

**THE HIGH COURT
JUDICIAL REVIEW**

[No. 76/2003 JR]

BETWEEN**SEBADIN GARIBOV AND NELI GARIBOV****APPLICANTS****AND**

**MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, NOEL CONROY, REFUGEE APPEALS TRIBUNAL IRELAND AND THE
ATTORNEY GENERAL**

RESPONDENTS**Judgment of Mr. Justice Herbert delivered the 16th day of November, 2006.****The Facts**

1. The Statement Grounding Application for Judicial Review in this matter is dated 24th October, 2003. The applicants seek an Order of Certiorari by way of Judicial Review quashing Deportation Notices purportedly issued by the Garda National Immigration Bureau dated 17th October, 2003 against both applicants pursuant to the provisions of s. 3(9)(a)(i) of the Immigration Act, 1999, made on foot of purported Deportation Orders made by the first named respondent pursuant to the provisions of s. 3(1) of the Refugee Act, 1996, (as amended) in respect of the first named applicant on 21st August, 2003 and in respect of the second named applicant on 22nd August, 2003, and other reliefs. These reliefs were sought on 13 grounds.

2. Ground (E) 3 claims as follows:

"The first named applicant is suffering from cancer of the vocal chords for which he is receiving treatment in Ireland. Such treatment and monitoring would be substantially disrupted if he were to be returned to Bulgaria. His return, pursuant to the decisions impugned would be contrary to his right to bodily integrity pursuant to the Constitution and his rights pursuant to the European Convention on Human Rights in particular Articles 3 and 8 thereof".

3. The other grounds upon which relief is claimed in the Statement Grounding Application for Judicial Review are as follows:

1. The first named respondent failed to take into account that the applicants are the parents and parents in law of an Irish Citizen and to remove them from the State would be to act in breach of Article 41 of the Constitution and/or the principle of family reunification.

2. The decision was grossly irrational and discriminatory as the Applicants son and daughter in law have been granted asylum in the State.

4. The first named applicant was convicted in absentia on 19th November 1997 and sentenced to one year imprisonment. This prosecution was malicious and motivated by racial harassment.

5. The return of the first named applicant would in such circumstances contravene s. 5 of the Refugee Act, 1996 and/or s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2000.

6. The applicants were entitled to remain in this State and/or have a legitimate expectation in that regard by virtue of the Treaty of Nice and as a matter of European Law.

7. The purported decisions failed to state any or any adequate reasons.

8. The first named respondent precluded the Applicants from making a meaningful application to him by failing to publish particulars of previous decisions pursuant to s. 3 of the Immigration Act, 1999.

9. Subject to full discovery, the first named respondent in breach of fair procedures and natural and constitutional justice relied on materials and documents not made available to the Applicants.

10. The Applicants were not liable to deportation on foot of the impugned decisions as refugee status had not been validly refused.

11. The Deportation Orders are void and *ultra vires* as not specifying the place of deportation in the Orders or alternatively in the Notices accompanying the Orders.

12. The first named respondent failed to have regard to all relevant considerations.

13. The form of the purported Notices is defective as referring to the "Deportations" of each of the applicants in each case.

4. A petition pursuant to s. 3 of the Immigration Act, 1999 was submitted by A.C. Pendred and Company, Solicitors for the applicants, to the first named respondent dated 9th October, 2001. The bulk of this two and a half page petition addressed issues of alleged threats to the life and freedom of the applicants by reason of their ethnicity as Roma people and, the stated involvement of the first named applicant in an organisation known as the Movement for Rights and Liberties which had investigated human rights abuses during the Communist Era in Bulgaria and, relies upon the provisions of s. 5(1) of the Refugee Act, 1996 and Article 3 of the European Convention on Human Rights, 1938.

5. This Petition contains the following two paragraphs:-

"Mr. Garibov has been treated in Ireland for cancer of his vocal chords. He has received radiotherapy to his neck and is followed on a regular basis at Saint Luke's Hospital (letter from Dr. Maeve Pomeroy, Saint Luke's Hospital dated 6th September, 2001 and letter from Dr. Nadeem Pervez, Saint Luke and Saint Anne's Hospital, Radiotherapy and Oncology Service dated 5th September, 2000, Tabs Five and Six). He will continue to need follow-up treatment for the next two to three years.

Please be advised that this is an open letter. We must produce this letter in any High Court proceedings were we to be so instructed or in any other proceedings which we would deem appropriate to the Garibovs' circumstances. Further we must and shall use this letter to fix you with any costs thereof. Moreover should the issue of damages for serious loss arise for our client or his next of kin, we shall also use this letter to fix you with the costs thereof."

6. The letter dated 5th September, 2000 and addressed "to whom it may concern" states that the first named applicant completed radiotherapy for cancer of the larynx in late July 2000 and would be called regularly for routine check up which will continue for years (the emphasis is mine). The letter dated 6th September, 2001 and addressed "to whom it may concern" confirms that the first named applicant will require a follow-up examination on a monthly basis for the next 2 to 3 years in order to detect and treat any recurrence of the cancer of his vocal chords.

7. A document disclosed by the respondents and entitled "Examination of file under s. 3 of the Immigration Act, 1999 – First Supervisor" and, dated 12th December, 2002 and, which it was accepted was before the first named respondent in making his decision, contains reference to the above letters which are indicated to be annexed to it. A further document disclosed by the Respondents and entitled "Examination of File under s. 3 of the Immigration Act, 1999 – second Supervisor" and, dated 25th July, 2003 recommended that refoulement was not an issue, (s. 5 of the Refugee Act, 1996) and recorded that the Refugee Applications Commissioner and the Refugee Appeals Tribunal had both expressed their opinion that the first named applicant might have been fleeing prosecution rather than persecution.

8. This Examination of File disclosed by the Respondents, contains the following paragraph under the heading, "Section 3(6)(h) Humanitarian Considerations":-

"Mr. Garibov has cancer of the vocal chords. He received radiotherapy to his neck, which he completed in late July, 2000. According to his consultant in St. Luke's Hospital, Dr. Maeve Pomeroy, the cancer is in remission, and the final checkup is scheduled for 14/10/03. She has offered to then forward a medical report to the Department. It is also noted that the Garibovs have been living in Ireland for a considerable amount of time, and that their son Galip has been granted refugee status in Ireland (69/1908/99 A), although in the light of the positive human rights developments in Bulgaria, following that country's application for EU membership, it would not be unreasonable to review his refugee status with regard to whether he would be persecuted in Bulgaria now."

9. Mr. S. Bonnländer, Executive Officer, Repatriation Unit, concludes his recommendation by stating:-

"There are humanitarian considerations in this case; however, how to weigh them remains difficult particularly in the context of imminent policy developments. Therefore, the case is submitted without specific recommendation."

10. The Approval of the first named respondent dated 6/08/03, is endorsed on this document above a handwritten note which is dated 1/08/2003 and signed Michael Flynn and is in the following terms:-

"I have considered the papers on file in this case. Despite the illness of Mr. Garibov I do not see any ground for granting humanitarian leave to remain to this couple given that they have failed the asylum process. However, we can hold off in any deportation until the final cancer checkup in October 2003".

11. As already appears the Deportation Orders were made by the first named respondent in respect of the Applicants on 21st and 22nd August 2003, notified to the Applicants on 9th October, 2003 by the Repatriation Unit, Immigration Division of the Department of Justice, Equality and Law Reform and, Deportation Notices served on the Applicants by the Garda National Immigration Bureau on 17th October, 2003. These judicial review proceedings were instituted by a Motion on Notice seeking leave to apply for Judicial Review dated 24th October, 2003 and returnable for 5th November, 2003.

12. At paragraph 3 of his Affidavit sworn herein on 20th January, 2004 the first named applicant states as follows:-

"I say that I have attended St. Luke's Hospital, Highfield Road, Rathgar, Dublin 6 for treatment with radiotherapy and I continue to be under the care of Dr. Maeve Pomeroy, MRCPI, FFR, DMRT, Consultant Radiation Oncologist for ongoing monitoring of my condition. I beg to refer to medical reports from St. Luke's Hospital dated 18/10/03 and to medical reports dated 13th January, 2004 to Mr. M. Flynn of Repatriation Unit Department of Justice, Equality and Law Reform 13/14 Burgh Quay, Dublin 2 and the Visa Office, 13/14 Burgh Quay, Dublin 2, which marked with the letter S.G. 1. I have signed my name prior to the swearing hereof".

13. These reports state as follows:-

"18/10/03, to whom it may concern,

Mr. Garibov received radiotherapy at St. Luke's Hospital from May to July of 2000. He is currently undergoing regular reassessment of treatment response. Should he develop any further problems he would require further intensive treatment and it is therefore imperative that this patient have rigorous follow up ideally by the doctors who are familiar with his clinical diagnosis and previous treatment".

14. 13th January 2004, to whom it may concern:-

"I am extremely concerned that it is proposed that Mr. Garibov would be sent from Ireland. Since his arrival in Ireland he has had a diagnosis of laryngeal carcinoma. We have treated him with radical radiotherapy but his very careful ongoing monitoring of his condition is very important in terms of his long-term prognosis.

Should he develop further problems he could have an excellent response to further treatment and I am very concerned that the Clinicians who have been involved in his care to date should be in a position to monitor his care.

I strongly advise that his deportation at this time would be injurious to his health. I am confident that you will understand that this is a special situation and should your Medical Officer require any further details I would be happy to supply them. I would appreciate if you could respond in a humane and flexible manner with regard to this special situation."

15. This letter is signed Dr. Maeve Pomeroy, Consultant Radiation, Oncologist, St. Luke's Hospital and is addressed to Mr. Michael Flynn, Repatriation Unit, Department of Justice and Visa Office, Department of Foreign Affairs.

16. The Report dated 24th August, 2004 from Dr. Noel Ahern, Registrar, to Dr. Maeve Pomeroy, Consultant Radiation, Oncologist, St. Luke's Hospital, and addressed to Mr. Michael Flynn, Repatriation Unit, Department of Justice, Equality and Law Reform states as follows:-

"Since his arrival in Ireland Mr. Garibov has had a diagnosis of laryngeal carcinoma. We have treated him with radical Radiotherapy but his very careful ongoing monitoring of his condition is very important in terms of his long-term prognosis.

Should he develop further problems he could have an excellent response to further treatment and I am very concerned that the Clinicians who have been involved in his care to date should be in a position to monitor his care. I strongly advise that his deportation at this time would be injurious to his health. I am confident that you will understand that this is a special situation.

Should your Medical Officer require any further details I would be happy to supply them. I would appreciate if would respond in a humane and flexible manner with regard to this special situation".

17. It appears to me that this report is a re-publication of or an exact repetition of the terms of the report of 13th January 2004, above cited.

18. By a letter dated 22nd July, 2005, A.C. Pendred and Company Solicitors, for the applicants forwarded medical reports from Dr. Thomas Maher, dated 15th July, 2005 and Dr. Aktham Shariff dated 6th July 2005 to the Repatriation Unit of the Department of Justice, Equality and Law Reform. The report from Dr. Aktham Shariff, Registrar to Dr. Osama Salib, Consultant Radiation Oncologist, St. Luke's Hospital is an identical copy or a re-issue of the Report of Dr. Maeve Pomeroy dated 13th January 2004.

19. Dr. Thomas Maher of Whitworth Medical Centre simply states:-

"Mr. Sebadin Garibov had radiotherapy for laryngeal cancer in 2000 and has been advised to have regular due follow in St. Luke's Hospital up to detect any recurrence and to provide any necessary treatment".

20. By a report headed "to whom it may concern and dated 12th January 2006 and addressed to the first named respondent and to the Garda Immigration Bureau, Dr. Osama Salib, Consultant Radiation, Oncologist at St. Luke's Hospital states as follows:-

"This gentleman attended St. Luke's Hospital for radiotherapy treatment to cancer of his larynx. He attends my outpatients on a regular basis for a follow-up. He requires follow-up for a number of years and I would be grateful if his stay in Ireland could be facilitated.

If you require any further information I would be happy to furnish same on request".

21. By letter dated 22nd February 2006 A.C. Pendred and Company Solicitors for the Applicants wrote to the Chief State Solicitor as follows:-

"Dear Mr. McClean,

Please find enclosed copies of letters forwarded to your clients in relation to the above named as you are aware that the matter is next for mention on Monday 13th March 2006.

We would anticipate that your clients will have reached a decision in this case prior to that date, as the matter will have been in the list on a number of occasions. Given that the proceedings have been instituted since 24th October 2003 some two years and four months, we will have no alternative but to set the matter down for Hearing."

22. By letters 14th March, 2006 the Repatriation Unit of the Department of Justice, Equality and Law Reform advised each of the Applicants and also A.C. Pendred and Company their Solicitors as follows:-

"I am directed by the Minister for Justice Equality and Law Reform to refer to your application for temporary leave to remain in this State.

As an exceptional measure, I am to inform you that the Minister has decided to grant you temporary leave to remain in the State until 14/03/2007. You will be required to apply one month before the end of that period for renewal of this permission. The conditions of your temporary leave to remain will be dependent on your conduct during this period and you should observe the laws of the State and be of good behaviour. Furthermore, it is a condition of your temporary leave to remain that you take up gainful employment and should not be a burden on the State during this period.

You should now register with your local Registration Office, which is located at the Immigration Registration Office, Garda Síochána, 13-14 Burgh Quay, Dublin 2. On completion of the necessary formalities you will be presented with a certificate of registration which is your only evidence that you have been given leave to remain and which will set out the conditions on which you have been permitted to remain. That certificate is an important document and care should be taken to ensure that you retain it in your safe keeping.

You may work in the State without the need for a work permit and set up in business without seeking the permission of the Minister.

Please note that this letter is not in itself evidence of permission to remain in the State and should not be used for any purpose other than to present yourself to your local registration office."

23. By letter dated 10th May 2006, A.C. Pendred and Company Solicitors for the Applicants wrote to the Chief State Solicitor in the following terms:-

"We write to you in relation to the above named client who was granted residency by way of letter dated 14th March 2006.

You will be obliged if you confirm in writing that the Deportation order has been revoked by your client Pursuant to Section 3(11) of the Immigration Act, 1999.

Save to say if the order has indeed been revoked the only issue is one of costs that pertain to the Judicial Review procedure reference No. 766/2003.

We would respectfully request you seek instructions from your client regarding any proposals, prior to the next call over date which is 22nd May 2006, in relation to costs, failing in agreement we will look to fix a date for a costs hearing."

24. By letter 19th May 2006 the Repatriation Unit of the Department of Justice, Equality and Law Reform responded as follows:-

"I am directed by the Minister for Justice, Equality and Law Reform to acknowledge receipt of your correspondence dated 10th May 2006 in relation to your above named clients.

Please be advised that the Deportation Orders made in respect of your clients have been revoked. The above named were granted temporary leave to remain in the State on 14th March, 2006.

Should you have any further queries please forward same to the Department of Justice Repatriation Unit, 13-14 Burgh Quay, Dublin 2."

25. At paragraph 4 of his affidavit sworn on 24th July 2006, Anthony Conleth Pendred, Principal of the firm of A.C. Pendred and Company, Solicitors states that since the initiation of the Judicial Review proceedings the matter has been before the High Court on 22 occasions. He accepts that on a number of these occasions the matter was resolved by the consent of the parties. At paragraphs 6 and 7 of that affidavit Mr. A.C. Pendred states as follows:-

"6. I further say it is contended by the First-Named Respondent by way of letter dated 14th July 2006 which states "*inter alia*"

"The Respondent rejects any allegation that there is any merit in your clients Judicial Review proceedings filed on 23rd October 2003 challenging the Deportation orders in respect of the First and Second-named Applicants dated 21st August 2003 respectively".

7. Notwithstanding the above statement, I beg to refer to the Statement of Grounds in particular to Ground (E) 3 where it is pleaded as follows, (here the deponent sets out the terms of this ground which I have earlier quoted in full).

Issues

26. The applicants now wish to withdraw their originating Motion on Notice issued in accordance with the provisions of Order 84 rule 20(1) of the Rules of the Superior Courts 1986, whereby they sought leave of this court to apply for judicial review. Mr. Humphreys, Counsel on behalf of the Applicants submitted that as a consequence of the revocation by the first named respondent by the letters dated 14th March 2006 of the Deportation Orders made in respect of the applicants and, their having been granted temporary leave by the first named respondent to remain in this State until 14th March 2007, the applicants had succeeded in their claim so that further proceedings were unnecessary and, the applicants should be awarded the costs of the proceedings to date.

27. The Respondents continue to maintain that there is no merit in this application for Judicial Review. They contend that the decision of the first named respondent to revoke the Deportation Orders made by him in respect of the applicants and to, grant them temporary leave to remain in this State until 14th March 2007, was based solely upon a humanitarian consideration and evaluation by the first named respondent of new material furnished to the first named respondent subsequently to the motion seeking leave to apply for judicial review dated 24th October 2003. The respondents refer in particular to the following medical reports to which I have already made reference, 13th January 2004, Dr. M. Pomeroy, (repeated on 24th August 2004 by Dr. N. Ahern and on, 6th July 2005 by Dr. A. Shariff), and, 12th January 2006 Dr. O. Salib.

28. It was submitted by Ms. S. Farrell, Counsel for the respondents that these reports differ very significantly from the pre Deportation Order medical reports, particularly in their expression of great concern that the Clinicians who have been involved to date in the treatment of the first named applicant, should continue to monitor his case and, their insistence that this is a special situation in which the deportation of the first named applicant, at this time would be seriously injurious to his health by depriving him of this very careful ongoing monitoring of his condition which is of very great importance in terms of his long term prognosis. These concerns, Counsel submitted, were altogether more extensive, emphatic and specific than the references to a very general requirement for monthly monitoring of the first named applicant for a two to three year period, contained in the letters of 5th September 2000 from Dr. Pervez and 6 September 2001 from Dr. Pomeroy which are the basis for the Ground (E) 3 of the Statement Grounding Application for Judicial Review. Ms. S. Farrell submitted that if the Applicants were not prepared to prosecute their application for leave to seek judicial review and wished to withdraw their Motion and terminate the Judicial Review proceedings, they should be permitted to do so only upon terms that they pay the respondents costs, of the proceedings up to the present date. The Respondent, she said, were ready and willing to deal immediately with the application for leave to seek judicial review by the applicants.

Conclusions

29. It is provided by Order 99 rule 1(1) of the Rules of the Superior Courts, 1986, that the costs of every proceeding in the Superior Courts shall be in the discretion of those Courts. Rule 1(4) of the same Order provides that the costs of every issue of fact or law raised upon any claim or counterclaim shall, unless otherwise ordered follow the event.

30. Though this Court has a very wide discretion in the matter of awarding costs, it is a discretion which it must exercise judicially, that is, in accordance with reason and justice and, with specific reference to the particular facts of the instant case, not merely following some general rule or private opinion or moved to by such considerations as benevolence or sympathy. In this case the fact is that the first named respondent has, since the commencement of the proceedings, conceded to the Applicants the principal relief sought by them and has thereby rendered any further proceedings in the matter by the applicants unnecessary. I find, on the balance of probabilities, on the affidavit evidence, that the first named respondent exercised his discretion to revoke the Deportation Orders made by him in respect of both the Applicants by reason solely of the new evidence presented to him in the medical reports of 13th January 2004 and 12th January 2006. I find that there is nothing in the medical report of 12th January 2006 which is not also and more comprehensively dealt with in the medical report of 13th January 2004. Insofar as the first named respondent reached a decision to revoke the Deportation Orders and to grant the applicants temporary leave to remain in this State until 14th March 2007, I find that this decision could have been made in January or February 2004 rather than on 14th March 2006 and no explanation has been advanced as to why this was not done.

31. What is before the court is an application to seek judicial review. Without dealing with the application fully on its merits it would

be impossible and, indeed improper for the court to endeavour to predict the outcome of the application. It appears to me that the question which the court must ask in considering this application for costs is, whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review.

32. In considering whether it was reasonable for the applicants to have instituted these proceedings on 24th October 2003, the court cannot reasonably have regard to events which developed after that date and could not have been reasonably predicted prior to that date. Subsequent events might be relevant to the question of whether it was reasonable in the Applicants to have persisted in their application in certain circumstances. In my judgment so far as the present application for costs is concerned, the court has to consider whether:-

“the decision to commence these judicial review proceedings was a proportionate reaction in the applicants to the situation arising from the decisions and actions of the respondents, their servants and agents;

the decision to commence these judicial review proceedings was clearly based upon identified, existing and relevant constitutional, statutory and additionally or alternatively legal rules and principles;

the decision to commence these judicial review proceedings was on its face manifestly, (as distinct from arguably) frivolous or obviously unstateable and for the purpose of delay;

any alternative course of action was reasonably available to the applicants which would not have exposed the respondents to the risk of incurring legal costs;

the applicants had afforded the respondents a reasonable opportunity, insofar as the particular circumstances of the case would permit of addressing and responding to their claims before commencing these proceedings.

33. Applying these tests, I find on the affidavit evidence to which I have referred, and from a careful consideration of the originating documents, that it was reasonable for these applicants, in the particular circumstances of the instant case, to have sought leave from this court to apply for judicial review on 24th October, 2003 and, thereafter at all times to have persisted in that application. In particular, in the light of the events which have occurred, I find that the respondents could have rendered the application redundant in January or February 2004 rather than in March 2006.

34. In the special circumstances, I find that the applicants though seeking to withdraw their Motion seeking leave to apply for judicial review are entitled, as against the respondents to the costs of the proceedings to date on a party and party basis. I find nothing in the conduct of the applicants or in the manner in which this application has been prosecuted by them which would permit this court as a matter of reason and justice to deprive the applicants of those costs or to award costs to the respondents.

Cases Cited in Argument

35. *Onasanwo v. The Minister for Justice, Equality and Law Reform (High Court-June 18th, 2003, - McKechnie J. Unreported).*