Neutral Citation [2015] IEHC 517

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 677 J.R]

BETWEEN

A.L.J. [TOGO]

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 30th day of July, 2015

BACKGROUND

1. The applicant was born on 11th October, 1984, and is a national of Togo. He claims that he departed Togo on 13th April, 2004, and arrived in Ireland on 5th May, 2004, having travelled via Benin and Paris. He applied for asylum and refugee status on 6th May, 2004. The applicant was found to be working illegally using a forged French identity document in Douglas in July, 2004. He told members of the Garda Síochána who interviewed him at that time that he came to Ireland to find work to support his family, who were in debt. He was recorded as stating that he hated his environment in the Glenvera Hotel on Wellington Road, Cork and he wished to return home to Togo. This background is set out in the affidavit of Detective Garda Simon Duignan in exhibit SD1 thereto.

2. His application for refugee status was examined and rejected by the Refugee Appeals Tribunal in a decision of 6th October, 2006, based primarily on findings of a lack of credibility.

3. The applicant then applied for and was refused subsidiary protection by virtue of a decision of 19th August, 2009. The first named respondent considered the representations made by the applicant as to why he should not be deported but nonetheless decided to make a deportation order on 20th August, 2009. The deportation order required him to leave the State by 9th October, 2009.

4. These proceedings were ostensibly commenced, without prior leave of the Court as is required by s.34 of the Employment Permits Amendment Act 2014, which in turn amends s.5 of the Illegal Immigrants (Trafficking) Act 2000, and which was commenced by virtue of S.I. 435 of 2014 as and of 3rd October, 2014. Notwithstanding the irregular manner by which the notice of motion and statement of grounds were purportedly issued and proceedings commenced in this matter, when the matter came on for hearing before the Court on 9th July, 2015, it was agreed by the respondents and the applicant that the matter could proceed by way of a leave application for judicial review on notice to the respondents.

5. In the proceedings the applicant seeks leave to apply for judicial review and an order of *certiorari* quashing the deportation order made in respect of the applicant on 20th August, 2009. In accordance with the provisions of s.5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended), the threshold for the grant of leave is that this Court is satisfied that there are substantial grounds for contending that the decision, determination, refusal or order is invalid or ought to be quashed.

APPLICANT'S SUBMISSIONS

6. The first thing to be noted is that the attempt by the applicants to quash the order of the 20th August, 2009, is hopelessly out of time. It is common case that no challenge was taken to the deportation order in and around the time that it was made. Indeed, counsel for the applicant conceded, in oral submissions before the Court that the order at the time it was made was valid. However, the applicant sought to argue that a critical point in this application is whether the order continues to be valid in 2015. The applicant submitted that it has ceased to be a deportation order by virtue of the lapse of time in the interim and the failure and/or omission on behalf of the minister to enforce the order in the interim period.

7. The applicant contended that between 2009 and 2015, effectively, the minister has not taken any steps in order to enforce the order of August, 2009 and, therefore, the potency of the order has drained away by passage of time. The applicant sought to rely on the decision of O'Neill J. in *Yau v. Minister for Justice, Equality and Law Reform & anor.* [2005] IEHC 360 and contended that this decision is an authority for the proposition that a deportation order can lapse and that an order which was validly made in the first instance, can cease to have force and effect, for example, a deportation which is excessively delayed or which was used for an ulterior purpose. The applicant referred to the *In re Article 26 and s.5 and s.10 of Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at p. 411 as being ample authority for the proposition that an order, though validly made, may, for one reason or another, cease to have force and effect.

8. The applicants further relied on the decision of MacEochaidh J. in *F.O. v. Minister for Justice, Equality and Law Reform & ors*. [2013] IEHC 206. The applicant referred to a passage in the judgment of MacEochaidh J. wherein the learned judge refers to the decision of O'Neill J. in the *Yau* decision.

RESPONDENTS' SUBMISSIONS

9. The respondents referred to s.3(1) of the Immigration Act 1999, which provides that a deportation order is permanent in its terms unless and until it is revoked in accordance with s.11 of the Act. The respondents relied on the decision of Hogan J. in *M.A.U. & ors. v. Minister for Justice, Equality and Law Reform (No. 1)* [2010] IEHC 492. Further, the respondents pointed out that the constitutionality of s.3(1) of the Immigration Act, 1999 (as amended) was challenged in the case of *Sivsivadze & ors. v. Minister for Justice and Equality & ors.*, in which the Supreme Court delivered judgment on the 23rd June, 2015, and reported at [2015] IESC 53. The constitutionality of s. 3(1) was upheld therein by the Supreme Court.

10. The respondents contended that the applicant's argument is misconceived and that it is not open to the applicant to seek *certiorari* of a deportation order on the basis of a lack of enforcement. The respondents stated that the remedy available to the applicant is to lodge an application to revoke the deportation order. This, in fact, has been done in this case and a decision is pending.

DECISION

11. What the Court is faced with in this is situation is that, on the one hand, the applicant is seeking to revoke a deportation order and, on the other hand, comes before this Court simultaneously seeking to quash the order as being rendered invalid by the passage of time.

12. The applicant sought to rely on two decisions of the European Court of Human Rights in *Minshall v. UK* (7350/06) (20th December, 2011) and further, *Shilyayev v. Russia* (9647/02) (6th October, 2005). Both of those cases refer to delay in the conclusion of legal proceedings, a criminal process in the *Minshall* and a civil process in the *Shilyayev* case. They concerned article 6(1) of the European Convention on Human Rights, which requires proceedings to be determined within a reasonable period of time. The respondents submitted, and I accept, that those authorities from the European Court of Human Rights bear no relevance to the factual matrix of this case.

13. The applicant has contended that from the date of the deportation order on 20th August, 2009, to the date of the proceedings before this Court, nothing has happened with regard to the minister seeking to enforce the deportation order. This does not appear to be borne out by the evidence before the Court. First, the applicant arrived in this country on false documents and to date is without a valid passport from Togo. The applicant avers at para. 6 of his affidavit shown on 14th November, 2014, that he has been living in direct provision for over 10 years. Again, this is not borne out by the various affidavits sworn on behalf of the respondents and, in particular, the affidavit of Tom Doyle sworn on 4th June, 2015; the affidavit of Simon Duignan sworn on 20th May, 2015; a further affidavit of Tom Doyle sworn on 4th June, 2015; the affidavit of Killian Morgan sworn on 4th June, 2015; and a final affidavit of Tom Doyle sworn on 8th July, 2015.

14. The applicant generally complied with reporting and presentation requirements after the making of the deportation order up and until November, 2011. He failed to report as required from 1st December, 2011, until 8th May, 2014. The applicant recommenced reporting to the Garda National Immigration Bureau after the first named respondent had advised his solicitors that his application for revocation of the deportation order pursuant to s. 3(11) of the Immigration Act 1999 (as amended), which had been lodged on 20th January, 2014, would not be considered until he either provided confirmation that he had left the State or he regularised his position by presenting himself at the offices of the Garda National Immigration Bureau.

15. The applicant, despite his averment at para. 6 of his grounding affidavit that he has lived in direct provision for more than ten years, did not in fact so reside for the last ten years. He resided at the Glenvera Hotel accommodation centre in Cork from May, 2004 to May, 2008. He went missing in or around May, 2008. He applied for accommodation at the Reception and Integration Agency in October/ November, 2008 and was offered accommodation in Donegal, which he refused to take, insisting on accommodation in the Cork area. In July, 2009 he again requested accommodation and was offered accommodation in Limerick, which he accepted. He was recorded as having gone missing from that accommodation on 7th June, 2011. In October, 2011, he again requested accommodation and was offered and accepted accommodation in Cobh, which he did not use. That accommodation was withdrawn on 1st November, 2011, because he was not using it. He did not apply at the Reception and Integration Agency for accommodation again until 20th March, 2014. He was offered accommodation in Limerick at that time; however, he did not avail of same. On 1st May, 2014, a further request for accommodation was made and a further offer of accommodation at Mount Trechard was made, and availed of by the applicant on 12th May, 2014. He has resided there since that date.

16. In tandem with copious correspondence between the applicant's solicitors and the respondents, the applicant himself has been writing to the first named respondent seeking repatriation to Benin, a neighbouring country to Togo. The applicant asserted in his grounding affidavit that the International Organisation of Migration had refused to repatriate him in 2011 because of the alleged risks that he would face in Togo. However, he has not provided any evidence to substantiate this claim and in contrast in his letter of 24th September, 2014, to the first named respondent, the applicant states that he asked the IOM to repatriate him to Benin in order to bury his mother but that nobody helped him. The applicant, on occasions, seeks to be repatriated to Togo and, on other occasions, seeks to be repatriated to Benin. The Court notes that other than Benin being an adjoining country and there being an agreement in relation to free movement between the two countries, the applicant has not asserted any links with Benin. Further, the IOM does not accept requests from persons subject to a deportation order; therefore, even if the applicant had made an application to the IOM for voluntary repatriation, it could not have been entertained as he was the subject of a deportation order at that time and was not, therefore, eligible for voluntary repatriation.

17. The legal validity of the deportation order must be judged at the time it was made. It can only be considered by the Court on the basis of the materials available to the minister at the time it was made. The deportation order is mandatory in its terms and directs the applicant to leave the State and to remain out of the State. The doctrine of estoppel cannot operate against the State to deprive the deportation order of effect. The respondents contended, and I accept, that the deportation order remains in force unless and until the first named respondent chooses to revoke it in exercise of the power vested in the minister pursuant to s. 3 (11) of the Immigration Act 1999.

18. The decision of MacEochaidh J. in *F.O. v. Minister for Justice, Equality and Law Reform (supra)* sets out the remedy open to a deportee who claims that a deportation order has lost its validity in light of a subsequent event and he states as follows at para. 37:

> "In those circumstances, a deportee's remedy is to seek the revocation or amendment of the deportation order pursuant to s. 3(11) of the Act. Such administrative process does not suspend a deportation order and it might be necessary and possible to seek injunctive relief to enjoin the implementation of the order […]"

19. The *F.O.* decision clearly demonstrates that the proper remedy, where a deportee asserts a change of circumstances since the deportation order was made, is an application for revocation and not an application to this Court to quash the deportation order, as the applicant seeks to do in this case. In my view, the proceedings before this Court are misconceived.

20. Mr. Justice O'Neill, in the *Yau* decision (*supra*), made an *obiter* comment with respect to the enforceability of a deportation order. That case concerned a challenge to the lawfulness of Mr Yau's detention pending the implementation of a transfer order, transferring him to Italy where he was understood to have a pending application for asylum. Reliance was also placed on the reference judgement of the Supreme Court in *In re Article 26 and s.5 and s.10 of Illegal Immigrants (Trafficking) Bill 1999* [2000] (*supra)*. The matter under consideration by the Supreme Court as relevant to this case was the challenge to s.5 of the bill, which concerned the entitlement of the asylum authorities to detain an asylum applicant for a period of up to eight weeks pending deportation and the passage at p.411 which states as follows:

> "Even though the Irish legislation contains an express time limit of eight weeks in the aggregate subject to certain extensions where proceedings are brought etc., it would still be the case that it would be an abuse of the power to detain if it was quite clear that deportation could not be carried out within the eight weeks."

I am not convinced that either of these cases are authority for the proposition that a deportation order can lapse by virtue of inaction on the part of the first named respondent. However, it is not necessary for me to make a finding to that effect in this case as I am not satisfied that the alleged inaction against the first named respondent has actually been established.

21. I reject the contention of the applicant that there has been any improper and/or inordinate delay on the part of the first named respondent in the implementation of the deportation order. It is clear that up to and including the date of the hearing of this matter that the applicant did not have a valid travel document, i.e. a passport from Togo or some other emergency travel document. In the absence of such a document, the first named respondent is not in a position to execute the deportation order. The applicant appears to have dipped in and out of the asylum system as and when it suited him for reasons best known to himself. The first named respondent has since May, 2014, when the applicant recommenced presenting himself at the offices of the Garda National Immigration Bureau, been attempting to obtain an emergency travel document from the Togolese authorities but has not yet succeeded in obtaining same. In my view, there is validity in the respondents' submission that, had the applicant continued to present himself to the Garda National Immigration Bureau as required between November, 2011 and May, 2014, the process might well have been completed earlier.

22. In order to obtain leave for judicial review in a matter such as this, the applicant must show, first, that there are grounds upon which this Court should extend the time within which to bring this purported judicial review leave application and, further, if the Court was so satisfied to extend the time, the applicant must convince the Court that there are substantial grounds upon which to bring such a challenge. I am not satisfied to extend the time within which to seek to bring a leave application in respect of the order of 20th August, 2009, and even if I was so persuaded, in any event, having considered the arguments set out by the applicant, I am satisfied that they do not constitute substantial grounds upon which to seek to commence such an application. In fact, the applicant's contention that a valid deportation order and one which the applicant accepts was valid at the time it was made, can be somehow rendered invalid by some alleged inaction the part of the first named respondent, and which allegation of inaction I am satisfied is not borne out on the evidence before the Court, in my view, is without merit.

23. I, therefore, refuse the application.