample opportunity to seek legal advice and seek access to the court. A line has to be drawn somewhere, and in *I.R.M.*, I indicated that enforcement of the order after the 28th day from its service would be lawful. That is not to categorically rule out enforcement before then in all circumstances. No substantial grounds have been shown to contend that the applicant should have yet a further opportunity to challenge his deportation (see *I.R.M*. at para. 34).

29. In *P.O. v. Minister for Justice* [2015] IESC 64(unreported, Supreme Court, (MacMenamin J.) 16th July, 2015), the applicants argued that the Minister had failed to disclose the official policy on the position of Nigerian children who had been born and raised in Ireland. It was contended that the Minister should have had guidelines in that regard which should have been disclosed. This submission was rejected by the Supreme Court having regard to the discretionary nature of the decision at issue, which accorded with the principle set down by the Supreme Court in *T.C. v. Minister for Justice* [2005] 4 I.R. 109. The absence of guidelines was held not to compromise the right of the applicants to be heard in relation to their revocation request.

30. Furthermore in the decision of Kearns P. in *Sivsivadze v. Minister for Justice* [2012] IEHC 244 (Unreported, High Court, 21st June 2012), an argument that s. 3 lacked principles and policies was rejected because the power to revoke a deportation order was held not to be a "*policy*" decision but rather one involving "*the exercise of a margin of appreciation related to the facts of individual cases. That discretion was clearly left by the Oireachtas to the Minister*".

Order.
31. For the foregoing reasons I will order:

> (i.) that the application for leave to seek judicial review be refused; and
>
> (ii.) that the matter be adjourned to enable any application for leave to appeal, which if made, should be on notice to the

respondents.