THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012 / 786 J.R.

BETWEEN/

ABDULLAH JAMALI, KHADIJA JAMALI, ZAKRIA JAMALI (A MINOR SUING BY HIS FATHER AND NEXT FRIEND ABDULLAH JAMALI), RAZIA JAMALI (A MINOR SUING BY HER FATHER AND NEXT FRIEND ABDULLAH JAMALI)

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

DECISION OF MS JUSTICE M. H. CLARK, delivered on the 24th day of January 2013.

1. By order of Ryan J. dated 17th September 2012, the applicants were granted leave to apply for two of three reliefs sought. The application for leave was moved on an *ex parte* basis and Ryan J. directed that the respondent should be put on notice of the application in relation to the third relief sought. The respondent has brought a motion seeking an order setting aside the order of Ryan J. granting leave. He contends that:-

> *(i) The said matters fall within section 5 of the Illegal Immigrants (Trafficking) Act, 2000 and accordingly the applicants are required to bring an application for judicial review on notice to the respondent; and*
>
> *(ii) The application for leave was brought beyond the time limits contained in either Section 5 or Order 84 of the Rules of the Superior Courts.*

2. This decision relates solely to that motion.

3. Abdullah Jamali is a failed asylum seeker from Afghanistan who has been living in Ireland since 2005. The negative decisions of the Refugee Applications Commissioner and the Refugee Appeal Tribunal in relation to his asylum application were never challenged. He applied unsuccessfully for leave to re-enter the asylum system and then for subsidiary protection which was refused. Those decisions were not challenged. In parallel with his subsidiary protection application he also applied for leave to remain on humanitarian grounds as an alternative to subsidiary protection.

4. It is not disputed that Mr. Jamali suffered significant physical and psychological injuries in the very complex and long standing conflict in Afghanistan. The complexities of the wars make it difficult to understand which particular group Mr. Jamali fears as he claimed to have fought first for Hizb i Islami and then the Taliban and then was in conflict with the Northern Alliance. Later documents suggest that he currently fears the Taliban. His wife and two children also fled Afghanistan and they now live as undocumented externally displaced people in Iran. Mr. Jamali was granted leave to remain in the State in December 2007 and he has been living under that permission ever since. He has what is known as a Stamp 4 permission to remain.

5. The notification that the applicant had been refused subsidiary protection was made by letter dated 22nd December 2008 which also stated:-

> *"The Minister has also considered whether a deportation order should be made in respect of you, having regard to the matters referred to in Section 3(6) of the Immigration Act, 1999. In that regard, I am directed to inform you that as an exceptional measure, the Minister has decided to grant you temporary permission to remain in the State for two (2) years until 22nd December 2010"*[1].

6. The applicant issued these proceedings to challenge to the adequacy of the reasons given by the Minister for that decision. He maintains that his leave to remain derives from the prohibition against refoulement set out in s. 5 of the Refugee Act 1996 as amended and is a "permission" to be in the State within the meaning of s. 4 of the Immigration Act 2004. The respondent maintains that the grant of leave to remain was made on humanitarian grounds pursuant to s. 3(6) of the Immigration Act 1999 and is a decision notified to the applicant within the meaning of s. 3(3) (b) (ii) of the Immigration Act 1999. This is significant because if the applicant is correct, the application for leave to apply for judicial review is not captured by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 and it was correct to proceed *ex parte*. However, if the respondent is correct, the application for leave ought to have been made on notice.

7. The facts leading to the challenge are that shortly after Mr. Jamali registered as a person with leave to remain with the GNIB, he applied for long stay visas for his wife and two children in Iran to join him in the State. The process was protracted and visas were eventually refused on public policy grounds and Mr. Jamali was reminded that a person with leave to remain in the State under s. 3(6) Immigration Act 1999 is specifically informed that "*there is no provision for family reunification*" associated with such permission. No challenge was brought to the visa refusals.

8. When those visas were first refused to Mr. Jamali's family, his solicitor obtained a copy of his entire asylum file from the respondent through a Freedom of Information request. She then wrote to the respondent seeking the precise reasons for the grant of leave to remain. The reasons given to date are not fact specific. They include:-

> *"Your client submitted representations and these were considered having regard to the various headings set out in Section 3(6) of the Immigration Act, 1999 (as amended). These headings include an applicant's family and domestic*

circumstances, the length of time an applicant has been in the State, the character and conduct of the applicant since their arrival in the State, their employment record and employment prospects as well as any humanitarian considerations advanced by the applicant in support of their application to remain in the State.

Specifically, in relation to your client, all factors relevant to his case were considered in advance of a final decision being arrived at. Account was taken of the length of time he has been in the State, his conduct since his arrival in the State and the many representations, submitted by and on behalf of your client, while bearing in mind that he failed the asylum process at first instance and appeal. In your client's case the Minister used his discretion by deciding not to sign a deportation order in respect of your client and granted him temporary permission to remain in the State".

9. The applicant was also informed as follows:-

"The Minister had regard for those representations and all of the papers on your client's file and having weighed up all the factors in favour of deportation as against those favouring leave to remain in the State, the Minister concluded that the factors against deportation held the greater weight. As a result, the Minister proceeded to grant your client leave to remain in the State on the basis of specified conditions…. This was subsequently renewed for a further three years and your client has now leave to remain in the State until 22nd December 2013, again subject to specified conditions".

10. The applicant argues that these are not adequate reasons. The delay in challenging the decision to grant leave to remain is explained by the assertion that the applicant became aware for the first time that on 18th June 2012 following receipt of his entire file that the Minister considered the question of the prohibition of refoulement before the decision granting leave to remain was made. In particular, he relies on an internal memo contained in the file to Laurena Gradwell, A.P.O which is as follows:

Consideration of file under Section 3 of Immigration Act, 1999, as amended, and Section 5 of the Refugee Act, 1996, as amended:

File Refence(s): 69/3126/04

Applicant's Name(s): Abdullah Jamali

Date(s) of Birth: 21/03/1975

Nationality: Afghan

I have examined Mr. Jamali's case under Section 3 of the Immigration Act 1999, as amended, and Section 5 of the Refugee Act 1996, as amended (Prohibition of Refoulement).

In light of my considerations of the specific and exceptional circumstances of Mr. Jamali's case, I conclude that his situation does warrant the granting of temporary permission to remain in the State as an exceptional measure. Therefore, I recommend that the Minister grant Mr. Jamali permission to remain in the State.

Gareth Hargadon

Subsidiary Protection Team 1

22/12/2008."

11. Mr. Jamali sought leave to apply for judicial review of the positive decision granting him leave to remain in the State and he sought declarations that the decision and the reasons given by the Minister therefore, on their true construction, being based on the specific facts of the applicant's case, amount to an acknowledgement by the respondent that Mr. Jamali is entitled to protection on the basis of non-refoulement. As noted above, the application was moved *ex parte* before Ryan J. who made an order granting leave in respect of two of the three reliefs sought and directed that the third relief sought should be on notice to the respondent.

12. Section 5(1) of the Illegal Immigrants (Trafficking) Act, 2000 provides:

"(1) A person shall not question the validity of— …

(b) a notification under section 3(3)(b)(ii) of the Immigration Act, 1999 ,

….

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as "the Order")."

(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall—

(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and

(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed […]"

13. Section 3(3) of the Immigration Act 1999 provides:

"(a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.

(b) A person who has been notified of a proposal under paragraph (a) may, within fifteen working days of the sending of the notification, make representations in writing to the Minister and the Minister shall –

(i) Before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) Notify the person in writing of his or her decision and of the reasons for it, and where necessary and possible, the person shall be given a copy of the notification in the language that the person understands".

14. Sub-section (5) sets out a number of situations in which the Minister is not required to make such a proposal, none of which are relevant in the present case.

15. The respondent argues that that the leave application was made on an *ex parte* basis in an effort to circumvent the application and effects of these sections as the application for judicial review is so clearly out of time. Even if the application were governed by Order 84, rule 21(1) RSC, the time limit would have expired in March 2009 as the post-amendment rule requires that an application for leave to apply for judicial review shall be made *"promptly, and in any event within three months from the date when grounds for the application first arose…".* For these reasons the respondent seeks to have the grant of leave set aside. The respondent also argues that the appropriate way to seek declaratory relief is by plenary summons. Both parties agreed that the grant of leave neither cured nor determined any delay issues.

16. The applicant relies heavily on the wording of the internal memo from Mr. Hargadon to Ms. Gradwell stating that he had considered both the s. 5 of the Refugee Act 1996 and s. 3 of the Immigration Act 1999 and argues that the only reasonable conclusion must be that Mr. Hargadon determined that the principle of non-refoulement precluded the Minister from making a deportation order and that this was the reason behind the decision to grant leave to remain for "*specific and exceptional circumstances*". Otherwise, a deportation order made would have been made pursuant to s. 3(1) of the 1999 Act. The ordinary and natural meaning of the decision actually made is that the deportation of the applicant was considered but because this would offend against the principle of non-refoulement the applicant was granted leave to remain.

17. The applicant disputes the meaning attributed to s. 3(3) (b) (ii) of the Immigration Act 1999 by the respondent and argues that when the sub-section is read in context, the decisions and notifications mentioned clearly refer to deportation orders. Such a meaning was already attributed to the sub-section by the Supreme Court in *Re the Illegal Immigrants Trafficking Bill* 1999 [2000] 2 I.R. 360. The Supreme Court specifically examined procedures for challenging the validity of certain orders, notifications, refusals, recommendations and decisions made in respect of non-nationals pursuant to, *inter alia*, the Refugee Act 1996 and the Immigration Act 1999. They illustrated the range of matters covered by the procedural requirements set down in s. 5 of the Bill (now the Act of 2000) and considered that a notification under s. 3(3) (b) (ii) of the Immigration Act 1999 was "*of a decision to make a deportation order*".

18. The very recent decision by the Supreme Court of *Sulaimon v. The Minister for Justice, Equality and Law Reform* [2012] IESC 63 dealt with the issue of whether the grant of leave to remain following a proposal to deport was a power exercised pursuant to s. 4 of the Immigration Act 2004 and in both of the judgments delivered by O'Donnell J. and Hardiman J. it was concluded that leave to remain is indeed such a power. As the Minister's decision granting leave to remain to Mr. Jamali post dated the commencement of the Immigration Act 2004 it is therefore a "permission" pursuant to s. 4 of that Act.

Decision

19. The Court has some concerns relating to the naming of Mr. Jamali's spouse and children as applicants. The decision challenged and the declaratory relief sought did not involve them. They have never been in the State and while affected by Mr. Jamali's failure to be recognised as a refugee or a person in need of subsidiary protection, it is doubtful if that affords them locus standi. The Court has therefore considered "applicant" in the singular or referred to the applicant as Mr. Jamali.

20. It has to be made clear that this decision relates only to the *ex parte* procedure employed by the applicant and does not determine the main issue on either the declarations sought, whether plenary action might be more suitable to the claims for declaratory relief or the collateral and important issue of the delay in commencing proceedings.

21. The question the Court must ask itself is whether the decision made to grant leave to Mr. Jamali to remain in the State is a decision under s. 3(3) (b) (ii) of the Immigration Act 1999 and therefore caught by s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000. If it is such a decision then the application for judicial review should have been on notice to the respondent.

22. The Court is not aware of any previous challenges to positive decisions granting leave to remain *per se* and has not been directed to any part of the Refugee Act 1996 or the Immigration Acts which provides for challenges to positive Ministerial decisions. There is therefore no guidance found on the issue. The Court is not entirely persuaded that the Supreme Court decision in *Re the Illegal Immigrants Trafficking Bill 1999* [2000] 2 I.R. 360 even contemplated the procedures to be applied in a challenge to a positive decision for leave to remain.

23. Notwithstanding that the Supreme Court did not actually determine the precise issue in this case, their determination on a simpler matter in their lengthy decision gives strength to this Court's determination on the narrow issue which falls to be determined in this motion. Context is everything when considering the ordinary meaning of words in a statute. The title to s. 3 of the Immigration Act 1999 is "***Deportation orders***". The section then outlines procedures for making such orders including the matters which must be considered by the Minister before making a deportation order, the circumstances under which non-nationals may be deported, the procedure for challenging such orders, the fact that a consent deportation order lapses if not executed within three months, the conditions which may be imposed following the making of a deportation order, the offence which is committed if such requirements are contravened and other such matters. It is difficult therefore when viewing the section as a whole and in context to read into, attribute or insert any further meaning to the section and in particular to attach to s. 3(3) (b) (ii) the interpretation that a proposal to deport referred to in the earlier s. 3(3) (b) can include a proposal not to deport in the following subsection. Similarly, the notification of a decision that the proposal to deport will not be followed through as the person involved will be granted leave to remain cannot be subject to the requirements contained in s. 3(9) (a) or indeed the rest of s. 3 of the Immigration Act 1999 which deals exclusively with the consequences to the making of a deportation order. The Court is satisfied that the meaning attributed to s. 3(3) (b) (ii) by the respondent is incorrect and borders on absurdity when the sub-section is read in context.

24. Where a person seeks to challenge a decision to which s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000 applies, he or she must proceed in accordance with the procedures and time limits prescribed. All the notifications, refusals, decisions, recommendations

and order specified in s. 5(1) without exception relate to negative decisions. Section 5 does not contemplate the procedures for challenging the adequacy or transparency of reasons given by the Minister for positive decisions. It follows that the judicial review procedure for such challenges falls outside s. 5 and therefore the ordinary Order 84 rules and procedures apply.

25. What then is the position of Mr. Jamali, a non-national with permission to remain temporarily in the State? Clearly the Minister must notify him of any decision affecting him and of any conditions attached to his permission to remain, as indeed happened in this case. Mr. Jamali reported to the immigration authorities as directed, to regulate his status by stamping his identity document. That stamp is practical daily proof of his status while the Minister's notification letter is the legal basis of his permission. Section 4 (1) of the Immigration Act 2004 provides confirmation for this view:

> *"An immigration officer may on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission")." (The Court's emphasis)*

26. It follows from the *Suleiman* judgment that the applicant is correct in asserting that the leave to remain granted to him by the Minister is a "permission" within the meaning of s. 4.

27. In the circumstances the application before Ryan J. was not a procedural nullity and the respondent's motion must fail. The Court will next proceed to determine that portion of the application for leave which was directed to be made on notice and then the post-leave application for the declarations for which leave was already granted. As previously mentioned the delay issue, being inextricably involved in the procedural challenge, was not sufficiently argued at the hearing of the motion to be determined at this stage.

1. That permission has been renewed and he currently has leave to remain until the end of 2013.