Neutral Citation Number: [2011] IEHC 459

THE HIGH COURT

2009 3363 P

BETWEEN

HAQ NAWAZ

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 7th day of July, 2011

1. The application

1.1 This is an application brought by the plaintiff on foot of a notice of motion dated 20th May, 2011 seeking an order restraining the first defendant (the Minister) from issuing a deportation order in respect of the plaintiff. Although this is not clear on the face of the notice of motion, the application is for an interlocutory injunction pending the trial of the action.

2. Factual and procedural background

2.1 The factual background to these proceedings is set out in my judgment delivered on 25th May, 2011 (the May judgment), in which I refused an application by the defendants to dismiss these proceedings under the Court's inherent jurisdiction on the basis that they were bound to fail. That judgment is under appeal to the Supreme Court.

2.2 As I have outlined in the May judgment, the only relief which the plaintiff seeks in these proceedings is declaratory relief, in particular, a declaration that s. 3 of the Immigration Act 1999 (the Act of 1999) is repugnant to the Constitution and incompatible with the European Convention on Human Rights (the Convention). I have set out in para. 2.3 of the May judgment the basis on which the plaintiff alleges–

> (a) repugnancy to the Constitution (that s. 3 disproportionately interferes with his personal rights, including his right to his good name and his right to earn a livelihood in breach of Article 40.3.1 and Article 40.3.2 and that it disproportionately interferes with his right to marriage and family life in breach of Article 41) and
>
> (b) incompatibility with the Convention (that it interferes with his private life in a manner not necessary in a democratic society by disproportionately interfering with his right to privacy under Article 8).

The nub of the plaintiff's challenge (as I pointed out in para. 5.7 of the May judgment) is that, where the Minister notifies a person of a proposal to make a deportation order (as had happened in the case of the plaintiff by a notice dated 23rd February, 2006) and the person to whom the notice is given makes representations to the Minister in accordance with s. 3(3)(b) (as the plaintiff did in response to the notice of 23rd February, 2006), if the Minister rejects the representations, the person is not afforded an opportunity to leave the State voluntarily without a deportation order being made against him. In this case, the Minister did not make a decision either to make or not make a deportation order on foot of the notification of 23rd February, 2006 and the plaintiff's representations.

2.3 What happened while the judgment on the defendants' motion to dismiss the proceedings was awaited (admittedly for far too long) was that the Minister issued a fresh notification to the plaintiff pursuant to s. 3 of the Act of 1999 of his proposal to make a deportation order. While a date does not appear on the notification, I assume it was dispatched on 3rd March, 2011. In any event, a copy of it was sent to the plaintiff's solicitors on 3rd March, 2011. That notice does not replicate the notice of 23rd February, 2006 verbatim, but, in substance, it conveys the same message: the plaintiff was admitted to the State on 30th September, 2003 and was subsequently granted permission to remain "until early 2006", since when the plaintiff has remained in the State without the permission of the Minister and is, therefore, unlawfully present in the State. Accordingly, the plaintiff is a person whose deportation would, in the opinion of the Minister, be conducive to the common good. On 23rd March, 2011 the plaintiff made representations to the Minster to remain temporarily in the State pursuant to s. 3 of the Act of 1999.

2.4 While, as yet, the representations have not been adjudicated on by the Minister and a deportation order has not been made, the position adopted on behalf of the Minister has been that the existence of the constitutional challenge to s. 3 pending in these proceedings does not preclude the Minister from making a deportation order. In any event, it was submitted on behalf of the defendants that, if a deportation order is made, it would be open to the plaintiff to challenge its validity by way of judicial review.

3. Criteria for grant of an interlocutory injunction/conclusions on the application

3.1 On behalf of the plaintiff it was submitted that to establish an entitlement to an interlocutory injunction the plaintiff must meet the tests set out by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] 1 I.R. 88, namely, that –

> (a) there is a fair issue to be tried,
>
> (b) the balance of convenience favours an injunction, and
>
> (c) damages are not an adequate remedy.

3.2 Counsel for the defendants submitted that it has not been demonstrated that there is a fair issue to be tried on a number of grounds.

3.3 First, it was contended that the plaintiff has not identified, either in law or in fact, a constitutional or a convention right which would be infringed if the Minister made a deportation order against the plaintiff. As regards the plaintiff's reliance on the right to earn a livelihood, it was contended that the plaintiff is unlawfully in this jurisdiction and does not now have, and never has had, an entitlement to work. As regards reliance on the plaintiff's right to a good name, the Court's attention was drawn once again to the decision of the Supreme Court in *F.P. v. Minister for Justice* [2002] 1 I.R. 164 and, in particular, the comments of Hardiman J. at p. 172 *et. seq.* As I stated in the May judgment (para. 4.4), I consider that the plaintiff in these proceedings has exactly the same status as the applicants in the *F.P.* case, aside from any status he has by reason of his separate claim to be entitled to subsidiary protection in the judicial review proceedings he has brought (Record No. 2009/1019 J.R.), which currently are subject to an appeal to the Supreme Court. That status, in accordance with what Hardiman J. pointed out at p. 174, means that at the time of making representations following a notification under s. 3, the plaintiff was a person without title to remain in the State and the legislative scheme was such that he might be deported. Counsel for the defendants laid particular emphasis on the judgment of Denham J. in *Bode (A Minor) v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 663 and, in particular, paragraphs 92 to 95 (at p. 695). There, Denham J. pointed out that the appropriate process within which to consider constitutional or convention rights of an applicant in the plaintiff's position is the process under s. 3 of the Act of 1999. Denham J. summarised the position as follows (at para. 99):

> "The Oireachtas has established a statutory scheme providing that the Minister, in considering the situation of foreign nationals, shall have regard to a wide range of issues when making a decision under s.3 of the [Act of] 1999, as amended. Constitutional and convention rights are appropriately considered at that stage. If there is a change of circumstances then an application may be made to the Minister to consider further matters under s.3(11) … ."

The plaintiff could not take issue with what was laid down by the Supreme Court in the *F.P.* case and the *Bode* case and, as I understand the position, the plaintiff does not attempt to do so. The plaintiff's case is that the statutory scheme is flawed and that, because of the lacuna in the statutory options available to the plaintiff, the Minister cannot exercise his discretion to make a deportation order in a manner consistent with the Constitution and compatible with the Convention. As I understand the plaintiff's case, it is that before a decision is made whether to deport him or not, the flaw in the scheme should be put right by the plaintiff having the option to leave the State voluntarily before a deportation order is made, if the Minster rejects his representations.

3.4 Secondly, counsel for the defendants attached significance to the fact that the plaintiff has not sought a perpetual injunction in the plenary summons or the statement of claim. That does not affect the plaintiff's entitlement to an interlocutory injunction. All the plaintiff is seeking is that the Minister should defer consideration of whether a deportation order should be made until the issues raised in these proceedings as to whether s. 3 is consistent with the Constitution and compatible with the Convention have been determined.

3.5 Broadly speaking, for the reasons set out in the May judgment for the conclusion which I reached that the defendants had not demonstrated that the plaintiff's case is bound to fail, I consider that there is a fair issue to be tried that the plaintiff has standing to challenge the constitutionality and compatibility with the Convention of s. 3 and that s. 3 is repugnant to the Constitution and incompatible with the Convention on the basis asserted by the plaintiff.

3.6 In reaching the conclusion that there is a fair issue to be tried, I have not overlooked the other authorities relied on by counsel for the defendants. Counsel opened the passage from the judgment of Gannon J. in *Osheku v. Ireland* [1986] I.R. 733 (at p. 746) in which he addressed legislation on the control of aliens in a broad constitutional context, including the fact that there are fundamental rights of the State itself. Even though that decision predates the Act of 1999, the observations of Gannon J. may well be seen to be relevant to the determination of the issues in the substantive proceeding. However, that is for another day. The decision of the Supreme Court in *L.C. v. Minister for Justice* [2007] 2 I.R. 133 cited by counsel for the defendants is superficially of more relevance to this interlocutory application because it dealt with an interlocutory application. In that case, a deportation order had been made against the applicant who sought to have it revoked under s. 3(11) of the Act of 1999. The High Court (Hanna J.) refused to grant an order of *certiorari* of the decision of the Minister not to revoke the deportation order. The applicant appealed to the Supreme Court and, pending the hearing of the appeal, sought an injunction restraining the implementation of the deportation order. The Supreme Court refused to grant the relief, McCracken J. stating (at p. 155):

> "In this case the 'decision being appealed from' is a decision of the respondent made under s. 3(11) not to revoke a deportation order against the applicant. There is no appeal and can be no appeal from the decision of the High Court Judge refusing relief in relation to the deportation order itself. It has been held by the High Court that the deportation order is valid, and that finding cannot be challenged before this court. If the court were to grant an injunction such as is being sought by the applicant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order."

In this case, there is no deportation order. The Minister has notified the plaintiff of his proposal to make a deportation order. The plaintiff's case is that the component of the statutory scheme which regulates the next step in the process is invalid having regard to the provisions of the Constitution. What the plaintiff is doing in seeking an interlocutory injunction to restrain the Minister from making a deportation order is to maintain the status quo (that he is not subject to a deportation order) pending the determination of the substantive proceedings.

3.7 On the second criterion, whether damages would be an adequate remedy for the plaintiff, it was submitted that, if a deportation order were made against him, the plaintiff would suffer a permanent stigma and permanent damage to his reputation. It was submitted that the damages necessary to compensate him would be incapable of quantification. As a matter of probability, I think that is correct.

3.8 As regards the third criterion, it was acknowledged by counsel for the plaintiff that, in considering where the balance of convenience lies, the Court must take into account the presumption of constitutionality, referring to the helpful commentary in Kirwan on *Injunctions: Law and Practice* at para. 10 – 55 *et seq.* Counsel for the plaintiff also relied on the following passage of the judgment of the Supreme Court in *Crotty v. Ireland* [1987] I.R. 713 (at p. 731):

> "As to the second question, whether the balance of convenience justifies the granting of an interlocutory injunction, the balance of convenience in the context of the Constitution is exceptional and considerations different to those of the ordinary injunction apply. If the interlocutory injunction sought by the plaintiff were not granted, then the Government's act of ratification would deprive this Court of its jurisdiction or power to grant to the plaintiff the remedies necessary to protect his constitutional rights. If that submission is correct, a fair argument has been made out and it constitutes what, in my view, would justify making an exception, given a reluctance to interfere with the Executive. I am satisfied that in order to do justice to the parties the injunction should continue."

In *Crotty*, the plaintiff was seeking an interlocutory injunction restraining the Government from ratifying the Single European Act pending the final hearing of his case. Counsel for the plaintiff submitted that the situation which will arise here, if the Minister is not restrained from making a deportation order, is analogous to the situation which was considered in *Crotty*, in that the plaintiff will suffer the loss and damage which these proceedings were instituted to prevent. In my view, the outcome of a refusal to grant an interlocutory injunction to the plaintiff in this case would not be analogous to the refusal to grant an interlocutory injunction in the *Crotty* case, where fundamental issues in relation to the doctrine of separation of powers arose and were, in fact, considered in due course. In this case, as counsel for the defendants pointed out, if the Minister makes a deportation order, it will be open to the plaintiff to seek to have it quashed. In response, counsel for the plaintiff submitted that one could not assume that a challenge would be successful and, in practice, it is exceedingly difficult to succeed on such a challenge. That, in my view, is not an adequate response, in that it must be assumed that the law would be properly applied on an application to quash a deportation order by way of judicial review. Account must also be taken of the fact that, in response to the Minister's proposal of 3rd March, 2011, the plaintiff made representations and thereby invited a decision of the Minister whether or not to make a deportation order. As is pointed out in the May judgment (at para. 6.7) the absence of a determination by the Minister raises the issue of prematurity or lack of ripeness in relation to the relief which the plaintiff is endeavouring to pursue in the substantive proceedings.

3.9 If the Court were entitled to adopt a pragmatic approach to the balance of convenience criterion, I would incline to the view that, in the interest of minimising the necessity for the Court's involvement in the issue raised by the plaintiff and the attendant costs, the Minister should be restrained pending the trial of the action from making a deportation order, which would inevitably lead to further proceedings by way of judicial review in this Court, in addition to these proceedings and the judicial review proceedings in relation to the subsidiary protection application referred to earlier. However, I consider that I must determine the matter on the basis of principle and, on that basis, I consider that the balance of convenience does not lie in favour of granting an injunction restraining the Minister from making a deportation order on the facts of this case, where a decision of the Minister will either render these proceedings moot, albeit an unlikely outcome, or, alternatively, will overcome the prematurity and lack of ripeness argument. Further, if the decision is to make a deportation order, that decision can be challenged by way of judicial review or, alternatively, there can be an application to revoke the deportation order. The determinative factor, however, is that the availability of an opportunity to challenge the deportation order, if made, and to get an order which would render it null and void, if the plaintiff's challenge to the constitutionality of s. 3 is well founded, effectively means that the status quo will not be altered.

3.10 In summary, having already found in the May judgment that the plaintiff's case is not bound to fail applying the high threshold on the basis of which an application to dismiss under the Court's inherent jurisdiction is determined, I think I could be adopting an inconsistent approach in concluding, applying the low threshold by reference to which the first criterion on the grant of an interlocutory injunction – whether there is a fair issue to be tried – is determined, that there is not a fair issue to be tried. While I am not suggesting that the two thresholds are coterminous, I have come to the conclusion in this case that there is a fair issue to be tried. However, I have come to the conclusion that the balance of convenience does not favour the grant of an injunction.

3.11 Finally, the grounding affidavit on this application was sworn by the plaintiff's solicitor. I think I am correct in stating that there was no indication given to the Court that the plaintiff would give an undertaking as to damages in the event of an injunction being granted. I mention this merely to make it clear that, if the Court were to grant an interlocutory injunction, an undertaking as to damages would have to be given.

4. Order

4.1 There will be an order refusing the plaintiff's application.