Neutral Citation: [2017] IEHC 609

THE HIGH COURT

[2017 1065 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

BETWEEN

J.A. (CAMEROON)

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

(NO.1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of September, 2017

1. The applicant arrived in Ireland from Cameroon in April, 2008 and unsuccessfully applied for asylum. A deportation order was made on 9th December, 2010. On the 11th January, 2011, the applicant failed to present to Garda National Immigration Bureau (GNIB) and evaded deportation for a period of over three years. On 10th October, 2011, while an evader, he made an application for readmission to the protection process under s. 17(7) of the Refugee Act 1996. That application was refused on 7th November, 2011. On 15th April, 2014, he presented again to GNIB and in September, 2014 he made a s. 3(11) application for revocation of the deportation order pursuant to the Immigration Act 1999. There followed an amount of correspondence which included a letter seeking residency on the 10th February, 2015 which seemed to have been part of the s. 3(11) application. On 8th September, 2016, the s. 3(11) application was refused.

2. However on 7th September, 2017, a further s. 3(11) application was made. On the 13th September, 2017, the applicant was advised that a flight had been booked for him to return, and on the same date an application was made for readmission to the protection process under s. 22 of the International Protection Act 2015. On 14th September, 2017, the applicant was arrested by Detective Sergeant Jonathan O'Brien at about 4:50 p.m. for the purpose of his deportation to Cameroon. The applicant declined to cooperate with his deportation. He spoke to his solicitor on the phone and D/Sergeant O'Brien and also then spoke to the applicant's solicitor who made reference to applications under s. 22 of the 2015 Act and s. 3(11) of the 1999 Act. D/Sergeant O'Brien contacted the GNIB who indicated there was no impediment to deportation. The applicant was conveyed to Cloverhill where he is currently in custody.

3. On the 22nd September, 2017 Creedon J. ordered an inquiry under Article 40.4 of the Constitution that came to me for substantive hearing. I have heard helpful submissions from Ms. Sinead McGrath B.L. for the Governor and Ms. Rosario Boyle S.C. (with Mr. Anthony Lowry B.L.) for the applicant. I have been given a certificate seeking to justify the detention, signed by Assistant Governor Joseph Hernon. However there are errors in the certificate in that Assistant Governor Hernon is incorrectly described as the Governor in the body of the certificate. There is also an error in the title of the proceedings as set out in the covering document signed by the Chief State Solicitor, so without any real objection from the applicant I gave liberty to the Governor to amend the certificate and this judgment is subject to the amended certificate being produced in due course in proper form.

4. Ms. Boyle in her comprehensive and helpful submission has raised, in essence, two points. Firstly, that an application under s. 22 conveys an entitlement to remain in the State, and the associated point that the policy of the Minister in relation to applications under s. 22 of the Act is not a lawful policy. The Minister has essentially adopted the position (in a document outlining procedures for the purposes of an application for consent to readmission to the protection process) that the application does not suspend the procedures leading to deportation. Ms. Boyle's second point is that the regulations for detention of applicants are *ultra vires* s. 5 of the Immigration Act, 1999 and by agreement of the parties I have postponed that issue to a date to be fixed in order to be dealt with separately.

5. I have also heard evidence on the first issue from D/Sergeant O'Brien and I am now dealing with that first issue on the associated arguments. The essential question is whether an application for consent to be readmitted to the protection process gives rise to a right to remain in the State under art. 7 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. I have already addressed this issue in my judgment in *S.H.M. v. Minister for Justice and Equality* [2015] IEHC 829 at para. 15 to 23 and despite Ms. McGrath's ingenious arguments to the contrary it seems to me that the discussion of that issue in that judgment still stands.

6. Reliance is also placed on *F.I. v. Governor of Cloverhill Prison* [2015] IEHC 639 but the *ratio* of that decision was that where there is a lack of positive evidence as to a settled intention to deport in a situation which has been complicated by a reapplication to the process, the onus is on the State in an Article 40 context to adduce evidence demonstrating such a continuing intention. In that case there was no such affirmative evidence and I was of the view that that onus has not been discharged. Here there is such positive evidence of a settled and continuing intention to deport in the form of D/Sergeant O'Brien's affidavit at para. 14.

7. Reliance is also placed on the decisions of the High Court and Court of Appeal in *C.A. v. Governor of Cloverhill Prison* [2017] IEHC 48 (Keane J.) and [2017] IECA 46 (Hogan J.), but that dealt with a somewhat different situation where there was no suspensive effect created by an application to remain in the State by a permitted family member or person claiming to be a permitted family member under Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

8. Article 7(1) of the 2005 directive provides for a right to remain in the State pending the determination of an application for protection. Article 7(2) provides that a member state may make an exception only where, in accordance with arts. 32 and 34, a subsequent application will not be further examined or where other limited exceptions apply in relation to international criminal matters which do not arise here. That in turn refers particularly to art. 32 (3) and (4) which provide first of all that "*a subsequent application for asylum shall be subject first to a preliminary examination"* implying that the matter that is subject to the preliminary examination is itself an "*application*" within the meaning of the directive; and secondly that if following the preliminary examination new elements or findings arise or are presented that significantly add to the claim "*the application shall be further examined in conformity with Chapter II*". The necessary implication of that is that if new elements are not so presented the application shall not be further examined, again necessarily implying that that which is not further examined is itself an application within the meaning of the directive (even though in Irish law under the 2015 Act it is only an application for consent to make an application).

9. Ms. McGrath argues, I think correctly, that the term "*application*" in s. 2 of the 2015 Act only covers a situation where a person has obtained permission to make an application under s. 15; and that as defined by s. 2(1) an applicant means a person who has made an application for international protection and therefore does not include a person whose only application is one for consent to make that application. Even though the applicant is not an "*applicant*" within the meaning of s. 2(1) of the 2015 Act it seems to me that the term "*application*" has a separate and autonomous meaning in European Union law for the reasons that I have set out.

10. In particular art. 2(b) of the directive uses wide and inclusive language to refer to an application which can be understood as a request for international protection from a member state under the Geneva Convention. Furthermore, even apart from that definition, when one reads art.7 in conjunction with art. 32 it is clear that the request for consent which is subject to the preliminary examination is itself an application for the purposes of art.7 and 32.

11. The conclusion therefore is that notwithstanding Ms. McGrath's creative and inventive arguments to the contrary, my analysis of the situation in *S.H.M.* stands and the position is that a right to remain in the State is conferred by an application for consent to make a reapplication to the protection process save where the application is abusive or where a previous such application has already been made.

12. That brings us to the next question which is can this applicant benefit from that right to remain. The answer to that question unfortunately for the applicant is clearly no for both of the reasons to which I have referred. Firstly, he has already made and had refused a previous application for readmission to the protection process, and no right to remain arises from the making of a second (or subsequent) application for readmission. Secondly, even apart from that it seems clear to me that the current application is abusive in the sense that it is designed to delay or frustrate an imminent removal from the State. The applicant had a period of seven years since his previous application for readmission to the protection process to make any further application, and only decided to make that application on or around the time he was informed that he was imminently going to be removed from the State. So in my view a clear inference of abuse arises. For that reason if nothing else the applicant had no *locus standi* to make any point contrary to the Minister's policy because any infirmity in that policy does not affect him.

13. Even if, separately to all of that, the applicant did have a right to remain in the State by virtue of having made a reapplication (including an application for permission to re-apply) that does not mean that his detention is unlawful if the reapplication could be decided within the period of eight weeks. The making of a s. 22 application by a person in detention should more properly stimulate early consideration by the Minister rather than necessarily requiring immediate release. D/Sergeant O'Brien has given evidence of a continuing intention to deport but at the same time he also seems to have taken a blanket view (not personal to him I hasten to add but seemingly a corporate State position) that s. 22 applications are not suspensive, which I do not consider to be correct. If in a case where an applicant did have a right to remain in the State by virtue of an application for re-admission to the protection process, detention would still be lawful if the intention was to determine the application for consent to readmission within a period of eight weeks such that the deportation could be lawfully effected within the context of a particular applicant's detention. Conversely, if a first, non-abusive, application for readmission to the process could not be speedily determined such that an applicant could not be deported within an 8 week period, the legality of the detention would come into question. However we do not get to that issue here.

14. Ms. Boyle's next point was that an exception to art. 7(1) could only be provided by a positive decision of a deciding authority such as the Minister or the International Protection Office, and the application of such an exception was not for the court. To my mind that argument would add a further layer of complexity and difficulty to the enforcement of immigration law. The lack of suspensive effect arises by operation of law and not by positive decision of any entity. So I would reject the contention that some affirmative decision is necessary in order to remove what would otherwise be a suspensive effect. Suspensive effect simply does not arise if the application is abusive or repeated and in this case it is both.

15. The third strand of Ms. Boyle's argument is that there must be an assessment of *non-refoulement* by the Minister prior to the effecting of the deportation of the applicant. That proposition was broadly accepted by Hogan J. in *Ejerenwa v. Governor of Cloverhill Prison* [2011] IEHC 351 and in fairness not hugely disputed by Ms. McGrath in this case, on the basis that the assessment of *refoulement* in the context of a s. 3(11) application would be conducted within the eight week period prior to the actual deportation. Again, I go back to the point that detention for the purposes of deportation does not become unlawful simply because an application is pending (whether under s. 22 or s. 3(11)). If that determination can be carried out prior to the expiry of the eight week period, then the detention is lawful in the meantime - on the basis that the Minister is first required to determine a first, non-abusive s. 22 application, and on the similar assumption that he is required to be satisfied that no *refoulement* arises from grounds set out in a s. 3(11) application (even if formal determination of the application does not take place) prior to actual deportation. That is the situation here.

16. For those reasons, limiting myself for present purposes to the issue of the continuing intention to deport and the suspensive effect of any re-application, and on the assumption that an amended certificate will be filed in due course, I am satisfied that the applicant is in lawful custody without prejudice to any issue that arises in the second leg of the case. While I have indicated in a previous Article 40 application (*Knowles v. Governor of Limerick Prison* [2016] IEHC 33 paras. 27 to 37) that third parties and notice parties are not appropriate in *habeas corpus* proceedings, that would have to be subject to a qualification that where legislation is being challenged, the Attorney General is an appropriate party so I will add the Attorney General as a notice party for the purposes of the second leg of the application.

17. Therefore the order I will make is:

(i). that the application be dismissed insofar as it relates to the complaints regarding the continuing intention to deport and the suspensive effect of any re-application;

(ii). that the respondent have liberty to file an amended certificate;

(iii). that the Attorney General be added as a notice party to the proceedings for the purposes of the remaining issues;

(iv). that the hearing of the balance of the Article 40 be adjourned to a date to be fixed.