Neutral Citation [2016] IEHC 649

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 615 J.R.]

BETWEEN

VILMAR DA SILVA AND WINNIE SCALLY

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. Are there substantial grounds to challenge a deportation order against a particular illegal immigrant on the basis that the Minister has allowed a large number of other illegal immigrants to remain in the State? That is the primary proposition being contended for in this application for leave to apply for judicial review.

2. The applicants are citizens of Brazil and Ireland respectively who are in a relationship which commenced in August, 2009. The applicant had recently arrived in Ireland on a visitor's visa for a fortnight in November, 2007. He has been illegally in Ireland thereafter.

3. An application seeking permission to reside in the State based on the "*de facto relationship*" was submitted on 22nd August, 2012.

4. That application was refused on 10th December, 2012. Ultimately a deportation order dated 1st July, 2016, was made in respect of the first named applicant.

5. In his grounding affidavit at para. 16, the first named applicant says that "*as a result of knowing many other foreign nationals, including friends of Brazilian nationality, who had been granted permission to remain in the State notwithstanding that they had resided in the State for in excess of 5 years without lawful permission, we believed that I also would be granted a similar permission to reside in Ireland*". On the basis of this view, three reliefs are sought in the leave application.

6. The first relief sought is an order quashing the deportation order.

7. Secondly an injunction is sought. An interim injunction was in fact granted on 29th July, 2016 when the matter was first mentioned in court by Faherty J. until 10th October, 2016. It appears to have expired on that date.

8. Thirdly, the applicant seeks an order for discovery of "*all materials relating to the ministerial policy of granting long term immigrants permission to remain in the State*" including records of what are referred to as "*radical actions*" and the like referred to by Minister of State David Stanton T.D. in a speech to Seanad Éireann on 29th July, 2016, on a private member's bill. Interlocutory reliefs such as discovery are not necessary or appropriate for inclusion in a grant of leave and generally arise only if leave is granted.

9. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

10. The essential ground of the application is that the first named applicant has not got the benefit of a policy "*made available to many others in a like position*".

11. This is not a substantial ground to challenge the deportation order. The fact that many illegal immigrants may or may not have been given permission to stay does not give any entitlement to the next illegal immigrant.

12. Mr. Mark de Blacam S.C. (with Mr. Gary O'Halloran B.L.) in his very able submission for the applicant relies on my decision in *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 (unreported, High Court, 25th June, 2016) at paras. 32 to 34, where I deal with a similar complaint, and hold that in the circumstances it is not a basis for granting relief. My comments in the S.T.E. judgment do not furnish a basis as to why leave should be granted in relation to this point in other cases: quite the reverse.

13. In addition the proceedings complain about the assessment of economic prospects, the applicant's private life under art. 8 of the ECHR, and a failure to consider submissions. These are fairly generic grounds as pleaded and do not comply with the specificity required by the Rules of the Superior Courts (Judicial Review) 2011, but in any event do not constitute substantial grounds to challenge the decision. These are matters the assessment of which is for the Minister in the absence of any clearly demonstrated illegality. Substantial grounds for contending that there is such an illegality have not been made out.

14. In any event, as has been established on numerous occasions, the art. 8 rights of a person whose position is "*precarious*" are minimal or non-existent: see *C. I. v. Minister for Justice Equality and Law Reform* [2015] IECA 192 (unreported, Court of Appeal, Finlay Geoghegan J., 30th July, 2015) at paras. 42 to 46: *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (unreported, Supreme Court, 16th July 2015) *per* MacMenamin J. at para. 26 and Charlton J. at para. 35; and my decision in *Li v. Minister for Justice and Equality* (No. 1) [2015] IEHC 638 (unreported, High Court, 21st October 2015)). Unhelpfully, the applicants' written submissions do not refer to these cases but rather refer to para. 45 of *N.A. v. Minister for Justice Equality and Law Reform* [2009] IEHC 245 (unreported, High Court, Clark J., 26th May 2009), which is a comment that is clearly superseded by the more recent caselaw including decisions at appellate level.

15. Overall, the applicants have failed to make out substantial grounds for the application.

16. The fact that the primary point being advanced amounts to saying that the first named applicant's flagrant disregard of the immigration law of the State over a decade should be counted in his favour does not enhance the present application. While

applicants normally like to emphasise unenumerated rights, conduct of the type at issue here is in breach of the fundamental unenumerated constitutional duties to comply with the law and uphold the integrity of the borders of the State.

Order.

17. For the foregoing reasons I will order:

(i). that the application for leave be refused;

(ii). that the matter be adjourned to enable the applicants to consider any application for leave to appeal, which should be on notice to the respondents if made;

(iii). that the applicant serve the CSSO with a copy of the judgment forthwith; and

(iv). that if and insofar as any injunction remains in force it be discharged from the date of oral pronouncement of this judgment.