Neutral Citation Number: [2007] IEHC 231

THE HIGH COURT

[2007 No. 686 J.R.]

BETWEEN

D. W. G.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

[2007 No. 697 J.R.]

M. T. O.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Birmingham delivered on the 26th day of June, 2007.

1. These two cases raise similar legal issues and were heard together. At issue in both cases is the desire on behalf of the applicants, both of whom are failed asylum seekers, to submit and have considered an application for subsidiary protection. The background to this is that Council Directive 2004/83/EC made provision for subsidiary protection for persons requiring such protection, but who did not meet the requirements to be declared a refugee.

2. Provision in Irish law for subsidiary protection was made through the European Communities (Eligibility for Protection Regulations, 2006) S.I. 518/2006.

3. At the outset it is appropriate to observe that subsidiary protection is available to those facing "serious harm" consisting of:-

> (a) Death penalty or execution
>
> (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.
>
> (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

4. One recalls that Irish law has long prohibited refoulement. Accordingly it would seem that the effect of the regulations will not be so much that persons who would otherwise be excluded from the State would be permitted to remain, but rather that persons who would in any event have been permitted to remain will have their status and entitlements clarified.

The first named applicant

5. By letter dated 12th June, 2007, solicitors on behalf of the first named applicant D. W. G. submitted a request that a claim for subsidiary protection be considered along with the request that their client be released from Cloverhill Prison where he was then, as now, detained awaiting deportation pursuant to s. 5 of the Immigration Act, 1999. On the same day, a letter was sent by fax from the Irish Naturalisation and Immigration Services of the Department of Justice, Equality and Law Reform which made the point that the regulations came into operation on 10th October, 2006 and that the regulations were not applicable in cases where a deportation order was made before the coming into effect of the regulations. The deportation order in this case had been made on 21st September, 2005.

The second applicant

6. As far as the second named applicant is concerned, his solicitor by letter dated the 7th June, 2007 sought subsidiary protection and conditional release, he too being then and now detained at Cloverhill Prison. For completeness sake I should add that the solicitors also applied for the revocation of the deportation order. By letter of 12th June, 2007 the Naturalisation and Immigration Service replied to the same effect as they had done in the case of the first applicant. In this case the deportation order is dated 20th February, 2002.

7. Each applicant comes before the Court seeking to judicially review the decision not to consider their request for subsidiary protection and seeking an injunction to restrain their deportation.

8. The question of whether the regulations apply to persons in respect of whom deportation orders were made prior to 10th October, 2006 has been before the courts already and the issue has been fully argued before Feeney J. who has reserved judgment. In these circumstances Ms. Siobhan Stack, Barrister-at-Law on behalf of the Minister has properly conceded that there is an arguable case that the interpretation placed on the regulations by the Department is erroneous.

9. However, Ms. Stack argues that notwithstanding that an issue of substance has been identified, that in the particular circumstances of the case that leave to seek judicial review should be refused and that there should be no injunction. In essence she says that each applicant by his conduct has disentitled himself to any relief.

10. In these circumstances it is necessary to consider the factual background to each case in greater detail. I should say that in each case when the matter first came before the court the application was grounded on affidavits sworn by the respective solicitors and there was no direct evidence from either applicant. Given the severe criticisms that were being levelled at their clients conduct I invited Mr. Kenneth Willis, Barrister-at-Law on behalf of the first named applicant and Mr. Colm McCarville, Barrister-at-Law on behalf of the second named applicant to consider whether they wished to put further information on affidavit before the court. Each, availed of the opportunity and affidavits were submitted by each applicant. While putting the affidavits before the court both counsel were very firm in their submission that the court should not be concerned with prior conduct and should focus only on events since June, 2007.

The situation of D. W. G.

11. It seems that this applicant first arrived in the State on or about 21st August, 1999 and was thereafter present in the State on foot of a succession of student visas, the last of which would seem to have expired on 6th June, 2001. On 2nd November, 2004 the applicant applied for asylum.

12. As is normal, he completed a questionnaire and attended for interview. Both the questionnaire and the responses at interview contain a number of blatant lies. Examples of these are as follows, in the questionnaire when asked for an educational history he claimed that between 1999 and 2002 he was studying business management at Liaoning University, when in fact he was in Ireland throughout the period. He claimed to have been employed in China as a clerk between November, 2002 and April, 2004 with a particular company. When asked if he had ever applied for an Irish visa, he replied no, contrary to the fact, and stated that he had not been issued with a student visa or work permit. He stated that he had left his country of origin on 15th October, 2004 and had travelled to Ireland through South Korea and the United Kingdom. In the questionnaire he gives a dramatic account of an incident that was supposed to have occurred on 15th August, 2004. He does so in these terms:

> "I was sitting in mediation on the balcony of my home. Suddenly I heard someone kicking the door of my house and my uncle opened the door. Before I knew what was happening four policemen already rushed in, they were fully armed, holding guns and electronic sticks and rushed to cuff and kick. My uncle was kicked down by one policeman when he was intending to stop. Then I charged and struggled with them as well. I heard them shout 'Good boy, you dared to practice Falun Gong. I am beating you to death'. They rushed to hit me with three electronic sticks. In a moment I didn't know anything. When I awoke my body was covered in water and full of injuries."

13. When interviewed on 19th January, 2003, he again gave a false education history. He claimed to have left China on 15th October, 2004 saying that his travel arrangements were made by a trafficker, to whom he paid 100,000 yuan. He gives a detailed description of his journey involving a ship to South Korea, seven days in a basement in South Korea, being provided with a false passport, before travelling to the U.K. where they stayed three days in another basement. In the course of this interview he submitted a medical report related to a kidney injury. The suggestion being that this was linked to the beating that he had described. Again, a graphic account is given of the alleged incident of 15th August, 2004. Arising from this interview the Refugee Appeals Commission interviewer recommended that he should not be declared a refugee as he was of the view that the applicant had failed to establish a well-founded fear of persecution. In this regard reliance was being placed in part on the fact that his knowledge of Falun Gong practice seemed incomplete. For example when asked if there was anything to recite before an exercise he said there was not, that there must be nothing in the mind. On the other hand, information available to the interviewer suggested that this was incorrect and that there were verses that were required to be recited. Significance was also attached to the fact that he referred to Falun Gong as a religion, whereas the founder, Master Li Hong Zhi is clear that it is not a religion but rather an ancient form of practising the refining of body and mind by special exercises and meditation.

14. The applicant was informed of the decision of the Commissioner to recommend that he not be declared a refugee by letter dated 9th February, 2005 and he was informed that he had fifteen days in which to appeal.

15. No appeal was ever brought against the decision of the Refugee Commissioner. His solicitor deals with this in the grounding affidavit by saying that he was instructed that the reason that the applicant did not appeal the decision of the Commissioner to the Refugee Appeals Tribunal was that he was too frightened to deal with any authority or body which would deport him back to China.

16. A deportation order was made on 21st September, 2005 and the applicant was notified of the making of the order by letter dated the 3rd November, 2005. This letter was sent to the address furnished by the applicant pursuant to s. (4)(9)(4) of the Refugee Act, 1996 as amended and was returned marked "gone away". In his grounding affidavit the applicant solicitor states that his client was not aware that a Deportation Order had been made, but was notified by the Garda National Immigration Bureau in or around March, 2007 that an order had been made.

17. No challenge to the Deportation Order was made before March, 2007 or subsequently. Neither were any representations ever made to the Minister that the order should not be made or having been made should be revoked.

18. It appears that the applicant's domestic circumstances may have changed since he first applied for asylum. At that stage he describes himself as single. However, in an affidavit sworn in the course of these proceedings, he states that he married in August, 2005 and that his wife gave birth to a daughter in March, 2006. These changes in circumstances have never been brought to the attention of anyone in authority prior to these proceedings.

19. On behalf of this applicant it is submitted that Mr. D. W. G. contends that he is a person eligible for subsidiary protection as being a person liable to suffer serious harm as defined in the regulations i.e.

> (a) Death penalty or execution,
>
> (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
>
> (c) Serious and individual threat to an individual life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

20. In seeking leave it is submitted that it is the test as set out in the case of *G. v. D.P.P.* [1994] 1 I.R. 374 that applies. I accept this is so. As I have already said it is accepted that he is in position to establish an arguable case that the regulations do not exclude persons in respect of whom deportation orders were made pre 10th October, 2006.

21. However, that it not the end of the matter. The test is whether an arguable case can be made that this applicant is entitled to the relief sought. It is axiomatic that judicial review is a discretionary remedy. The conduct of the applicant is clearly a relevant consideration. Here the applicant has submitted an application and when he was unsuccessful at first instance, disengaged from the process, taking no steps to appeal or challenge the decision. While the occasion when an applicant's conduct would disentitle him to leave must be very rare, it would for example not be the situation that merely being in the country illegally would preclude an application for leave, in my view the facts of this case do fall into such a category. The applicant had been legally resident in the State for a number of years and then remained on in the State and then in order to extend his stay submitted an application for asylum that was quite simply a work of fiction. When his application failed he disengaged from the process in effect going underground.

22. His initial application to the court for judicial review was lacking in candour. His solicitor commenting on his behalf said neither he nor the applicant had any documentation in their possession relating to the application for asylum in 2004. The form completed in aid of the application for subsidiary protection indicates the application is being made on the basis that he fears:-

> 1. Death or execution;

2. Torture or inhuman or degrading treatment or punishment;

3. A serious and individual threat to his life or person by reason of indiscriminate violence in a situation of international or internal armed conflict.

23. The form also states that the applicant is a Falun Gong Practitioner and relied on this fact when making his application for asylum. Accordingly, it is clear that this application is an add-on or follow-on to the asylum application, an asylum application that we know to be entirely false.

24. The application form indicates that he is known to government officials and the police in his home town and that he has been warned directly, that if caught by the authorities he will be imprisoned and tortured. It indicates also that, that he was told by one police officer that he would be tortured while in prison and the method of torture has been described to him by the police officer, as including various methods of burning "against radiators etc". That claim has to be seen in the context that he is in Ireland since 1999, having come initially on a student visa. There was no reference to this conversation with the police officer at the time of the initial application for asylum.

25. Having regard to the applicant's conduct and the circumstances surrounding and forming a backdrop to this application for leave, I am not prepared to grant leave and I refuse the application.

26. Lest I be wrong in my approach to the granting of leave I intend to proceed to consider the application for an injunction as if leave had been granted. In pressing the case for an injunction each applicant has contended that the balance of convenience clearly favours the injunction and that damages would not be an adequate remedy. The underlying premise is that the applicants would face death or torture or ill treatment. I, without hesitation, accept that if a real and substantial risk that the individual would be exposed to torture or execution was established, then beyond any question whatever the balance of convenience would clearly favour the granting of an injunction in order to stay deportation. That is so self evident that I would be very surprised if the contrary proposition would ever even be argued. I have been referred to the case of *The Society for the Protection of Unborn Children v. Grogan* [1998] 1 I.R. 753 and in particular a passage in the judgment of Finlay C.J. has been brought to my attention. At p. 765 Finlay C.J. comments as follows:-

> "Having regard to that duty of the Court, it is clearly quite inappropriate to approach the exercise of the discretion to grant or refuse an interlocutory injunction upon the basis of a supposed status quo ante consisting of activities which are constitutionally forbidden acts. The true principle which falls to be considered in this case in relation to the exercise of that discretion is the unqualified existence of the relevant provisions of the Constitution at the time of the application for an injunction which, in my view, having regard to the constitutional law applicable, replaces the ordinary concept of status quo ante arising in interlocutory injunction cases. With regard to the issue of the balance of convenience, I am satisfied that where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in a balance against the granting of such protection would be another competing constitutional right."

27. I respectfully agree with the approach of Finlay C.J. but it does not seem to me that the passage has any application to the present case. In that case the defendants were engaged in constitutionally impermissible activity which would have as its consequence the termination of the life of the constitutionally protected unborn. Here there is no credible evidence before the court that the first named applicant faces execution or torture. A certain amount of country of origin information has been made available comprising three newspaper articles containing references to Falun Gong which were submitted with the application for subsidiary protection, but in essence the claim for an injunction is based on the bald assertion by the applicant that he will face ill-treatment, a bald assertion from an applicant who lacks credibility. It has been argued on behalf of both applicants that questions of credibility do not arise at this stage. Indeed it was suggested that to consider questions of credibility would violate the separation of powers since the obligation to consider requests for subsidiary protection is vested in the executive. I am unable to accept that proposition. In order to consider where the balance of convenience lies there has to be some element of assessment of whether the claim to face persecution is grounded in reality or not. It has been argued that the balance of convenience is all one way and that there are no countervailing considerations to be weighed against the case made by an individual applicant. In my view that is to oversimplify matters and ignores the public interest in seeing the integrity and efficacy of the asylum and immigration system maintained. In making that obsevation I repeat what I said earlier that of course if a real and a substantial risk of execution or torture were established there could be only one answer to the question as to where the balance would lie.

28. This is a case where a valid deportation order was made. It has never been challenged and it remains in effect. In the case of *Adetapo Adenyiyi Awonuga (a minor suing by his mother and next friend, Rehnat Folashate Awonuga)* judgment delivered on 4th April, 2006 by Ms. Justice Finlay Geoghegan, she refused to grant an injunction to prevent deportation when there was in existence an unchallenged deportation order and that was so notwithstanding that she was prepared for the purpose of her judgment to accept that the mother had an arguable case to challenge a refusal under the Irish Born Child scheme. Finlay Geoghegan J. concluded that there was no case made out on behalf of the adult applicant such that the court should exercise its discretion in her favour to grant an interlocutory injunction restraining deportation.

29. Mr. Willis has invoked Article 8 of the European Convention on Human Rights. He does so in a situation where his client states that he married in August, 2005 and that a baby daughter was born in March, 2006. This argument ignores the fact that there is a valid deportation order in existence and no steps had been taken to challenge it or to seek its revocation on the grounds that it was excessive or disporportionate or otherwise. Moreover, it is not clear that the deportation of the applicant would see the family being sundered apart. Accordingly I would not be prepared to grant an injunction.

The situation of the second named applicant

30. The second named applicant is a Nigerian national who came to the State in 1999. He applied for asylum and was permitted to engage in work while his application was processed. When his application failed, his entitlement to work ceased but notwithstanding that he has continued working with a company in Leixlip which has furnished a reference on his behalf.

31. By way of history, the applicant applied for asylum on 14th April, 1999. While the application was initially processed under the Hope Hanlon procedure it was ultimately considered by the Refugee Appeals Tribunal. The basis of his claim was that he stated that he feared he would be kidnapped from Lagos and brought back to his father's village and there he would be a human sacrifice as part of the rituals of a traditional religion. He indicated that he was last in this village in 1977 when he was kidnapped and ill-treated as a preliminary to being sacrificed before he was rescued by his father.

32. Both at first instance and on appeal the application was regarded as giving rise to serious credibility issues. The Tribunal member

who heard the appeal commented "many Nigerian asylum seekers claim to be in fear of death should they return on the grounds that one cult or another is out to make human sacrifice of them. The independent researchers who have written on the subject are universally agreed that there is no human sacrifice in Nigeria for infringements or in furtherance of cultism." It is possible apparently that at some stage in the 18th/19th Century there may have been human sacrifice but that question is no longer in the slightest way relevant to contemporary Nigerian society."

33. The applicant as normal was offered the opportunity to make representation for leave to remain notwithstanding the refusal of refugee status. No such representations were received and a deportation order was made. So far as the failure to make representations is concerned it does appear that the applicant did consult with a solicitor for that purpose and it is not wholly clear what happened thereafter. It also seems that at some stage he consulted another solicitor but this solicitor ceased practice. In addition he approached a local Dáil deputy who made representations on his behalf. His, then, solicitor was notified on the 11th March, 2002 that the time for making representation was long past, that his client had failed to report to the Garda National Immigration Bureau as requested and that he was therefore classified as having evaded deportation and was liable for arrest and detention without warrant.

34. In May of this year he was in touch with the Irish Refugee Council. We know this as correspondence to a legal case worker there is exhibited. This letter from the department was carbon copied to Mr. Kevin Tunney, Solicitor who is the applicant's present solicitor. No application for subsidiary protection was made at this stage.

The application for revocation of the deportation order and for consideration of the case under the scheme for subsidiary protection

35. The applicant has remained in the State in contravention of the terms of a deportation order for more than five years. In doing so, he was throughout that period committing a criminal offence. While it is certainly the case that the challenge to the decision of the 12th June, 2007 was made promptly, I feel that I cannot ignore the backdrop of the very considerable delay involving on-going illegality since the making of the deportation order. If during that period he feared that his deportation would render him liable to execution or torture as he now claims and if he was in a position to substantiate that claim then he could have stopped his deportation at any stage, as the exclusion from the State of a person to face execution or death in these circumstances would violate the principle of non refoulement as contained in s. 5 of the Refugee Act, 1996.

36. In these circumstances I do not propose to grant leave. He has by his conduct disentitled himself to the discretionary remedy that is judicial review. I reach that conclusion notwithstanding my view that it is only in rare cases that conduct will disentitle an individual to relief and my view that the mere fact that someone's presence in the State was illegal would not per se disentitle an applicant to relief.

37. In refusing leave in this case and in the case of the first applicant I believe my approach is consistent with that taken by MacMenamin J. in the case of *Akujobi v. The Minister for Justice, Equality and Law Reform,* (judgment delivered on the 12th January, 2007). In that case MacMenamin J. found that the applicants had debarred themselves from entitlement to seek leave for judicial review by reason of want of good faith. The approach of MacMenamin J. was consistent with the approach of O'Neill J. in *Dada v. Minister for Justice, Equality and Law Reform,* (judgment of the 3rd May, 2006) and to that of Peart J. in *Mamyko v. The Minister for Justice, Equality and Law Reform* (judgment of the 6th November, 2003). In that case Peart J. criticised as undesirable that an applicant should be permitted to "drip feed" grounds from time to time or that applicants should react at the "eleventh hour" to the prospect of deportation by submitting fresh applications for leave to remain, where the grounds are such they have been capable of a communication at a much earlier stage, and in fact at a time when representations were made originally on their behalf. In this case if the applicant's fears were genuine. It was always open to him to move to halt his deportation relying on the prohibition on refoulement. It also seemed that he was legally represented from some time prior to 25th May of this year at which stage the Department was copying correspondence to his present solicitor. Counsel for the applicants have referred me to *Arsenio v. The Minister for Justice, Equality and Law Reform,* (judgement of the 22nd March, 2007 of Charleton J.). In that case Charleton J. was prepared to grant the injunction notwithstanding that serious lies had been told, lies he described as egregious. However, in my view that case is distinguishable in that while the lies told there were undoubtedly serious or egregious they were not central to the relief sought in that, the case was ultimately going to stand or fall on a question of statutory interpretation which would decide whether the applicant had or had not a right to remain.

38. In these circumstances I have indicated I do not propose to grant leave. This applicant, too has by his conduct disentitled himself to the discretionary remedy that is judicial review. As in the *D. W. G.* case of his fellow applicant I propose to go on to consider what the position would be had I granted leave. Again, my view is that he is in the position of seeking equitable relief in a situation where his hands are far from clean and where he has failed over a number of years to advance the arguments that he now seeks to make. Again, the arguments on his behalf in relation to the balance of convenience and inadequacy of damages are based on the premise that he is in fact at risk of execution or torture. No credible evidence to that effect has been put before the court and the case is put on the basis of a bare assertion. If credible evidence existed it could have halted his deportation at any time over the last five years.

Conclusion and Summary

39. I am refusing leave in both cases, I am refusing the applications for interlocutory injunctions in both cases.