THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 486 J.R.]

BETWEEN

N.M. (GEORGIA)

APPLICANT

AND

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

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2018

1. This is the applicant's fifth set of High Court proceedings, which have essentially allowed her to prolong her stay in Ireland by anything up to six years by continuously litigating. However, it is not the law that as long as you can keep litigating, you can remain in the State. Some of that litigation was part of the lengthy fallout from the *M.M. v. Minister for Justice and Equality* [2018] IESC 10 [2018] 1 I.L.R.M. 361 proceedings, so at one level the present case can be seen as possibly the first outrider of a new campaign by unsuccessful *M.M.* applicants to stay in Ireland on the rather thin basis that they have been here for years pursuing ultimately groundless proceedings.

2. The applicant is a native of Georgia who arrived in Ireland in August, 2005. Her application for asylum was refused and an appeal was dismissed by the Refugee Appeals Tribunal. An application was made for subsidiary protection, which was refused. In the applicant's first set of judicial review proceedings [2011 No. 984 J.R.], *certiorari* was granted on 22nd March, 2012 quashing the refusal of subsidiary protection. A previous deportation order of 9th August, 2011 had been made but was then revoked following that outcome. A subsequent subsidiary protection application was refused on 20th November, 2012. The applicant then brought a second set of judicial review proceedings [2012 No. 1013 J.R.] challenging the subsidiary protection refusal. That was dismissed in my judgment in *N.M. (Georgia) v. Minister for Justice and Equality (No. 1)* [2018] IEHC 186 (Unreported, High Court, 27th February, 2018). In the meantime, mandamus proceedings seeking a decision under s. 3 of the Immigration Act 1999 had been brought [2014 No. 635 J.R.]. Those proceedings were struck out by consent on 26th January, 2015. A new deportation order was made on 10th April, 2015 and a fourth set of judicial review proceedings [2015 No. 262 J.R.] challenging the deportation order was issued. Those proceedings were struck out on consent on 1st February, 2016, so the present action is the fifth High Court action by this applicant.

3. The applicant then sought permission to work in the State. That was rejected on 28th February, 2018. She also applied for residency on the basis of the McMahon report. She requested an undertaking that she would not be deported pending that application, which was refused. The Minister indicated on 9th July, 2018 that that the applicant's correspondence of 14th June, 2018 and 28th February, 2018 seeking residency would be treated as an application for revocation of the order under s. 3(11) of the Immigration Act 1999.

4. Leave was granted in the present proceedings on 25th June, 2018.

5. I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicant and from Ms. Fiona O'Sullivan B.L. for the respondents.

Relief sought

6. The primary relief sought in these proceedings is an injunction restraining the deportation of the applicant from the State pending a decision being made on her application for residency or the application to revoke the deportation order issued in respect of her on the 26th September, 2011.

The proceedings anticipate a negative decision which may never arise

7. The applicant faces a number of serious difficulties with the present application. First of all, she has not been refused permission under the McMahon report. A decision is awaited. To that extent, the proceedings are essentially precautionary. They may or may not have been necessary and there is a distinct possibility that the proceedings are a waste of the court's time.

The proceedings seek an injunction as a substantive relief which requires showing an entitlement to such relief, not just a showing of balance of convenience

8. The second and more significant difficulty is that the proceedings seek an injunction as a substantive relief. Thus the caselaw on interlocutory injunctions such as *Okunade v. Minister for Justice and Equality* [2012] 3 I.R. 152 [2013] 1 I.L.R.M. 1 [2012] IESC 49 is not relevant in the context of a substantive type of application. Mr. O'Shea relies on *D.U. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 337 (Unreported, Butler J., 17th October, 2007) but that was a case where the injunction was ancillary to substantive relief by way of *mandamus.* The relevant law in relation to substantive injunctions arises from *L.C. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133 [2006] IESC 44 and *Onyemaechi v. Minister for Justice and Equality* [2017] IEHC 682 (Unreported, High Court, 17th October, 2017) and in such a context where an injunction is sought as a substantive relief the applicant must demonstrate an entitlement to such order rather than simply that the balance of convenience or of justice favours that order.

The McMahon report does not confer rights on applicants

9. The third problem for the applicant is that there is no basis for an injunction because the McMahon report does not confer any rights on applicants. To contextualise that point, deportation, as is well-established, is very much a discretionary process: see *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64, *Sivsivadze v. Minister for Justice, Equality and Law Reform* [2012] IEHC 244 (Unreported, High Court, 21st June, 2012), *per* Kearns P, (cited with approval by Charleton J. in P.O. at para. 29) and see also the judgments of, Hardiman J. in F.P. v. Justice, Equality and Law Reform [2002] 1 I.R. 164, Charleton J. in *O.O. v. Minister for Justice and Equality* [2015] IESC 26 (Unreported, Supreme Court, 19th March, 2015) and Ryan P. in *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016). In specific terms I have also previously decided that the McMahon report does not confer rights on applicants in this type of situation, for a number of reasons including the basic problem that it is not Government policy: see *De Souza v. Minister for Justice and Equality* [2018] IEHC 31 [2018] 1 JIC 1204 (Unreported, 12th January, 2018), *Ferreira v. Minister for Justice and Equality* [2018] IEHC 32 [2018] 1 JIC 1205 (Unreported, High Court, 12th January, 2018), *Bertan v. Minister for Justice and Equality* [2018] IEHC 13 [2018] 1 JIC 1201 (Unreported, High Court, 12th January, 2018), *C.O. (Nigeria) v. Minister for Justice and Equality* [2017] IEHC 725 [2017] 11 JIC 2406 (Unreported, High Court, 24th November, 2017), *Onyemaechi v. Minister for Justice and Equality* [2017] IEHC 682 [2017] 10 JIC 1705 (Unreported, High Court, 17th October, 2017) and *D.E. v. Minister for Justice and Equality* [2017] IEHC 276 [2017] 5 JIC 0903 (Unreported, High Court, 9th May,

2017) . On appeal in the latter case, the Supreme Court did not reach that issue (see *D.E. v. Minister for Justice and Equality* [2018] IESC 16), but nor did it specifically disagree with such an approach to the McMahon report. Certainly the applicant, at the present time, has not established any entitlement based on that report. Paragraph 25 of the respondent's submissions correctly states the position, where Ms. O'Sullivan says that "*the applicant erroneously elevates the recommendations contained in the working group report as equivalent to official government policy to grant residency to applicants who have been in the State for five or more years regardless of any other relevant matters*".

Presence in the State due to time spent litigating is not a factor favouring injunctive relief

10. The fourth problem for the applicant is that if I am wrong about all of the above, the fact that the delay resulted from the use of the court process is not a factor favouring an injunction. It would send an unhelpful message if the court rewarded the applicant for having successfully delayed deportation for years by granting an injunction on the basis of delay caused by such litigation. An assessment of the merits of the applicant's application under s. 3(11) is a matter for the Minister rather than the court, but the fact that the delay in question has been manufactured by the applicant through the use of the court process, even though she was fully entitled to do so, does not create an equity in her favour.

Order

11. The proceedings are dismissed.