Neutral Citation [2016] IEHC 653

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 616 J.R.]

BETWEEN

FIONA MUBANGO

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY AND IRELAND

RESPONDENTS

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

1. The applicant arrived in the State from Zimbabwe on 11th of December, 2001. According to the exhibited analysis of the Minister she received a student visa until 2004 and then permission to remain as a dependent of another lawful family member until February, 2011, (although Mr. Mark De Blacam S.C. (with Mr. Garry O'Halloran B.L.) in an able submission for the applicant suggests it was the other way around).

2. Her parents and one of her siblings are now Irish citizens. At least one of her two other siblings are living in Ireland.

3. She has been illegally present in the State since 3rd February, 2011. However immediately prior to the expiry of permission, she was convicted in January, 2011 of 16 counts of theft against an elderly man for whom she was a carer, in the amount of around €10,000. No compensation was paid. She was sentenced to three years imprisonment. On 21st May, 2012, was given temporary release.

4. A first deportation order was made against her on 11th February, 2013, but as a result of a first set of judicial review proceedings [2013 No. 126 JR] this was revoked.

5. A second deportation order was made against her in June, 2013, but again as a result of a second set of judicial review proceedings [2013 No. 518 JR] this was also revoked.

6. Prior to the making of a proposal to make a new deportation order, her solicitors wrote on 26th August, 2013, making representations referring to her family position and her lengthy period of presence in the State with permission, although they did not expressly make the case that she was a settled migrant.

7. A proposal for deportation order was made on 16th October, 2013. The letter sent to the applicant was returned "not called for". A copy was also sent to the applicants' solicitors.

8. No representations were made in response to the proposal to deport.

9. A deportation order was made on 21st June, 2016.

10. On 4th July, 2016, the applicant was notified of the making of the deportation order, which she now seeks leave to challenge by way of judicial review.

11. Having regard to the particularly repulsive nature of her crime, as well as her failure to compensate her victim, the applicant is clearly someone who the Minister is entitled to regard as a good candidate for deportation. She is not someone whose conduct would readily incite the exercise of discretion in her favour.

12. 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.

13. The central issue in the application for leave is the proposition that there are substantial grounds for contending that the Minister's analysis of her art. 8 right to a private life was flawed, because the Minister held that *"it is not …accepted that any such potential interference [with private life] will have consequences of such gravity as potentially to engage the operation of Article 8".*

14. Mr. de Blacam argues that the applicant was a settled migrant and thus is entitled to significant protection for her private life, particularly having regard to her overall family situation.

15. However, looking at the situation as of 21st June, 2016, when the deportation order was made, the applicant has been in the State for a period of thirteen and a half years. For the first three years she was present on a student visa, which clearly comes within the category of "precarious" presence such as not to significantly engage art. 8.

16. Even assuming for the sake of argument that she could be regarded as a settled migrant for the period between 2004 and 3rd February, 2011, she has since been illegally in the State for a period of well over five years. It is clear that illegal presence in the State does not generally engage rights under art. 8. (See on the situation of the precarious, C*.I. v. Minister for Justice, Equality and Law Reform* [2015] I.E.C.A. 210 (Unreported, Court of Appeal (Finlay Geoghegan J.), 30th July, 2015) citing *Nnyanzi v. U.K.* (2008) 47 E.H.R.R. 18; *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (Unreported, Supreme Court, 16th July, 2015) and my decision *in Li v. Minister for Justice and Equality* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015)).

17. In these circumstances, substantial grounds have not been shown for the proposition that the Minister's conclusion was invalid.

18. Furthermore, and as a separate ground for refusal of the application, no representations were made in response to the proposal to deport the applicant. An applicant cannot seek to invoke the process of the court on a point such as this where he or she has failed

to avail of the correct procedure to make such a submission to the decision-maker at the appropriate time. Submissions made prior to the proposal to deport do not appear to properly ground a judicial review in these circumstances but if I am wrong about that and even if they could be relied on for this purpose, they did not make the precise case now being made.

19. Finally and independently of the foregoing, judicial review is a discretionary remedy, even at the leave stage (see *G. v. D.P.P.* [1994] 1 I.R. 374). Conduct of the applicant is relevant to that discretion. Having regard to the status of the applicant as a person who abused the hospitality of the State to offend against a vulnerable person, it does not appear necessary for the doing of justice as between the applicant and the State that the court facilitate the review of the withdrawal of that hospitality in this particular case unless there were substantial grounds for contending that any infirmity in the art. 8 analysis would in fact give rise to a breach of the ECHR. That is not the case because even if the Minister had conducted the analysis in line with the applicant's submission, she could still have lawfully concluded that the factors favouring proposed deportation outweighed (if not overwhelmingly outweighed) any art. 8 rights of the applicant. The decision made was thus within jurisdiction. The applicant might say (more in hope than expectation) that perhaps she would not have reached that view; but in the absence of substantial grounds to argue that the decision arrived at was outside her jurisdiction, the exercise of discretion against the applicant does not appear to contravene the ECHR.

Order.
20. For the foregoing reasons, I will order:-

(i) that the application for leave to seek judicial review be refused;

(ii) that the matter be adjourned to enable the applicant to apply for leave to appeal, which if made should be on notice to the respondent;

(iii) that the applicant serve the CSSO with a copy of this judgment in any event within 7 days.