Neutral Citation [2012] IEHC 73

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 759 J.R.]

BETWEEN

A.D.S. (GHANA) AND

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND THE COMMISSIONER OF AN GARDA SiOCHANA

RESPONDENTS

JUDGMENT of Mr. Justice Cross delivered on the 14th day of February, 2012

1. By order dated 18th July. 2011, the court granted the applicant leave to apply for judicial review for certain reliefs as set out below. The central issue of the case is whether in the circumstances where refoulement is alleged, the applicant is entitled to an automatic suspension of his valid deportation order until the Minister has considered is revocation application pursuant to s. 3(11) of the Immigration Act 1999.

2. The reliefs sought can be summarised as follows:-

> (a) An order or *mandamus* directing the first named respondent to determine the applicant's s. 3(11) application prior to the execution of the deportation order.
>
> (b) That the applicant be afforded a reasonable amount of time to consider and take legal advice in relation to any determination under s. 3(11).
>
> (c) Injunctive relief restraining the respondents from implementing the deportation order prior to the s. 3(11) determination.
>
> (d) A declaration that for the respondents to deport the applicant prior to the s. 3(11) determination would be in breach of statutory duty and constitutional justice.

3. By order dated 26th August, 2011, the applicant applied and was given injunctive relief, the precise terms of which are not clear but which is not for the moment important restraining the deportation of the applicant either until the determination of these proceedings or indefinitely.

4. The respondent brought a motion to remove the injunction granted.

Background

5. The applicant alleges that he was born in Ghana in around 1984 and is a member of the Fulani nomadic tribe.

6. He came to the State on 9th January, 2007 and applied for refugee status and his application ultimately refused on 24th May, 2007.

7. The applicant's further subsidiary protection and leave to remain applications were rejected on the basis that the protection of the Ghanaian State authorities and the option of relocating safely within Ghana would enable the applicant to avoid future persecution. Neither of these decisions were challenged by the applicant.

8. A deportation order was made in respect of him on 20th October, 2010, obliging him to leave the State by 19th November, 2010. The applicant did not comply with that requirement and on 5th August, 2011, submitted an application to have his deportation order revoked pursuant to s. 3(11) of the Immigration Act 1999 based on information suggesting that the situation in Ghana had become more perilous for the Fulani and that the applicant was or might not be entitled to Ghanaian citizenship. The respondents refused to issue an undertaking not to deport the applicant prior to the s. 3(11) application being considered.

The Submissions

9. I have been furnished and have considered the affidavits herein and the exhibits as well as submissions and authorities of both the applicant and the respondents which they have kindly furnished in book form.

The Applicant's Arguments

10. Mr. Anthony Hanrahan, of counsel, on behalf of the applicant argued that the first named respondent must consider any refoulement issues raised by the proposed deportee prior to the implementation of any deportation order. In other words, the Minister is obliged to ensure that refoulement concerns are met not only at the time the deportation order is issued but al so at the time it is implemented.

11. In support of his contention, Mr. Hanrahan relied on *Irfan v. MJELR* [2010] IEHC 422, where Cooke J., after considering the delay between the deportation order and its implementation, stated that the Minister remains under an obligation to ensure that when the implementation of a deportation order ultimately takes place that it does not violate s. 5 of the Refugee Act 1996, as amended.

12. Counsel submitted that if the Minister did not consider the refoulement issues as outlined in s. 3(11) application prior to the applicant's deportation then he violates his continuing obligations to consider such matters as identified by Cooke J. in *Irfan*.

13. In support of his refoulement allegations and a possible breach of Article 3 EHCR. Counsel submitted up-to-date COI that demonstrated what he described as a "serious escalation violence, bigotry and persecution against the Fulani tribe in Ghana since the deportation order has been made". Furthermore, he also submitted documentation that would suggest that the applicant would not be considered or might not be considered a citizen of Ghana by the relevant authorities.

14. Mr. Hanrahan went on to argue that an application under s. 3(11) must suspend the operation of a deportation order (in other words to have automatic suspensive effect) where refoulement is alleged. If there is no automatic suspensive effect, it cannot be said to constitute an effect remedy for constitutional and ECHR purposes.

15. Mr. Hanrahan relied upon some Europe Court of Human Rights case law, *MMS v. Belgium* [2011] ECHR 108 - Grand Chamber Judgment, 12th January, 2011 and *Conka v. Belgium* [2002] 34 EHRR 4, as well as Cooke J. in *A.(P.A.)(A Minor) v. MJELR* [2010] IEHC 297, to support his contention that the harm alleged is irreversible that there must be an automatic stay of execution on deportation. Mr. Hanrahan also proposed that in circumstances where the applicant has received a negative s. 3(11) determination, he should be given a reasonable opportunity prior to deportation to consider whether to challenge the decision.

16. In defining "reasonable", he relied on *A.(P.A.)* where Cooke J. saw the prohibition on deportation within fourteen days of the making of a deportation order as essential to support access to the courts. While this case is referred to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, he submitted that the same principles should apply in these circumstances.

The Respondents' Arguments
17. Ms. Siobhan Stack, of counsel, on behalf of the respondents conceded that where new matters arise on a revocation decision which tend to show a breach of the refoulement provisions, the Minister is obliged to consider them.

18. The respondents relying on *C.R.A. v. Minister for Justice* (2007] 3 I.R. 603, argue that the matters to be considered must be:-

> "...truly materially different from those presented or capable of being presented in the earlier application. There must be in the words of Clarke J. in *Kouyape v. Minister for .Justice* 'unusual, special, or changed circumstances'."

19. Ms. Stack submitted that the central issue in the case is whether the matter set out in the s. 3(11) application are in fact up-to-date restatements of matters which were already addressed by the Minister at the time he made the deportation order or whether they are considered to be truly new within the meaning of *Kouyape*.

20. Drawing on the applicant's previous submissions i.e. subsidiary protection *etc*., Ms. Stack argued that nothing new had been produced by the applicant other than further examples of the type of complaint initially made by the applicant and ultimately refused as insufficient by the Minister.

21. Addressing the applicant's assertion that he is not or may not be entitled to Ghanaian citizenship, the respondents maintain that the applicant is not a passive participant in the proceedings and that this was something within his power to raise at an earlier stage in the process.

22. Further, counsel argues that there is no evidence to support the contention in relation to citizenship and the applicant failed to produce any evidence outlining his attempts to clarify the matter. He arrived in the State without any travel documentation, a fact that is highly suspect.

23. However, in any event, lack of citizenship does not raise any refoulement considerations. The alleged statelessness of the applicant relates to the practical arrangements for him leaving the country and if valid it might prevent his deportation if the Ghanaian authorities refuse to accept him.

24. Ms. Stack argued that the applicant is not entitled to an injunction to restrain deportation in circumstances where he did not challenge the deportation order itself (*L.C. v. Minister for Justice* [2007] 2 I.R. 133 and also C.R.A. (above)).

25. Ms. Stack, however, accepted that if there were new facts to support a threat to life or freedom of the applicant for a Convention reason or that the deportation would breach obligations under Article 3 or s. 5 of the Refugee Act, as amended, that the position would be different.

26. Ms. Stack contended that even if it was appropriate to grant an injunction *ex parte*, a perpetual injunction was inappropriate. The correct course would have been to apply for an injunction pending the hearing of the substantive application which should then have been heard on notice. This would afford the Minister an opportunity to hear the new evidence and potentially restraining from operating a valid deportation order. For this reason, the Minister's motion in respect of the granting of the relief on the *ex parte* basis was reasonably issued. Furthermore, it was argued that the applicant should not be entitled to any further injunctive relief.

27. Counsel submitted that the Minister has never refused to consider the s. 3(11) application and as such an order for *mandamus* is sought by the applicant was inappropriate that Cooke J. in *Nearing v. Minister for Justice* [2010] 4 I.R. 211.

28. She further contended that as the applicant had not established any new evidence in support of his contention, it would be inappropriate to support any suspension of the deportation order.

The Decision
29. Before addressing the substantive issue before the court I would like to address a preliminary matter raised by the respondents during the course of the proceedings: that an application under s. 17(7) of the Refugee Act 1996, as amended, was the appropriate procedure open to the applicants and not the s. 3(11) application which was actual ly pursued. The court considers this argument irrelevant to the present proceedings as the result of either application would have been the same *i.e*. the deportation order would not have been suspended pending the outcome of either decision and the applicant would still be before the court seeking relief albeit by different route. Therefore, the court will refrain from weighing the merits of either application as in any event all roads lead to Rome.

30. The matter before the court concerns whether the Minister is obliged to make his determination regarding the s. 3(11) application prior to the implementation of the deportation order if refoulement is alleged. Further, the applicant argues that he is entitled as a

right to a suspension of the deportation order until the determination of the s. 3(11) application. The applicant does concede that there is no obligation on the Minister to consider an application prior to deportation if there is no issue of refoulement. Therefore, in the court's opinion the crux of this case turns on whether issues of refoulement or breach of Article 3 ECHR exists which are distinct from matters previously raised.

31. It is accepted that the Minister must at all times be mindful of refoulement considerations as per Cooke J. in *Irfan v. MJELR* [2010] IEHC 422 at para. 8:-

> "the statutory prohibition on removal from the State contained in s. 5 of the Act of 1996 continues to apply after the making of the order. Accordingly, where a lapse of time has occurred without implementation of the order, the Minister remains under an obligation to ensure that when implementation takes place, the prohibition will not be infringed. This may be particularly so where conditions in the country of destination are known to be volatile such that the risk to life or freedom in areas of religious, ethnic or political strife and violence is a possibility."

32. The applicant asserts that in order for the Minister to be able to discharge this obligation he must consider the refoulement allegations prior to deportation. By this statement the applicant can only mean that an allegation of refoulement in and for itself is enough to suspend the implementation of a valid deportation order and that there is no requirement to substantiate the claim. The court, however, cannot entertain such an approach: a mere assertion cannot be enough to suspend a statutory process. The applicant must at least demonstrate that there are or may be matters to be tried.

33. Otherwise. this pl aces the Minister in an impossible position as a ll an applicant would have to do is to allege refoulement in order to suspend the deportation and following a negative determination, the applicant would have another fourteen days in which he might submit another claim alleging refoulement. I use fourteen days, by way of an example and the applicant al so alleges that he should be entitled to this amount of time to consider any negative s. 3(11) determination.

34. It is the opinion of this Court that this would encourage a wealth of potentially bogus claims to remain in the system indefinitely.

35. Furthermore, *Conka* upon which the applicant relies to suggest that an automatic suspensive effect is necessary in circumstances such as these, is distinguished from the instant proceedings as the applicants in question were refused access to the courts and were deprived of their liberty in the *Conka* case.

36. This is not the case here. At all times, the applicant has had the opportunity to come to court and state his case. He was entitled to apply for interim relief which was granted and he is not entitled to establish his case to obtain a further injunction that would enable him to remain in the State pending the determination of the s. 3(11) application. Furthermore, the effectiveness of any remedy must be looked at in the full context of the remedies available to the applicant under the national scheme.

37. Section 3(11) is part of a statutory process and does not operate in isolation. Any deficiency in s. 3(11) can be remedied by way of judicial review proceedings. This includes circumstances where the applicant has received a negative determination under the s. 3(11) process.

38. Therefore, the proper course of action in these proceedings would be to apply for injunctive relief. It remains, therefore, to determine whether in this instant case the grounds for an interlocutory injunction have been made out. The immediate issue, accordingly, is whether the applicant has established that there is a fair issue to be tried as to the existence of a substantial ground as to why the deportation ought to be suspended pending the determination of the s. 3(11) application. And if so whether damages would be an ad equate remedy if the injunction were refused and the applicant were subsequently to succeed in his s. 3(11) application and having been deported in the interim.

39. In that respect the applicant put forward two interlinking issues: the applicant's nationality; and new COI information that allegedly demonstrated that the situation in Ghana has become increasingly perilous for members of the Fulani tribe.

40. However, the applicant must demonstrate in these circumstances that the new information would meet the test as outlined by Clarke J. in *Kouaype*.

41. In relation to the citizenship argument, throughout the asylum process the applicant has always maintained that he was born in Ghana and by implication entitled to citizenship of that State. However, it would appear from the questionnaire dated 9th February, 2007, that even from the beginning of the process the applicant was not entirely certain of the meaning of citizenship.

42. It must be accepted that the respondents a re correct in their assertion that the applicant had the benefit of legal advice and if there were any queries relating to nationality they should have been and could have been raised much earlier. The respondents are al so correct that it is up to the applicant to furnish information such as this. However, given the applicant's illiteracy and the added complication of having to conduct the asylum process through an interpreter, it is quite possible that the meaning of citizenship 'Was lost in translation.

43. The court would also ponder the practical effect of deporting someone to a country in which they are not entitled to legally reside. It would seem an invidious position to leave any individual in and {he court is not convinced by the respondent's arguments in this regard.

44. In relation to the new COI, the court is not of the view that the applicant has presented any new.' information to suggest that the Fulani are being subjected to anything more than was already considered and rejected by the Minister.

45. During the course of the proceedings, much time was afforded to a discussion concerning the meaning of' the term "flushed out" as used by State official in relation to the Fulani. The applicant stated that the term is indicative of increasing threats being made against the Fulani and that the Minister can no longer believe that the Ghanaian State would act to protect the Fulani. The court does not consider that this adds anything new to the circumstances. The Minister is already aware of the manner in which the Ghanaian State treated the Fulani.

46. Consideration has already been given to the treatment of the Fulani by the police (and State officials). There is nothing to suggest that the State is depriving the Fulani of their liberty or subjecting them to such serious harm that would suggest that their lives were at risk. The COI does indicate that the State and State Officials consider that members of the Fulani are engaged in criminality and are generally a menace to the native Ghanaian peoples but there has been no new information in reality supplied in that context. The court is of opinion. therefore, that the respondents were correct in their assertion that the fact that the reports

are new does not necessarily correlate with the evidence being new.

47. The possible lack of citizenship does not necessarily raise refoulement concerns. The court is of opinion that there is no evidence to suggest that the applicant will be in any perilous position due to a lack of citizenship in and of itself. However, any persecution that the applicant may suffer as a member of the Fulani tribe may be compounded by a Jack of citizenship as he may not benefit from any of the protections naturally afforded by the State to its citizen. Accordingly, a combination of the possible lack of citizenship together with the situation of the applicant as a member of the Fulani tribe may together raise refoulement issues. It is for the Minister to determine if this evidence of the possible lack of citizenship and the extra perilous position that the applicant may be in as a result is sufficient to compel a revocation of the deportation order. In view of this finding, I am of the view that on the Campus Oil decision, the applicant would be entitled to an injunction.

Conclusion

It should be noted that at all times, it is for the Minister to determine if the evidence presented as such that he would be compelled to revoke a deportation order. It is for the court in these circumstances to assess whether sufficient evidence has been presented that would justify the issuing of an injunction. The court is of the opinion that while the applicant has not demonstrated any evidence that would suggest a breach of s. 5 of the Refugee Act 1996, as amended, or a breach of Article 3 of the ECHR with reference to the alleged new COI the applicant has demonstrated new information within the meaning of *Kouaype* in relation to the applicant's citizen entitlements and has raised concerns in relation to the consequence thereof and it is the view of this Court that this is sufficient to warrant an injunction pending the determination of the s. 3(11) application.

APPROVED: Cross, J