



THE COURT OF APPEAL

Record No. 2015/263

Ryan P.
Finlay Geoghegan J.
Hogan J.

BETWEEN

N.H.V.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

THE ATTORNEY GENERAL AND

THE IRISH HUMAN RIGHTS COMMISSION

NOTICE PARTIES

Judgment delivered by Ms. Justice Finlay Geoghegan on the 14th day of March 2016

Introduction

1. This is an appeal from the judgment and order of the High Court (McDermott J.) dismissing the application for judicial review of the appellant, a Burmese national, who arrived in the State on the 16th July, 2008 and applied for refugee status on the following day.

2. The factual background to his application for judicial review was that by May 2013, his application for a declaration of refugee status had not been determined. There had been decisions which had been the subject of successful judicial review applications and the matter was remitted back to the Refugee Appeals Tribunal. The appellant was experiencing distress and demoralisation being obliged to remain living in direct accommodation. He obtained a potential offer of employment and through his solicitor applied to the Minister for temporary permission to reside and work in the State either pursuant to s. 4 of the Immigration Act 2004 or s. 9(11) of the Refugee Act 1996 (as amended) or by exercise of executive discretion. This was refused and the Minister indicated that he was precluded from granting permission by virtue of s. 9(4) of the Refugee Act 1996 (as amended).

3. The appellant was granted leave to apply for judicial review (Mac Eochaidh J.) on the 29th July, 2013, to seek the following reliefs:-

"(i). An order of *certiorari* quashing the decisions of the respondent dated 13th June and 15th July, 2013, to refuse to grant permission to the applicant to take up employment in the State on the ground that the Refugee Act 1996 precludes the respondent from so doing.

(ii). A *declaration* that the applicant, as a person who has sought protection in the State, is not precluded in law from being granted permission to take up employment in the State by the respondent.

(iii). In the alternative to (i) and (ii), if the effect of s. 9 (4) of the Refugee Act 1996 (as amended) is that the respondent is precluded in law from granting permission to the applicant to take up employment, a *declaration* that s. 9 (4) is repugnant to the Constitution, and in breach of Articles 7 and 15 of the Charter of Fundamental Rights and/or incompatible with the European Convention on Human Rights"

4. Leave was granted on the following grounds:-

"(i) By refusing the applications made by or on behalf of the applicant for a residence permission pursuant to section 4 of the Immigration Act 2004 and/or pursuant to the respondent's executive discretion, which would permit him to take up employment, the respondent unlawfully fettered his discretion and/or unlawfully refused to process a valid application and/or imposed a restriction on himself which in law did not exist.

(ii) The respondent has wrongly applied section 9(4) of the Refugee Act 1996 by failing to recognise the express provision at section 9(11) of the Act which allows for section 9(4) to be waived.

(iii) The applicant has resided lawfully in the State since 17th July, 2008. To continue to prohibit him from working after such a long period of lawful residence in the State is in breach of the applicant's rights under the Constitution (including Article 40.3 thereof), the Charter of Fundamental Rights (including Articles 7 and 15 thereof) and section 3 of the European Convention on Human Rights Act 2003 (with reliance on inter alia Articles 8 and 14 of the European Convention on Human Rights).

(iv) By reason of (iii), if section 9(4) of the Refugee Act 1996 imposes a continuing prohibition on the applicant taking up lawful employment in the State, and prevents any exception being made to this prohibition, then the said section is repugnant to the Constitution, in breach of the Charter of Fundamental Rights and incompatible with the European Convention on Human Rights."

5. The application was heard in the High Court with a similar application which is no longer under appeal. The High Court (McDermott J.) in the written judgment delivered on the 17th April 2015, rejected each of the grounds relied upon and dismissed the application. The appellant has appealed on all grounds and the issues on appeal may be summarised as follows:-

1. Does the Minister have a discretion under s. 9 of the Refugee Act 1996, as amended to grant a work permit to a person in the position of the appellant;
2. If the Minister has no discretion under s. 9 of the 1996 Act, does she enjoy an inherent executive discretion to grant such a permit;
3. If the answers to the first two questions are in the negative is s. 9(4) of 1996 Act in breach of the EU Charter of Fundamental Rights;
4. Does the appellant have a personal right to work or earn a livelihood in the State protected by Article 40.3 of the Constitution and if so is s. 9(4) of the 1996 Act repugnant to the Constitution;
5. Does the appellant have a right to work in the State pursuant to Article 8 of the European Convention on Human Rights and if so is s. 9(4) of the 1996 incompatible with the ECHR.

6. I have had the opportunity of reading in draft the judgment of Hogan J. in which he addresses comprehensively all of the above issues. I am in agreement with his conclusions and reasons therefor on all issues, other than his conclusion that the appellant has a right to work or earn a livelihood protected by Article 40.3 and his consequential conclusion that s. 9(4)(b) of the 1996 Act is repugnant to the Constitution.

7. In this judgment I only propose addressing the appeal against the conclusions reached by the trial judge on the constitutional issues.

8. Hogan J. has referred to the principal judgments which trace the development of the approach of the Supreme Court and the High Court to the entitlement of non-citizens to rely upon different Articles of the Constitution and to challenge the constitutionality of an Act of the Oireachtas. Those judgments form the backdrop for the narrower questions at issue in this appeal. The appellant, as an applicant for asylum, contends that he has a personal right to work or earn a livelihood protected by Article 40.3 which he is entitled to enforce against the State. Article 40.3 in its express terms only refers to citizens:-

"1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

9. The trial judge identified correctly in my view the issue which the High Court had to decide on the application for judicial review in respect of which leave was granted namely whether the appellant, as an asylum seeker, is entitled to the right to work or earn a livelihood as a "personal right" under Article 40.3 of the Constitution. Hogan J. identifies at para. 60 a broader issue as to "whether a non-citizen can ever invoke the constitutional right to earn a livelihood". I am not addressing that broader question. There are many classes of non-citizens, including EU citizens. The *locus standi* of the appellant is confined to his position as an applicant for asylum in the State.

10. The trial judge, correctly in my view, concluded, in accordance with the judgment of the Supreme Court in *Re. Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 and the other judgments to which he referred, that the fundamental rights or personal rights protected by Article 40.3 to which a non-national may be entitled under the Constitution do not always coincide with the rights protected as regards citizens. Accordingly where a person, such as the appellant, claims to be entitled to a particular fundamental right or personal right within the meaning of Article 40.3 it is necessary to examine whether he is entitled to that particular right. Further, the appellant's status within the State is a relevant consideration to deciding whether he is entitled to the particular right.

11. I cannot share the view of Hogan J. that the Supreme Court by its judgments in *Re. Article 26 and the Electoral (Amendment) Bill* [1984] I.R. 268, *Re. Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* and *Nottinghamshire County Council v. K.B.* [2011] IESC 48, [2013] 4 I.R. 662 has "concluded that non-citizens in principle enjoy the rights guaranteed by the fundamental rights provisions of Articles 40 to 44 of the Constitution in much the same general (but perhaps not identical) manner as citizens". That, in my view, is too broad a proposition. Nor can I agree with the view which he expressed in *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579, [2013] 4 I.R. 186, in reliance upon the Electoral (Amendment) Bill judgment (and repeats in his judgment herein) that "the Supreme Court has made it clear that the fundamental rights provisions of the Constitution apply without distinction to all persons within the State". My reasons for this disagreement are as follows.

12. In the *Electoral (Amendment) Bill* judgment, the Supreme Court was concerned with the constitutionality of a Bill the effect which was to permit a British citizen ordinarily resident in a constituency to have a right to vote in an election of members of Dáil Éireann. The then Article 16.1 of the Constitution granted the right to vote at an election for members of Dáil Éireann to "every citizen . . .". The judgment of the court addressed the question as to whether Article 16.1 could properly be construed as contemplating the extension of the franchise to persons who were not citizens. The court considered the submissions in favour of confining the right to vote to citizens primarily by reference to Articles 6, 12, 16 itself and 47 and then stated in the passage upon which I understand Hogan J. relies for his conclusion:-

"The most powerful argument against this interpretation of Article 16 and, in particular of Article 16.1.2 and of the associated Articles is the contention, strenuously submitted on behalf of the Attorney General, that various other rights such as the freedom of association, the freedom of conscience, inviolability of a dwelling and other similar rights are granted in the Constitution to citizens, and the Courts have interpreted those provisions as having the effect, at least in certain circumstances, of not excluding the existence or the granting of similar or identical rights to persons who are not citizens. It is the view of the Court that that argument fails by reason of the clear distinction between the provisions of Article 16, Article 12 and Article 47 which provide the mechanism by which the People may choose and control their rulers and their legislators, and Articles such as Article 40 and Article 44, which grant to individuals particular rights within society and in relation to the organs of State."

13. I cannot read the above passage as the Supreme Court making it clear "that the fundamental rights provisions of the Constitutions apply without distinction to all persons within the State". It must be noted that the submission made to it on behalf of the Attorney General related to "various other rights such as . . ." and that the court had interpreted those provisions as having the

effect "at least in certain circumstances of not excluding . . .". The manner in which that submission was rejected may be considered to have impliedly involved an acceptance by the court that certain other rights had in certain circumstances been determined to extend to persons who were not citizens but it cannot, in my view, be considered as having decided anything further.

14. Next and most importantly is the judgment of the Supreme Court in the *Illegal Immigrants (Trafficking) Bill* 1999. The court was in this instance considering certain constitutional rights of persons in the position of the appellant herein. Sections 5 and 10 of the Bill had been referred to the Supreme Court pursuant to Article 26. Section 5 of the Bill restricted the manner in which a series of immigration and asylum decisions could be challenged to judicial review brought within fourteen days and also imposed restrictions on an appeal to the Supreme Court.

15. The court at p. 383 considered initially the wide power of the State to control aliens and then turned to the question of the rights under the Constitution of persons seeking asylum:

"Both counsel assigned by the court and counsel for the Attorney General made submissions, in the light of their particular status, as to the nature and extent to which persons seeking asylum or refugee status enjoy the protection of certain rights under the Constitution in accordance with the principles of natural justice and constitutional justice. Counsel assigned by the court submitted that, despite the undoubted power of the State over non-nationals (including asylum seekers), such persons are not without rights while they are within the jurisdiction of the State. It is only necessary to examine this question in this part of the judgment to the extent that such rights are relevant to the interpretation of s. 5 of the Bill. The rights, including fundamental rights, to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State, the right not to be deported from the State being an obvious and relevant example.

Counsel assigned by the court submitted that among the rights of a non-national which have been recognised by the courts are the following:-

- (i) If detained, a right under Article 40.4.2 of the Constitution to apply to the High Court to question the legality of his or her detention. The Article is clearly not limited to citizens but applies to 'any person';
- (ii) A right of access to the courts to enforce his or her legal and constitutional rights;
- (iii) In dealing with applications for refugee status or asylum, a right to fair procedures and to the application of natural and constitutional justice;
- (iv) A right to require that any measures taken against a non-national by the State, in the exercise of its rights and powers, are exercised in a constitutionally valid manner and in accordance with laws which are not repugnant to the Constitution.

Counsel also submitted that non-nationals enjoy a constitutional right to equal treatment in the sense that any difference in treatment must be justified by some legitimate government objective. It was also submitted that non-nationals were entitled to the unspecified personal rights guaranteed by Article 40.3.2 of the Constitution and a right of reasonable access to legal advisors. Counsel for the Attorney General, although they differed materially in respect of certain of the submissions made by counsel assigned by the court on this subject, were in general agreement, in their submissions, that the rights referred to above are enjoyed by non-nationals as well as citizens."

16. As appears, the court expressly stated that "the rights, including fundamental rights, to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State".

17. The court in its judgment then continued to consider the rights identified at paras. (i) to (iv) by counsel assigned by the court with which it appeared counsel for the Attorney General agreed were rights enjoyed by non-nationals as well as citizens.

18. The court, in considering both the right of access to the courts and rights to fair procedures contended for on behalf of non-nationals, emphasised that it was only concerned with the provisions of s. 5 of the Bill determining the procedure by which the validity of a decision or other matters governed by s. 5(1) might be challenged before the courts. Whilst, recognising a more general right of access to the courts of non-nationals and also a right to fair procedures albeit stating that in certain circumstances they might be subject to conditions or limitations which would not apply to citizens the court's conclusion at p. 386 in relation to the decisions referred to in s.5 of the Bill.

"The court is satisfied that, in the case of applications to the High Court to challenge the validity of such decisions or other matters, a non-national is entitled to the same degree of natural justice and fairness of procedure as a citizen".

19. The approach of the Supreme Court in the above judgment emphasises, in my view, the requirement that where it is contended that a non-citizen has a right in the State which is claimed to be a fundamental right or a personal right protected by Article 40.3, it is necessary to look at both the status of the non-citizen and also the nature of the particular right being contended for. Again, it does not appear to me that this judgment can be considered as authority for a broad proposition that non-citizens enjoy the rights guaranteed by the fundamental rights provisions in the Constitution. Rather it supports the conclusion that certain non-citizens may be entitled to certain constitutionally protected fundamental or personal rights.

20. The final decision of the Supreme Court referred to by Hogan J. is *Nottinghamshire County Council v. K.B.* [2013] 4 I.R. 662 and [2011] IESC 48 and in particular the judgment of O'Donnell J. Again, with respect I cannot read that judgment as support for the broader conclusion. At p. 743, O'Donnell J. stated:-

"The issue of whether some or all of the constitutional provisions are limited to citizens was first raised almost 50 years ago in *The State (Nicolaou) v An Bord Uachtála* [1966] I.R. 567 and was debated in that case over nine days in the High Court, and eleven days in the Supreme Court without definitive resolution. It has not been resolved since, albeit that a *modus vivendi* appears to have been arrived at in which non-citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution essentially related to voting and representational matter are nevertheless properly limited to citizens. It has not however been possible to articulate any unifying theory. It follows, that the related and even more complex question as to whether and if so how, a person can

assert that the act of travelling to Ireland can give rise to constitutional rights or claims has not been addressed yet. However, the requirement that issues are determined in cases which are the subject of a real dispute which requires resolution, and the necessity and desirability that any such issues should be the subject of comprehensive argument both in the High Court and Supreme Court, means that it is neither necessary, nor possible to seek to resolve the issue here. If the issue is to arise in any future case, it will be necessary to consider carefully the constitutional text, many more decisions than were cited in this case, and a number of different fact situations including questions as to the significance of citizenship, residence, or fleeting presence in the jurisdiction. It may be that regard might usefully be had to the provisions of Article 40.1 of the Constitution which does not appear to have figured significantly in the decisions or commentary to date. Whether that provision or any other provision is of any assistance, is a matter which may however properly await a case in which the issue is squarely addressed, and where it requires determination."

21. The next issue therefore is whether the appellant at the time he made his application for judicial review to the High Court or at the date of the hearing of this appeal should be considered as having a personal right to work or earn a livelihood in the State which is protected by Article 40.3 of the Constitution.

22. On appeal, it was common case that a citizen enjoys such a right. The trial judge drew attention to the analysis of Costello J. in *Cafolla v. O'Malley* [1985] I.R. 486 at p. 493:-

"Generally speaking the right to earn a livelihood can properly be regarded as an unspecified personal right first protected by Article 40.3, subsection (1). But this right may also exist as one of the bundle of rights arising from the ownership of private property capable of being commercially used and so receive the protection of Article 40, s. 3, subsection (2) . . ."

23. The appellant relies upon the first formulation. The appellant is not asserting any property right. In the absence of an existing contract of employment or occupation that does not seem possible.

24. Central to the assessment of whether or not a person in the position of the appellant has a constitutionally protected personal right to work or earn a livelihood is his current status in the State. He is here as an applicant for asylum who has been given leave to enter the State and remain here pursuant to s. 9 of the 1996 Act. Counsel for the respondent relies upon the assessments made by Murray J. (as he then was) of the status of such a person in the State in *G.A.G. v. Minister for Justice* [2003] 3 I.R. 442 in the single judgment delivered with whom the other members of the court agreed at p. 474:

". . . that persons who are allowed to enter the State for the purpose of making an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact the very purpose of an application for refugee status is to seek permission to be allowed to enter and reside in the State as an immigrant and benefit from such a status."

25. The appellant herein is undoubtedly in the unfortunate situation that he has now lived in the State in direct provision for a significant number of years (in excess of five years at the time of the High Court application and in excess of seven years at the hearing of the appeal). Counsel on his behalf submitted that he has been lawfully in the State during that period. That is so in a limited sense. He is not unlawfully present in the State. He is, however, a person who is only permitted to remain in the State pursuant to s. 9 of the 1996 Act, while his application for a declaration of refugee status is decided. Whilst, undoubtedly, one has significant sympathy for the appellant in relation to the situation in which he finds himself nevertheless objectively his status in the State cannot be considered to have changed or be any different from the day he arrived in the State.

26. In my judgment it cannot be concluded that a person who is in the State for one purpose only namely to have his application for refugee status decided and does not have any right to reside in the State as an immigrant, has a personal right protected by Article 40.3.1 to work or earn a livelihood within the State. A right to work or earn a livelihood within the State is inextricably linked to a person's status within the State. A right to work cannot be exercised *in vacuo*. It is a right to work and earn a livelihood in the State.

27. As confirmed by the Supreme Court in the *Illegal Immigrants (Trafficking) Bill* judgment at p. 382 the power of the State to control aliens in their activities within the State reflects "an inherent element of State sovereignty over national territory long recognised in both domestic and international law". One activity that is and was consistently restricted or controlled is the right to work or earn a livelihood. Whilst I recognise that work or earning a livelihood may not be solely concerned with an economic activity, but may also contribute to a person's sense of dignity or well being, nevertheless the inextricable link between a person's status in the State and their right to work in the State is such that Article 40.3 cannot be construed as giving to an applicant for asylum a constitutionally protected right to work or earn a livelihood within the State.

28. Insofar as such a right forms part of the personal rights of a citizen protected by Article 40.3 capable of enforcement against the State, such a constitutionally protected right must be considered as flowing from the social contract between the citizen and the State and is intimately connected with the citizens entitlement to live in the State.

29. Accordingly in my judgment the trial judge was correct in concluding that the appellant does not have a constitutionally protected personal right to work or earn a livelihood within the State.

30. By reason of the conclusion reached on this issue it is not necessary to consider the further question as to whether s. 9(4) of the 1996 Act, as amended, is repugnant to the Constitution. In the absence of the appellant having a right to work or earn a livelihood protected by Article 40.3 there is no basis for an alleged repugnancy.

31. As identified by the trial judge at para. 62 of his judgment the real complaint in this case is the delay which has occurred in the processing of the appellant's asylum application. As stated above, in accordance with the decision of the Supreme Court in the *Illegal Immigrants (Trafficking) Bill*, the appellant may have constitutionally protected right to fair procedures, although the ambit of that right remains to be determined. However, the appellant did not seek in his judicial review proceedings any relief upon grounds of delay alone. This is understandable as the applicant is seeking a positive declaration from bodies that may be considered to be in delay. Regrettably though the delay may be, it is not a ground for the appellant obtaining any of the reliefs sought in these judicial review proceedings in relation to the constitutional issue for the reasons given in this judgment and on all other issues for the reasons in the judgment of Hogan J. with which I agree.

32. Accordingly, notwithstanding sympathy for the appellant in his present circumstances, the appeal must be dismissed.

