Neutral Citation Number: [2010] IEHC 508

THE HIGH COURT

JUDICIAL REVIEW

2010 186 JR

BETWEEN

B. M.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MR. JUSTICE RYAN delivered on the 12th day of November, 2010

1. This is an application for an order of *certiorari* by way of judicial review, quashing the decision of the Minister dated 18 March 2010 pursuant to s.3 (11) of the Immigration Act, 1999 whereby the Minister refused to revoke a deportation order in respect of the applicant. Leave was granted by order of Birmingham J. on 18 May 2010 on the grounds that the respondent made his decision on foot of an inaccurate representation of the factual situation and failed to take account of a relevant consideration.

2. The applicant is an Indian national who on his account moved from India to England in 1993 and to Belfast the following year, where he married an Irish national. The couple had a son in 1996 but the marriage did not last; the couple separated in 1998 and divorced in 2009. Following the breakdown of his marriage, the applicant moved south of the border. At this time, the applicant made a false application for asylum under the name B. S. and he received social welfare benefits. In October 1999, he received notification from the asylum authorities that this application had failed. The applicant filed an appeal under the false name but did not pursue the matter.

3. The applicant was arrested by Gardaí in Dundalk on 13 November 1999 in connection with another matter and his fingerprints were taken. While being questioned, he made a statement admitting the false asylum application under the name B. S.. In February 2000, the applicant received his last social welfare payment under the assumed name and ceased using that name.

4. In April 2000, the Department of Justice, Equality and Law Reform notified B. S. that his appeal for asylum was deemed abandoned and in October 2002 a deportation order was made. On 6 December 2002, a letter was sent to Mr. B. S. to present himself at Dundalk Garda Station.

5. In the meantime, the applicant under his true identity had become involved in a long-term relationship with another Irish national. The couple bought their own home in 2001. The applicant has a son from this relationship who was born on 6 December 2003 and who suffers from serious medical difficulties. In 2006, the applicant was convicted of driving under the influence of alcohol.

6. In 2008, the applicant endeavoured to regularise his status in the State and on 26 May 2009 he was granted permission to remain for a period of two years. On 23 July 2009, the Garda National Immigration Bureau (GNIB) issued the applicant with a Certificate of Registration. In February 2010, the applicant was arrested and his fingerprints were taken and the two identities he had used were discovered. His fingerprints and convictions came up in the Garda PULSE system as those of B. S. because the prints had been stored under that name following his first arrest in 1999, as had his convictions. This match in fingerprints also brought to light the deportation order and he was detained on foot of that order.

7. The applicant claimed he had no knowledge of the deportation order prior to this incident and applied to the respondent to revoke it. The Minister refused to revoke the order noting, *inter alia*, that the applicant had used an alias to make a fraudulent claim that he had used that alias to obtain social welfare fraudulently and had been convicted of a number of criminal offences.

8. In making this decision, the Minister was not aware of the written, signed statement made by the applicant to the Gardaí in November 1999 after his initial arrest, when he admitted the false asylum claim as B. S.. The issues in this application are the impact knowledge of this statement would have had and whether the decision was made in the mistaken belief that the applicant had continued to use the false identity for all his time in the State.

9. The applicant argued that the respondent acted in the mistaken belief that the applicant had maintained a double identity in the State since 1998/1999 and had been convicted of criminal wrongdoing under the assumed name of B. S.. This was a mistake, in fact, because the applicant did not use that name from 2000 on and was never convicted of an offence in that name. He submitted that the Minister failed to have regard to the fact that he had made the signed statement in November 1999 admitting the fraudulent claim for asylum in the name B. S.. The fact that this information was before the Gardaí meant that it should have been brought to the attention of the immigration authorities. However, it transpired that this admission by the applicant was not brought to the respondent's attention before he made his decision to refuse to revoke the deportation order. It was submitted that consideration of this statement could have altered the balance in favour of permitting the applicant to remain in the State.

10. The respondent submitted that the refusal to revoke the deportation order followed a detailed consideration of the applicant's circumstances involving the balancing of the applicant's rights against the rights of the State. In respect of the 1999 statement, this was not sufficient to alert the State authorities to the fact that the application for asylum had been abandoned. It was submitted that the members of An Garda Siochána investigating a criminal offence in Dundalk in 1999 were not the agents of the Minister in processing asylum applications. Finally, the respondent submitted that the omission of consideration of the statement was not material so as to deprive the decision-maker of jurisdiction; in fact, the applicant had provided misleading information in the statement which could have harmed his application for revocation of the deportation order.

11. The respondent denied that the decision-maker had proceeded on the basis of mistake of fact because the applicant's solicitor had set out how he had abandoned the assumed name in the course of his prosecution in 2000 and that the convictions were recorded under his true identity. Furthermore, the decision contained no stated error of fact evidencing that such a mistake occurred. The respondent invoked the discretionary nature of judicial review, and in particular, the applicant's conduct and lack of candour with the State which should disentitle him to the reliefs sought.

12. The applicant has submitted that a deportation order existed since 2002 but it was not acted upon, although members of An Garda Siochána were aware of the applicant's whereabouts. This meant that by February 2010, the time of the applicant's arrest, he had lived within the State for 7 years from the date of issuance of the order and had built up significant social connections in this time, not least the birth of his second child. At first glance, this appears to be a reasonable assertion. However, there is a danger in this in considering that every Garda in the State should be on the lookout for any person who looks different. In other words, a heightened suspicion of anyone who might be an immigrant would be an undesirable development and it is the reverse of the coin that says he was living a normal life and no policeman investigated him on suspicion of being an illegal immigrant.

13. It is also said that as the authorities knew of his whereabouts, if they had put together the information in the November 1999 Garda statement with the deportation order, they could have located him and executed the order. The fact is that the statement did not make its way to the immigration authorities nor did the information about B. S.. I think this is putting too much of an obligation on the State and ascribing to every branch an encyclopaedic knowledge of everything else that goes on and I think such a suggestion bears more resemblance to Orwell's *1984* or a *Stasi*-like security apparatus and I consider it is unwarranted and wholly unreasonable. In the circumstances of the case, I do not think the State's right regarding the deportation is affected by these events cited by the applicant.

14. The real issue in this case is the assessment of the weight to be given to the humanitarian considerations put forward on behalf of the applicant. They included the following:

> i. That fact that he admitted to the use of a false name in his 1999 statement to the Gardaí;
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> ii. The family unit he has created in the State, i.e., his two citizen children and his long-term relationship;
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> iii. The special needs of his younger son which require ongoing medical treatment and special services;
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> iv. The relationship he has with his older child, the son of his ex-wife, is a stable one and would be disrupted if the applicant were deported;
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> v. The applicant's partner is an Irish national who has never been to India;
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> vi. The length of time he has spent within the State, although the significance of this time has been diminished by the use of an assumed name;
>
> vii. The fact that the applicant and his partner have purchased their own home, representing a significant investment.

15. In balancing the applicant's rights against those of the State, these humanitarian points were significant and in my view would put this case in an exceptional category of claims for humanitarian permission to remain as these grounds are not common. To be specific, it is not merely that the applicant has been in the State for a long time such that he has acquired social contacts and personal connections; claimants generally have those same interests, as do their families. In the applicant's personal circumstances his younger son's medical condition and the interests of his elder son are quite exceptional. Although it is probably correct to assert that the applicant's partner would be able to relocate to India without facing *insurmountable* difficulties, it would be quite unreasonable to consider the case without appreciating that she would have very *considerable* difficulties. In a word, there were powerful claims in this case of a humanitarian kind that weighed against deportation. In those circumstances, Birmingham J. felt that the case was "finely balanced" when he gave leave to apply for the reliefs sought in this application and I adopt that observation.

16. This is the context in which the question of the written statement of admission of November 1999 has to be considered. As the Minister is obliged to consider carefully and fairly the reasons that are put forward for revocation, the question 1 have to ask is this: if the Minister and his officials had the written confirmation signed by the applicant from November 1999 admitting to the Gardaí that he had used a false name in an asylum application until that date, would it have made a difference to the consideration of the case? The answer in my view is unhesitatingly yes. The applicant's character was properly in issue throughout the consideration. This is evident from the focus on the convictions which were legitimate matters of concern.

17. The essential point as it seems to me is that any reasonable assessor of the facts in a case like this is going to be affected by some independent written corroborative material that goes to demonstrate consistency and truth on the part of an applicant. This will have a substantially greater impact than the applicant's mere assertion or indeed that of his solicitor writing on his behalf. In the circumstances of this case, there was a combination of circumstances, namely, that the written statement did not make its way to the immigration authorities, that the PULSE system operated in the way it did and that the GNIB were not apparently able to respond in sufficient time to the Minister's inquiry in connection with the application for permission to remain. The result of this was to deprive the Minister and his officials of the benefit of this statement when they considered the case

18. In the result, the unfortunate circumstances that arose in this finely balanced calculation distorted the scales. Although the jurisdiction to quash an administrative decision for error of fact only arises where the error renders the decision irrational (See *Ryanair Ltd. v Flynn* [2003] 3 IR 240 per Kearns J., as he then was), the mistake must be considered in the particular factual context so as to assess its impact on the result.

19. My conclusion is that this decision must be quashed and the matter sent back for reconsideration.