Neutral Citation Number [2012] IEHC 189

THE HIGH COURT

[2011 No. 850 J.R.]

BETWEEN

F. L.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 10th May, 2012

1. The principal issue for resolution in these proceedings whereby the applicant seeks leave to apply for judicial review is whether the Minister is obliged by s. 3 of the Immigration Act 1999 ("the Act of 1999") personally to consider and sign deportation orders or whether - as the respondent contends - such decisions may lawfully be taken in the name of the Minister by a senior civil servant by virtue of what has come to be known as the "Carltona" doctrine. In the present case, the deportation order was made in respect of Ms. L., an Algerian national, by Mr. Noel Waters, a senior civil servant who is duly authorised by the Minister to take decisions of this nature in his name. Mr. Waters is the Director General of the Irish Naturalisation and Immigration Service and he is probably the most experienced civil servant in the State with responsibility for immigration and asylum matters.

2. These questions were fully considered by me in my judgment in *T. v. Minister for Justice and Equality*, High Court, 2 November 2011. Counsel for the applicant, Mr. Noonan, invited me not to follow this decision in the face of additional authorities which he sought to bring to my attention. But before considering this issue, it is necessary to say something about the background facts of this case.

3. The applicant is an Algerian national who arrived in Ireland in September 2007, but who did not apply for asylum until some two years later. A key part of her asylum claim was that she was the director of a women's rights organisation in Algeria and that she had suffered persecution and discrimination from the police. By decision dated the 8th June 2010 the Refugee Appeals Tribunal found against the applicant on credibility grounds. No documentation could be sourced by the Tribunal in relation to this organisation and the Tribunal concluded that the applicant had an inadequate knowledge of other women's human rights groups in Algeria such as would take from the general credibility of her account. No challenge has been taken to that decision.

4. The applicant then made an application for leave to remain and for subsidiary protection. The application for subsidiary protection was refused on 22nd July, 2011, and on 23rd August, 2011, the applicant was informed that a deportation order had been made.

5. So far as the deportation order is concerned, the net question is whether Mr. Waters could lawfully execute that order in the name of the Minister. If the *Carltona* doctrine does not apply, then there is little dispute but that the order is *ultra vires* and void, irrespective of the experience, standing and status of Mr. Waters. In that situation, this would count for nothing, since Mr. Waters simply would not have been authorised by law to take this decision. Although, as I have already indicated, this question was fully examined by me in T., it seems necessary to consider this issue afresh.

The Carltona Principle

6. As I pointed out in T., *Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560 is the eponymous decision of the English Court of Appeal which conveniently describes a key constitutional doctrine governing the relationship between civil servants and the responsible Minister. Here private property had been requisitioned by a civil servant acting under the authority of the Minister pursuant to war-time regulations. The Minister in question had not, of course, actually taken the decision, but Lord Greene M.R. rejected the argument that the decision to requisition the property was invalid on that ground ([1943] 2 All E.R. 560, 563):-

> "In the administration of government in this country the functions which are given to ministers...are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in this country. It cannot be supposed that this regulation meant that, in each case, the minister in question should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department. Public business could not be carried on if that were not the case."

7. Having thus described the decision in *Carltona*, I then continued:-

> "This principle has been expressly approved in this jurisdiction by the Supreme Court: see *Tang v. Minister for Justice* [1996] 2 I.L.R.M. 46 and *Devanney v. Shields* [1998] I I.R. 230. As the late Professor Wade pointed out in a passage from *Administrative Law* (7th Ed., at p. 357) (which was quoted by Hamilton C.J. in *Devanney*) "strictly speaking, there is not even delegation in these cases". The civil servants rather acts in the name of the Minister pursuant to a general principle of law which, in this jurisdiction, is buttressed by the provisions of s. 2 of the Ministers and Secretaries Act 1924, by virtue of which the Minister is invested as a corporation sole. The Minister thus has political responsibility for the acts of his civil servants and, of course, he is accountable in this regard to Dáil Eireann: see Article 28.4.1 of the Constitution. The Minister is also free to take any particular decision himself. The point nevertheless is that his responsible civil servants are free to take such decisions in the name of the Minister, save where this principle is negatived, either expressly or impliedly, by either the context of the relevant legislation or, perhaps, by the general law."

8. In what type of cases might the Minister be expected to take the decision personally by way of exception to the *Carltona* doctrine? Insofar, therefore, as there are exceptions to the *Carltona* doctrine they would seem to arise by necessary implication where the decision is of such particular or intrinsic importance that the Oireachtas must be taken to have assumed that the Minister

would take the decision personally. As Denham J. put it in *Devanney* ([1998] 1 I.R. 230, 261) there are "exceptions in matters of significant importance where the Minister is expected to make the decision personally." The issue here really comes to down to whether this is one such case, but before examining this question, it may be convenient to discuss briefly the leading authorities.

The Decisions in *Tang, Devannev. Laurentiu* and *Meadows*

9. In *Devanney* the Supreme Court held that while the office of the District Court clerk was an important one, the decision to appoint a District Court clerk - which power was vested in the Minister for Justice under the applicable legislation nonetheless did not require to be taken personally by the Minister. This was in part because, as Keane J. noted, the role of the Minister *vis-a-vis* that the appointment was a purely formal one since he was in practice merely giving effect to a recommendation which had earlier been made by either by the Civil Service Commissioners or by an official responsible for personnel within the Department: see [1998] 1 I.R. 230, 263.

10. As I noted in *T*:-

> "The decision to deport is, however, far from a purely formal one. It often requires a detailed appraisal of the facts, the application of Government policy, together with a consideration of statutory prohibitions (*e.g.*, the prohibition of *refoulement* in s. 5 of the Refugee Act 1996), constitutional provisions and the ECHR. I appreciate that up to very recent times the practice has been that the decision to deport has been taken by the Minister personally and this Court is well familiar with deportation orders which have been personally signed by previous occupants of the post of Minister for Justice and Equality. Indeed, a previous Minister informed the Dáil that "the ultimate step, that of deportation, is undertaken...only with the express authority of Minister in the form of a signed deportation order": see 600 *Dáil Debates* at Col. 750 (12th April, 2005). But the usage of statute can only be of limited assistance in construing the *vires* of the Minister and it is entirely open to the present Minister to change existing practice assuming, of course, that there is a legal basis for doing so."

11. In fact, in judgments delivered two years prior to *Devanney*, the Supreme Court had upheld, applying *Carltona* principles, a decision made by a civil servants which refused the applicants leave to remain in the State: see *Tang v. Minister for Justice and Equality*. It is true that both Hamilton C.J. and Denham J. stressed that the decision at issue there did not amount to a deportation order. But those comments were made solely in the context of whether the applicants could still make a submission to the Minister on this question, which the Supreme Court affirmed that they could. The emphasis on the fact that the decision did not amount to a deportation order should not be understood as the Court tacitly suggesting that the *Carltona* principle might not apply to a decision of that nature. Indeed, Denham J. stressed that nothing "relating to the issue of deportation [is] relevant to the decision at issue in this case": see [1996] 2 I.L.R.M. 46, 63.

12. Mr. Noonan sought to rely on two further decisions of the Supreme Court which were not referred to in *T*. The first of these, *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, concerned the constitutionality of s. 5(1)(e) of the Aliens Act 1935. As it well known, that sub-section was found to be unconstitutional by the Supreme Court inasmuch it was found to constitute an unlawful delegation of legislative power, contrary to Article 15.2.1.

13. It is true that in *Laurentiu* the Supreme Court confirmed that the power to deport is an executive power. But this characterisation really does not advance the debate any further. Nearly every statutory power which is devolved by law on Ministers by the Oireachtas involves the exercise of executive power in one shape or another. It cannot follow from this premise that the relevant Minister must be expected to take every decision of this kind personally. All that Article 28.2 of the Constitution requires is these powers are exercised "by or on the authority of the Government" and Article 28.4.1 requires that the Minister (as a member of Government) remains responsible to Dáil Eireann.

14. The decision taken by Mr. Waters was taken "on the authority of the Government'" in this sense in that Mr. Waters was duly authorised by the Minister to take decisions of this kind. The Minister further remains answerable and politically accountable to Dáil Eireann in respect of these decisions in the manner required by Article 28.4.1.

15. The second authority relied upon is that of *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3. That case concerned issues such as the adequacy of reasons given by the Minister, the applicable standard of review and the proportionality doctrine. In the course of his judgment Murray C.J. stressed that the decision was personal to the Minister and that he could not be bound by the views of officers "who considered a proposed deportee's application for asylum at the initial or appeal stage." But these comments cannot be understood outside of their proper context, as Murray C.J. was thereby seeking to emphasise that the Minister could not be absolved from making a decision concerning the applicant's status (and, specifically, whether she should have been deported, her pleas that she faced the threat of female genital mutilation notwithstanding) simply by reason of the fact that these issues had already been addressed by the Office of the Refugee Applications Commissioner or the Refugee Appeal Tribunal.

16. These comments of Murray C.J. cannot, therefore, be regarded as expressing any views on the scope of *Carltona* doctrine. Nor can I accept that the decision in *O. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 175 is of any direct assistance. In that case a civil servant had engaged in some preparatory work on a draft deportation order before the applicant's application for subsidiary protection had been finalised. The implicit suggestion here, of course, was that the Minister had pre judged the subsidiary protection application. Cooke J. stressed that the work done was purely preliminary and preparatory. As he explained:-

> "The work done by an executive officer carries no weight or authority until it has been read, revised and approved by several superior levels in the hierarchy of the repatriation unit and acquires no status whatsoever as a decision until it is ultimately considered, accepted and acted upon by the Minister."

17. All of this may be regarded as unexceptionable. But it cannot really directly bear on the position of Mr. Waters who, after all, has been expressly authorised by the Minister to take certain immigration decisions in his name.

Examining the 1999 Act

18. An examination of the 1999 Act yields little by way of significance on this point, since it refers consistently to the Minister. One returns to the question of whether the structure, the context and the nature of the powers thereby conferred impliedly limit the scope of the *Carltona* doctrine. It is true that s. 3 of the Immigration Act 2004 permits the Minister to appoint immigration officers, but this Act contains no clause providing that it is to be collectively construed with the Act of 1999. No proper inference, therefore, can be drawn from s. 3 of the Act of 2004 regarding the scope of application of the *Carltona* doctrine.

19. In the end, as I pointed out in *T.*, the matter is almost one of first impression:-

> "While I accept that the decision to deport is often a complex one which has significant implications for the individual who is the subject matter of the order, I am not satisfied that it is of such intrinsic importance to the community at large that the decision can be made only by the Minister personally. It must also be recalled that the Minister for Justice has many onerous obligations. It cannot be suggested that the Oireachtas must have intended that he alone should personally take the decision to deport a given individual in every single case, since this would mean that he had responsibility for potentially hundreds of such decisions in any given year."

20. It follows, therefore, that this is also a case governed by *Carltona* principles and that the nominated civil servant remains free to make the decision in question. Of course, as I have already stressed, the Minister remains accountable to Dáil Eireann for all such decisions, both as a matter of constitutional law (in Article 28.4.1) and as a matter of political theory and reality.

Conclusions on the *Carltona* point
21. It follows, therefore, that, for the reasons just stated, the *Carltona* doctrine applies to the present case and it cannot be said to have been impliedly negatived by the provisions of the 1999 Act.. The deportation decision was accordingly lawfully made in the name of the Minister by Mr. Waters. It follows, therefore, that I must refuse to grant the applicant leave to apply for judicial review on this ground.

Article 4(1) of the Qualifications Directive
22. The next argument advanced by the applicant is that the Minister was obliged pursuant to Article 4(1) of Directive 2004/83/EC ("the Qualifications Directive") to supply her in advance of a draft of a negative subsidiary protection decision so that she could comment on it. In the course of a reference which I made to the Court of Justice on 11th May, 2011, pursuant to Article 267 TFEU in Case C-277/11 *MM v. Minister for Justice, Equality and Law Reform*, I referred the following question:-

> "In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of Council Directive 2004/83/EC require the administrative authorities of the Member State in question to supply to such applicant the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?

23. In the order for reference, I suggested that the question posed be answered in the negative. This view was endorsed by Advocate General Bot in his opinion released on 26th April 2012 and a judgment from the Court of Justice is presently awaited.

24. The Article 4(1) argument advanced here can fairly be described as purely theoretical. Ms. L. has not suggested that there was any aspect of the Minister's decision which could have come as a surprise to her. This is in itself is hardly unexpected, given that the Minister's decision largely adopted and endorsed the views expressed by the Refugee Appeal Tribunal. The case based on Article 4(1) stands or falls, therefore, on the existence of an *ex ante* obligation to consult in all cases where a negative result is proposed. As this application will be governed by the judgment of the Court of Justice in *MM*, I propose to adjourn this application for leave pending the outcome of the decision in that case.

Article 8 ECHR
25. The applicant married an Irish citizen in September 2010, but it is acknowledged that the parties are separated and living apart. There are no children of the marriage and Ms. L. has no other family in the State. The Minister's decision recited these facts and then concluded that "a decision by the Minister to deport [Ms. L.] does not constitute an interference in the right to respect for family life under Article 8(1) ECHR."

26. Mr. Noonan is technically correct to observe that the Minister was in error in saying that there was no interference with family life. But this is in the nature of harmless error, since what the Minister was essentially saying was that there were pressing reasons associated with the immigration process which actually justified this interference with family life in the present case for the purposes of Article 8(2) ECHR. Viewed thus, it would be very hard to say that this decision was disproportionate. The applicant had no firm links with the State, the marriage was contracted when her immigration status was vulnerable, the marriage has broken up and, even more critically, there are no children of the marriage whose interests would need to be safeguarded by this Court.

27. In these circumstances, I would refuse the applicant leave to challenge the Minister's decision on this ground.

Conclusions
28. Save for the *MM* point, I have refused to grant the applicant leave to apply for judicial review. Even though I have adjourned the application for leave pending the decision of the Court of Justice, the *MM* point itself cannot be regarded as particularly strong, not least in view of the very recent opinion of Advocate General Bot. In these circumstances, I cannot regard the applicant as having established an arguable case for the purposes of the grant of interlocutory relief, so that the question of the adequacy of damages and the balance of convenience does not even arise.

29. In these circumstances, I must further refuse to grant the interlocutory relief sought.