Neutral Citation [2015] IEHC 518

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 495 JR]

BETWEEN

J. I.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 31st day of July 2015

1. This is the judgment of the Court on an application for an interlocutory injunction to restrain deportation. It is necessary to set out some facts concerning the applicant and the procedural history of the proceedings.

The applicant's background:
2. The applicant says she is a Nigerian schoolteacher born on the 18th of March, 1979. She applied for asylum in Ireland on the 23rd of April, 2007, claiming her father was a member of a cult involved in human sacrifice who wished to sacrifice her in order to extend his lifespan. She also claimed that she was member of a certain political party threatened by a rival group. The Refugee Applications Commissioner recommended refusal of asylum on the 11th of May, 2007.

3. The applicant challenged this decision by proceedings instituted on the 29th of May, 2007, but withdrew the proceedings on the 3rd of December, 2009.

4. She then pursued an appeal to the Refugee Appeals Tribunal which she had filed without prejudice to the (withdrawn) judicial review challenge to the decision of the Commissioner.

5. The Refugee Appeals Tribunal made a negative recommendation on the 22nd of July, 2010. Section 6 thereof is in the following terms:-

> *"This case is highly unusual in the sense that the Applicant came to the hearing and told the Tribunal that her claim was fabricated and that she came to Ireland as she was afraid of rape, poverty, suffering and being attacked, inter alia, in Nigeria. The Applicant was asked if she was ever raped, kidnapped or attacked at home she said she was not.*
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> *She said that her personal details, in her form 1, were correct but that the story which she recounted in her form 1 was untrue and that she was not persecuted by virtue of her membership of a social group or political opinion.*
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> *The applicant said that she is a Christian and she was unhappy about the lies, which she had previously told and that she wanted to set the record straight. The Tribunal appreciates the fact that the applicant ultimately told the truth, albeit a bit late in the day…*
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> *The Applicant's evidence was quite clear in that she told the Tribunal that she is, effectively, an economic migrant. She said she was not earning enough in Nigeria and that she wanted to be with her sister. She gave no evidence of past persecution. While it is completely understandable that a human being would want to make a better and perhaps easier life for herself, this unfortunately does not bring an Applicant within the convention.*
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> *It is well established that an Applicant's failure to satisfy one of the criteria results is [sic] a failure to establish a claim for refugee status. The Applicant has not satisfied any of the criteria as set out in section 2. Thus, based on the evidence given on the Applicant's part, this application for refugee status must be refused and the decision of the Refugee Application Commissioner is affirmed."*

6. The applicant applied for subsidiary protection on the 4th of October, 2010. Subsidiary protection is a form of international protection complementary to the protections available for asylum seekers. It is designed to protect persons who do not qualify as refugees but who nonetheless are "at risk of serious harm," that being a term of art defined in Irish and European law. It is, therefore, not surprising that her application for subsidiary protection was refused. She had admitted to being an economic migrant in her asylum claim. Much the same case was made on her application for subsidiary protection. She said that she had come to Ireland because she wanted a better life for herself and her unborn children. She complained that life in Nigeria was very difficult. She mentioned government corruption, poor pay as a teacher and other difficult circumstances.

7. On the 28th of April, 2011, her solicitors made a further submission in connection with the application for subsidiary protection saying that the applicant would not be able to obtain state protection and that she feared persecution if returned to Nigeria. It was not indicated what the source of persecution might be nor was it said why she needed state protection. It was stated that she feared her life would be at risk though no source of this risk was identified. It was also stated that "medical opportunities open to her and her family" would be significantly less than those available in Ireland.

8. The Minister refused the application on the 20th of April, 2012. In that decision the Minister's official referred to the passages from the Refugee Appeals Tribunal quoted above and said:-

> *"In light of the foregoing, it is reasonable to consider that the applicant's statements in relation to her claimed to fear of returning to Nigeria are not credible. As a result, I am satisfied that the applicant's claim is not credible."*

9. In connection with this particular finding the respondents submit that the Minister found that the applicant's admission, at the Tribunal, that she was in effect an economic migrant, had the effect of rendering incredible her claim to have a fear of suffering harm if she was returned to Nigeria. The Minister's decision, according to the respondents, was not based on an adverse credibility finding

made by the Tribunal but rather on the applicant's admission recorded in the Tribunal decision, and not refuted by the applicant, that she came to Ireland in search of a better life and not because she feared harm. The respondents emphasise that in the context of deciding an application for subsidiary protection there is a significant difference between making use of the applicant's own evidence, as recorded in a decision of the Refugee Appeal Tribunal, and making use of the findings of the Refugee Appeals Tribunal, made in respect of an applicant. No decision is required in respect of this point on this application for interlocutory relief.

10. The Minister made a deportation order on the 9th of May, 2012.

Procedural history:
11. The applicant issued a notice of motion for leave to seek judicial review to challenge the decision on subsidiary protection and the deportation order. One of the grounds pleaded in the proceedings was in the following terms:-

> " *Ground E4:*
>
> *The enmeshment of the subsidiary protection scheme operated in the State with the deportation/leave to remain procedure is in breach of European law and renders the refusal of subsidiary protection unlawful."*

12. The application for leave was made on notice to the respondents because s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended) requires challenges to deportation orders to be made in that manner and within certain strict time limits, although leave to challenge subsidiary protection decisions were not required to be made on notice. The applicant elected, in accordance with standard practice, to put all leave applications on notice to the respondents even those matters not required to be on notice.

13. After the first return date of the notice of motion, it appeared once or twice in the Monday lists during July 2012 and was eventually adjourned at the end of July 2012 to the list to fix dates, certified ready for hearing. (It was the practice to adjourn leave applications to the list to fix dates where a date would be fixed for the hearing of the application on notice to the respondents. The respondents might serve an affidavit in respect of the application but would only issue a notice of opposition if leave was granted. The practice has changed somewhat in the intervening time. Most applications are heard on a telescoped basis and affidavits and draft statements of opposition are issued prior to the determination of leave applications to facilitate a single hearing in the matter).

The decision of Cooke J. in V. J. [Moldova] v. The Minister for Justice and Equality [unreported] 31st of July, 2012:
14. In an unrelated matter, in April 2012, an ex parte application for leave to seek judicial review in respect of a negative subsidiary protection decision was made to Cooke J. which advanced a ground of challenge indistinguishable from that set out above (see para. 11), commonly referred to as "the enmeshment ground." In respect of this matter Cooke J. held as follows:-

> *"25. It seems questionable whether the concept of 'enmeshment' is one known to the vocabulary of administrative law. What is being alluded to here, however, is the fact that in the way in which the Qualifications Directive has been implemented by the 2006 Regulations, the opportunity to apply for subsidiary protection has been incorporated into the procedure leading to the making of a deportation order under s. 3 of the Immigration Act 1999. Regulation 4(1) of the 2006 Regulations requires that the notification given by the Minister of a proposal under s. 3(3) of the Act of 1999, to make deportation order in respect of a failed asylum seeker is to include a statement that if the asylum seeker considers that he or she is a person eligible for subsidiary protection, 'he or she may, in addition to making representations under s.(3)(3)(b) of that Act, make an application for subsidiary protection to the Minister within the fifteen day period' stipulated in the notification.*
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> *26. In typical if not all cases, the notification under s. 3(3) is given in what is referred to as the 'three options letter' in which the failed asylum seeker is informed that the Minister proposes to make a deportation order but offers the asylum seeker a choice between leaving the State voluntarily before any Order is made; agreeing to submit to the making of the Order and, alternatively, applying for temporary leave to remain and additionally making an application for subsidiary protection. It is argued that by placing the entitlement to apply for subsidiary protection within the context of the choice to be made between these options, the combined effect to Regulation 4(1) and s. 3 is to place an inhibition on the making of an application for subsidiary protection which is incompatible with the scheme of the Qualifications Directive and general principles of European Union law.*
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> *27. The Court will, accordingly, grant leave to the applicant to apply for judicial review upon a single ground directed towards this argument to be formulated as follows:-*
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> > *'By confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s. 9(2) of the Refugee Act 1996, has expired and a decision has been taken to propose the deportation of the applicant under s. 3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s. 3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is ultra vires Council Directive 2004/83/EC of the 29th April, 2004, and is incompatible with general principles of European Union law.'"*

15. Cooke J. delivered judgment granting leave to pursue the "enmeshment" point on the 31st of July, 2012, the last day of the legal year in 2012.

Ex parte application on the 12th of September, 2012:
16. Notwithstanding the existence of an inter partes application for leave to seek judicial review in the list to fix dates, the applicant made an *ex parte* application at a vacation sitting of the High Court on the 12th of September, 2012. Confusion surrounds the purpose and result of this application. Having considered the perfected order of the court and the explanations of counsel it seems that the applicant had at least two objectives in making the *ex parte* application. The first was to secure an interim injunction restraining deportation. This was granted by the court until the 15th of October, 2012. The second objective was to amend the grounds alleging illegality of the subsidiary protection decision by expressing the enmeshment ground, already pleaded, in the wording chosen by Cooke J. as set out in the quotation from *V.J. [Moldova]* above. It is not clear to me why it was necessary to replead this matter. I note that injunctive relief had not been sought in the original notice of motion seeking leave to apply for judicial review. Something must have happened which caused the applicant to seek protection from deportation in the Summer of 2012.

17. The order which issued following the *ex parte* application records that an application was made for leave to apply for judicial review of the subsidiary protection decision of the 20th of April, of the deportation order of the 9th of May, 2012, and for various declarations. Critically, the order records that the applicant "do have leave to apply for judicial review for [those reliefs] on the

ground [as formulated by Cooke J. in *V.J. [Moldova]*]. (set out in para. 14 above)

18. The order of September 12th, as indicated, records that an interim injunction was granted until the 15th of October, 2012, restraining deportation and ordering that the applicant serve a notice of motion for an interlocutory injunction on the Chief State Solicitor to be returnable for the 15th of October, 2012. The order notes that the applicant is required to comply with order 84 rule 22 and rule 23 of the Rules of the Superior Courts and to notify the respondents of the provisions of o.84 r.22(4). This note in these rules refers to the obligation on the part of an applicant following the grant of leave to issue a notice of motion for the substantive judicial review proceedings.

19. No notice of motion was issued returnable for the 15th of October, 2012, in respect of an interlocutory application for injunctive relief. Therefore, the interim injunction lapsed.

20. No notice of motion for the substantive judicial review proceedings following the grant of leave was ever issued.

21. The applicant has never made any attempt to correct any errors in the order made by O'Keeffe J. on the 12th of September, 2012, and perfected on the 13th of September, 2012.

22. The applicant's solicitor sought an undertaking not to deport the applicant until the determination of the proceedings by letter of the 8th of October, 2012, which enclosed a copy of the order of O'Keeffe J.. This was initially refused by a letter from the Chief State Solicitor of the 9th of October, 2012, but was later granted by letter of the 15th of November until the 17th of December, 2012, but was not extended after that time. Nothing happened for almost two years thereafter until the applicant's counsel applied *ex-parte* to Barr J. on the 23rd of September, 2014, for a further interim injunction which was granted until the 20th of October, 2014. A notice of motion for an interlocutory injunction was made returnable for the same date and it is this motion which is the subject matter of this decision of the Court.

Are there proceedings in being?:
23. To recap a little, the order of O'Keeffe J. of the 12th of September, 2012, records that an *ex parte* application was made challenging a deportation order (which is impermissible to be made *ex parte*) and a subsidiary protection decision. Following the grant of leave on one ground only (which appears not to relate in anyway to the deportation order) no notice of motion for the substantive judicial review proceedings issued.

24. Order 84 rule 22(3) of the Rules of the Superior Courts provides:-

> *" A notice of motion or summons….. must be served within seven days after perfection of the Order granting leave, or within said other period as the Court may direct. In default of service within the said time any stay of proceedings granted in accordance with r.20(8) shall lapse. In the case of a motion on notice it shall be returnable for the first available motion day after the expiry of seven weeks from the grant of leave, unless the court otherwise directs".*

25. The respondents have strenuously argued that the order granting leave permitted the applicant to institute judicial review proceedings and failure to do so within the time allowed, or since, means that there are now no proceedings in existence. According to the respondents, judicial review proceedings are commenced by the act of issuing a notice of motion in accordance with the order. It is open to the applicant, according to the respondents, to apply for an extension of time to issue the notice of motion but no such application has ever been made. Judicial review proceedings can only come into being if the court grants such an extension of time and a notice of motion is then issued and served within the time indicated by the court, assuming the court is willing to extend time.

Status of the original application for leave on notice:
26. According to the applicant's written submissions:-

> *"leave was in fact applied for, and granted, ex-parte, after a Motion had issued on notice (which itself was not strictly necessary) on one ground only – the [M.J.] [Moldova] ground – upon which leave had been granted by the High Court in another case (subsequent to the issue of these proceedings but prior to the application to O'Keeffe J.). (emphasis in original) The intention had been to apply for leave on all other grounds (in relation to subsidiary protection and the deportation order) upon whatever date was later fixed by the Court for that application to be made. This was a vacation sitting of the High Court in the context of an urgent application when it would not have been practical (even if permissible) to apply for leave in respect of the other grounds upon which the refusal of subsidiary protection was intended to be challenged on notice."*

27. In relation to this submission, it has never been adequately explained to the Court why an *ex parte* application for leave to seek judicial review was sought on the 12th of September, 2012, in a case in respect of which a notice of motion seeking leave had already issued and stood adjourned in the list to fix dates.

28. If the applicant was of the view that the statement required to ground judicial review as issued had to be amended to reflect the wording formulated by Cooke J. in *M.J. [Moldova]* then the application should have been restricted to this matter. If the order made by O Keeffe J. on the 12th of September did not reflect what happened in court, some effort should have been made to correct it by appropriate application to O'Keeffe J. or to another judge of the High Court by speaking to the minutes of the order.

29. In accordance with the rule in Henderson and Henderson (1843) 3 Hare 100 as applied in *A.A. v The Medical Council* [2003] 4 I.R. 302 (which requires a party to litigate all complaints against another party arising from the same facts in a single set of proceedings) the respondents say that the applicant cannot apply, on successive occasions, for leave to seek judicial review of the same decision. The fact that this is what has happened and will happen (by *ex parte* application to O'Keefe J. and by an intended inter partes application now awaiting hearing) is not, according to the respondents, excused by the existence of one (amended) statement grounding application for judicial review with one record number. The respondents submitted that the effect of the order of O'Keeffe J. of the 12th of September, 2012, was to extinguish all grounds of judicial review other than the one in respect of which leave was granted. In view of the present procedural position (failure to serve a notice of motion following the grant of leave by O'Keeffe J.) the respondents submit that there are now no proceedings in being. That being so, there is no issue, much less a fair issue to be tried and, therefore, no injunctive relief can be granted.

Application for interlocutory relief:
30. In *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 the Supreme Court gave clear guidance on the correct approach to the determination of an application for an interlocutory injunction to restrain deportation.

31. Clarke J. noted the possible injustice to an applicant who was deported but ultimately found to be entitled to a rehearing, or reconsideration, of their entitlement to remain in the State, but he concluded, at para. 109:-

> *"However, in the absence of any additional factors on either side, it seems to me that, if faced simply with an assertion on the part of the first respondent that it is desired that a deportation order be enforced unless and until it be found invalid and an assertion on the part of an applicant that the applicant in question does not wish to run the risk of being deported only to be readmitted if the relevant proceedings are sufficiently successful, the position of the first respondent would win out."*

32. At para. 110 Clarke J. continued:-

> *"The default position is, therefore, that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side. If, for example, (and it should be made clear that no such consideration arises on the facts of this case) there was a serious risk of criminality or other activity contrary to the public interest then that would be a factor to which significant additional weight would lie on the side of refusing an injunction. Perhaps more likely an applicant must, of course, be entitled to put before the court the practical consequences of being deported pending the conclusion of the judicial review process, such as the relevant conditions in any country to which the applicant is likely to be deported. There may, as already noted and as the trial judged recognised, be some cases where the presence of the applicant for the hearing of the judicial review proceedings is necessary. If that is so then all due weight needs to be attached to that factor. In a case were an applicant would suffer material prejudice in the presentation of the case at trial very great weight would need to be attached to that fact."*

33. The Supreme Court noted that the default position in favour of enforcing the deportation order might be overcome by some countervailing factor. At paras. 111 -12 the position was described as follows:-

> *"Furthermore, if an applicant can demonstrate that deportation, even on a temporary basis, would cause more than what one might describe as the ordinary disruption in being removed from a country in which the relevant applicant wished to live, such as a particular risk to the individual or a specific risk of irremediable damage then such factors, is sufficiently weighty, could readily tilt the balance in favour of the grant of an injunction or stay.*
>
> *[112] In that context it does need to be noted that counsel on behalf of the applicants placed reliance on the fact that the rights invoked on their part are fundamental human rights guaranteed both by the Irish Constitution, by the Charter of Fundamental Rights of the European Union, insofar as applicable to European Union measures such as subsidiary protection, and by the European Convention on Human Rights 1950. That the right to be protected from been deported to a situation where one is placed in significant danger is an important or fundamental right can hardly be doubted. However, regard has to be had, on the facts of any individual case, to the basis put forward for the suggestion that there is a real risk of harm should the person be deported. Where, as will frequently be the case, such a person has had the opportunity to have the facts underlying their claim to such a risk analysed by a serious of administrative and judicial bodies, then the court will, as the trial judge in this case was, be in a much better position to form a judgement on the question of whether there is a real risk of serious harm should a deportation order be implemented. Where, on an arguable grounds basis, the situation with which a judge of the High Court is faced when considering an interlocutory injunction application in this field is one where there is a credible basis for suggesting that a real risk of significant harm would attach to the applicant on deportation, then it would require very weighty considerations indeed to displace the balance of justice on the facts of that case, certainly if what was intended was a deportation back to the country in which the relevant applicant would face those risks… While, therefore, important and fundamental rights can be involved it does not necessarily follow that, in each case in which an interlocutory injunction is sought, there is any credible basis for suggesting that truly fundamental rights are, in fact, involved. Where such rights are involved a very heavy weight indeed needs to be attached to them."(emphasis in the original)*

34. The applicant has argued that she has established a fair arguable issue to be tried by reference to the grant of leave by O'Keeffe J. and the outstanding grounds upon which leave will be sought in these proceedings. Secondly, the applicant argues that in accordance with the decision of the Supreme Court in *Okunade* the balance of justice lies with granting an injunction for the following reason (per written submissions):-

> *"If the Applicant were to be deported now she would effectively be denied her Constitutional and European Law right of access to this Honourable Court. She is entitled to the benefit of Article 47 of the Charter at least in respect of the subsidiary protection aspect of her claim. She would also be denied her right under the general principle of European Law -- to "effective legal protection".*

In supplemental submissions filed in support of the application for interlocutory relief the applicant replies to the contention advanced by the respondents (based on dicta in *Okunade*) that she must show a credible basis for suggesting a real risk of significant harm if she were to be returned. The applicant says that her application for subsidiary protection sets out difficulties in Nigeria with the Nigerian police force, including corruption, extortion, violence, torture, and extra judicial executions.

35. The relevant averments in the affidavit grounding this application are as follows:-

> *"I say that the balance of convenience favours the grounding of interlocutory relief. I say that apart from fears I entertain in relation to persecution in the event of my being deported as set out in the application for subsidiary protection exhibited at "JI 1" in the grounding affidavit sworn by me herein on the 30th May 2012. I am doubtful if I would be able to find employment there and would fear that I would become destitute. There is no social welfare system in Nigeria and I would have no source of income. If I were to be deported and ultimately found to be entitled to return to the State I fear I would not be able to afford to. I could not go to my father's house as he is estranged from me and has no love for me. My mother is deceased and none of my siblings or half siblings would be in a position to or be willing to help me. I have no 'network' in Nigeria upon which I could rely. I survive in Ireland with the help of a wide circle of friends and some support from my Church."*

36. At para. 8 of her affidavit of the 22nd of September, 2014, grounding this application, the applicant says:-

> *"I say and am informed by my solicitor, Mr. Brian Burns, that the particular Ground upon which leave has been granted has been the subject of a substantive hearing in another case, but that judgement from the High Court is not expected*

to be delivered in the near future. This is beyond my control. I say that if that point is successful it would mean, most likely, that the refusal of subsidiary protection in my case would have been unlawful and that I would then be entitled to an oral hearing of such application."

Conclusions:
37. The Court acknowledges that significant procedural confusion afflicts these proceedings. There may well be merit in the respondents' procedural arguments that there are now no proceedings in being. If that is correct the Court might well be entitled to refuse interlocutory injunctive relief for that reason. However, the procedural irregularities are not necessarily beyond repair. A court provided with proper explanation and justification might restore those proceedings if they suffer the alleged frailties. That is a matter for another day. In view of the significance of the issues which are at play it seems appropriate to approach the application for an interlocutory injunction on the assumption that there exists a fair issue to be tried but that the applicant must overcome the default position, as described by Clarke J. in *Okunade*, either by establishing significant countervailing circumstances or a real risk of significant harm if returned.

38. Essentially two arguments were made as to why she should not now be deported. The first is that she might win her underlying proceedings (assuming they are still in being) and she would face the inconvenience, or the difficulty, of trying to return from Nigeria, to Ireland, to participate in an oral hearing for a fresh determination of her subsidiary protection application. In my view, the practical difficulties she might face trying to return to Ireland are not a reason to restrain deportation in accordance with the guidance given by the Supreme Court in *Okunade*. It will be recalled that in that case Clarke J. referred to the fact that the ordinary disruption caused by deportation could not justify granting an injunction. In so far as this inconvenience or difficulty is presented as a countervailing factor which would tip the balance in her favour, and away from the default position, I reject the argument.

39. Has the applicant established for the purposes of this application that she faces a real risk of significant harm if she is returned? Neither the Refugee Appeals Tribunal nor the decision maker on her application for subsidiary protection accepted that she faced any risk of harm. In so far as the applicant seeks to establish the existence of a real risk of significant harm befalling her, the best she can do is to refer to a very general assertion about problems in Nigeria, and how they affect some people there. There is no suggestion that she, herself, has ever been harmed in Nigeria. Indeed, the application refers to her fear of persecution without identifying any source. Her grounding affidavit repeats the essence of her case to the Refugee Appeals Tribunal and, indeed, to the subsidiary protection decision maker that life is very difficult in Nigeria and that she would much prefer to live in Ireland. Of course, on a human level the Court has sympathy with the difficulties of the applicant's life. However, in accordance with the law, as explained by the Supreme Court, an injunction can only be granted where a credible basis for suggesting the existence of a real risk of significant harm is established to the satisfaction of the Court. I find that there is a complete failure to establish what is required to secure an injunction in this case. I have no hesitation in refusing the application for an interlocutory injunction