Neutral Citation [2016] IEHC 657

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 694 J.R.]

BETWEEN

K.A.S.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. In this judicial review leave application, the applicant seeks leave to challenge his interaction with the immigration and asylum system by reference to a series of objections that are technical, elaborate, lengthy and in some respects mutually conflicting. Before coming to the details of his application it is relevant to set out his immigration history.

2. The applicant came to the State from Pakistan on a student visa on 17th March, 2005. The visa expired on 5th October, 2005, and the applicant then remained illegally in the State for a seven year period.

3. On 10th September, 2012, seven and a half years after his arrival, the notion of making an asylum claim first occurred to the applicant. The details of the asylum claim are sparse and consist essentially of one paragraph in his asylum questionnaire in which he alleges persecution by an entity in Pakistan known as M.Q.M. (see questionnaire dated 18th September, 2012). He claims that his brother was killed as a result of differences with this group.

4. While one might have the impression from the claim that M.Q.M. is some form of criminal organisation, Mr. Michael Lynn S.C. (with Mr. Anthony Hanrahan B.L.) in a very able submission for the applicant accepts that it is a political party, as appears from a letter dated 1st July, 2016, from the research and information unit of the legal aid board to the Refugee Legal Service. That letter notes that information about the group is "*extremely scarce*" and the limited information that could be obtained was only minimally supportive of the applicant's claim.

5. On 25th October, 2015, the Minister drafted a proposal to deport, but did not send it to any address. When the applicant's solicitors complained about this problem, the Department replied by letter dated 5th August, 2016, as follows: "*The proposal to deport letter was retained on file as we had been made aware by RIA that the applicant had left the last notified address provided to us and provided no further address. It would be completely illogical to issue a letter to an address that we were fully aware that your client was no longer residing at and I do not see any way that it would have benefitted your client to have us send a letter to an address that he no longer resided at, only for it to be returned to us undelivered. By not providing a new address, your client was also guilty of an offence under the Refugee Act 1996.*"

6. A deportation order was made on 20th February, 2014. The Minister wrote to an address for the applicant in Cork on 5th March, 2014, with a notification that the order had been made.

7. In January, 2016, the applicant left the State and was detained in Hungary while using the passport of another person, *en route* to Italy.

8. On 18th April, 2016, he was transferred back to the State from Hungary after a request under the Dublin III regulation (regulation (EU) No. 604/2013). The commissioner's letter of 10th March, 2016, accepting the applicant back relied on Article 18(1)(b) of the Dublin III regulation, which refers to an applicant whose application is "*under examination*". When the applicant returned, however, the papers exhibited indicate that he was not actually transferred under the Dublin regulation but came of his own volition after the procedures for transfer had been initiated.

9. On 2nd September, 2016, Faherty J. granted an interim injunction restraining deportation of the applicant and adjourned the leave application to 17th October, 2016.

10. As I held in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016), it is not open to an applicant to circumvent s. 5 of the Illegal Immigrants (Trafficking) Act 2000 by seeking declarations which cannot co-exist with the validity of a decision subject to that section (see e.g. paras. 65, 72 and 78 to 80 of *X.X.*). In terms of relief sought in the present case, relief 4(a) is an order of *certiorari* quashing the deportation order. That is clearly subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. All of the remaining reliefs (4(b) to 4(g)) if granted would have the effect of undermining the validity and enforceability of the deportation order. For that reason they are also subject to s. 5 of the 2000 Act. To hold otherwise would allow the validity of the order to be collaterally challenged as a result of creative legal complexity and confection.

11. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

Are there substantial grounds to contend that the failure to serve the proposal to deport letter entitles the applicant to relief?

12. The applicant's complaint that the proposal to deport letter was not served on him is an exercise in empty technical point-scoring. The Minister's inability to serve it was due to the applicant's own failure in his duty to notify the Minister of his address.

13. Hogan J. granted leave in relation to a failure to prove service of such a letter in *M.M. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 529 (unreported, High Court, 19th September, 2011), but that was in the quite different situation where the whereabouts of the applicant were known. Hogan J. says at para. 16 that failure to demonstrate service of a notice is "*so fundamental that this Court could not permit any subsequent deportation order to stand, at least absent quite special*

circumstances". But that *obiter* comment refers to a situation where the applicant is in known whereabouts and is capable of being served. It has absolutely no application to a situation where an applicant has failed in his duty to notify his address and where the Minister is therefore totally unaware of his whereabouts. Under those circumstances, the Minister's failure to serve a notification of intention to deport is not a matter that can go to the validity of the deportation order and does not require special circumstances in order to be excused. The breach by an applicant of his or her fundamental duties to notify a current address is a sufficient basis for non-service of the notice; or if I am wrong about that it amounts to waiver or alternatively conduct which requires refusal of relief as a matter of discretion.

14. There are no substantial grounds for the first ground (Ground 5(a)). (See also *S.A.A.E. v. Minister for Equality and Law Reform* (Unreported, High Court, 20th October, 2016) where I also rejected a leave application on this point).

Are there substantial grounds for contending that the Minister is obliged to consider the up to date situation in Pakistan?
15. The applicant has not put forward material demonstrating that there is a likelihood of a significant change in the situation regarding a risk of *refoulement* if returned to Pakistan. Accordingly the factual basis for advancing this ground (Ground 5(b)) does not exist.

Are there substantial grounds for contending that the commissioner has failed to issue a notice pursuant to reg. 10(3) of the E.U. (Dublin System) Regulations 2014?
16. Ground 5(c) alleges that the applicant has been told that he must apply under s. 17(7) of the 1996 Act if he wishes to re-enter the process. The applicant contends that reg. 10 of the European Union (Dublin System) Regulations 2014 is the appropriate mechanism under which he should be considered for refugee status. However reg. 10 only applies to an applicant under s. 8 of the 1996 Act *"to whom Article 18(1)(c) of the E.U. Regulation applies".* As the applicant is not such a person, this ground lacks the necessary factual foundation and is misconceived.

Are there substantial grounds for contending that the applicant should have received a notice under art. 11 of the 2014 Regulations?
17. Ground 5(d) contends that alternatively the applicant should have received a notice under reg. 11(3) of the 2014 Regulations. However, reg. 11 only applies to a person "*to whom Article 18(1)(d) of the E.U. Regulation applies*". The applicant's transfer back to Ireland was accepted under art. 18(1)(b) of the E.U. Regulation. In the absence of any challenge to that communication or a plea that that acceptance was incorrect, the factual basis for contending that a different provision of art. 18(1) applies is lacking.

Are there substantial grounds for contending that the applicant is entitled to an effective remedy under art. 39(1)(b) of the asylum procedures directive?
18. Art. 39(1)(b) of the Asylum Procedures Directive (Council Directive 2005/85/EC of 1st December, 2005) provides that member states shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against *"a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20*". Even leaving aside the absence from this case of an application to re-open the asylum claim, and leaving aside the question of whether arts. 19 and 20 apply to this applicant, the Court of Appeal has recently held in *N.M. v. Minister for Justice, Equality and Law Reform* [2016] 2 I.L.R.M. 369 that "*contemporary judicial review does indeed provide an effective remedy for the purposes of Article 39" per* Hogan J. at para. 59. On that basis there are no substantial grounds for contending that the applicant has been deprived of an effective remedy.

Are there substantial grounds for the contending that the respondents are not entitled to rely on the previous deemed withdrawal of the applicant's asylum application and the previous deportation order?
19. Ground 5(f) submits that because the commissioner agreed to take the applicant back from Hungary pursuant to art. 18(1)(b) of the Dublin III Regulation (which refers to "live" applications), the respondents are essentially estopped from relying on the deemed withdrawal of the asylum application and the deportation order. However there are no substantial grounds for contending for the existence of an estoppel because the applicant did not rely on this representation to his detriment. The exhibited letter of the Department dated 5th August, 2016, states that:

> *"The applicant arrived in Dublin Airport on 18th April, 2016 on a flight from Hungary via Munich. The applicant was not escorted and had no transfer papers. On 16th April, 2016, ORAC informed Hungary of arrival of applicant. The applicant therefore, was not returned by Hungary and arrived of his own accord."*

20. There is no grounding affidavit sworn by the applicant taking issue with this (the affidavit grounding the application is sworn by his solicitor and para. 6 of that affidavit only deals with the matter obliquely and does not specifically contend that the return to Ireland was on foot of a Hungarian transfer decision or reliance on the commissioner's representations). There is no averment that the applicant returned only because he was assured that he would be afforded a live asylum process.

21. For these reasons, substantial grounds for the contentions in Ground 5(f) are not discernible.

Are there substantial grounds for contending that the time limit for the making of a subsidiary protection application is in breach of EU law?
22. Mr. Lynn contends that the fifteen working day time limit for the making of a subsidiary protection application under the European Communities (Eligibility for Protection) Regulations 2006 and the European Union (Subsidiary Protection) Regulations 2013, is in breach of the EU law principle of effectiveness (Ground 5(g)). Reliance is placed on the decision of Hogan J. in *Danqua v. Minister for Justice, Equality and Law Reform* [2015] IECA 118 (unreported, Court of Appeal, Peart, Irvine and Hogan JJ., 10th June, 2015), referring a question to the Court of Justice of the European Union, and the opinion of Advocate General Bot of 29th June, 2016, in Case C-429/15 *Danqua v. Minister for Justice and Equality*, proposing that the court find that the time limit is contrary to the principle of effectiveness. The Court of Justice has since given judgment in Case C-429/15 *Danqua v. Minister for Justice and Equality* (CJEU, 20th October, 2016) to that effect.

23. However, the insuperable difficulty for this particular applicant is that his failure to make a subsidiary protection application was not due to the fifteen working day time limit. It was due to his breach of immigration law by failing to notify the Minister of his address. Even if the time limit had been longer, the applicant would still not have been assisted, because he, by his own conduct, prevented the immigration legislation from working as anticipated. Thus, the necessary factual basis for this contention does not exist in this case. This and many of the other points in this application are strictly *"[f]or aficionados of pointless formalism*", to whom *"[r]eal-world facts are irrelevant"* (adopting the language of Alito J. (dissenting) in *Mathis v. U.S.* 579 US __ (2016) (slip op. p. 9)).

Discretion
24. As follows from the foregoing, substantial grounds for this application are not discernable. Even if they were, this is a case where I would have refused leave on the basis of discretion on the basis that the applicant's difficulties basically stem from his own unlawful

failure to provide an address for service and his own unlawful act in leaving the State clandestinely under a fraudulent identity. As Lord Carnwath said in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at para. 61, "[j]*udicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes*." (See also my judgment in *Mirga v. Garda National Immigration Bureau* [2016] IEHC 545 (Unreported, High Court, 3rd October, 2016)).

25. It is clear from the judgment of Finlay C.J. in *G. v. D.P.P.* [1994] 1 I.R. 374, that discretionary matters can play a role, even at the leave stage. This is an applicant who has played fast and loose with the immigration law of at least three countries. He has been unlawfully present in Ireland for over ten years. He frustrated the proper operation of the immigration law of the State by leaving his accommodation without notifying the Minister of his address. He travelled to Hungary, and attempted to travel to Italy, on a fraudulent passport. And while one might sometimes be slow to exercise discretion against an applicant where they are making an arguable protection claim, the basis for this particular claim is so minimal, and the claim made as a throwaway afterthought so belatedly, that it is appropriate to exercise a discretion against an applicant such as this. Indeed, one might wonder, if discretion cannot exercise against someone such as the present applicant, against whom could it be exercised.

Order

26. For the foregoing reasons, I will order:

(i) that the application for leave to apply for judicial review be refused;

(ii) that the matter be adjourned to enable the applicant to apply for leave to appeal, and that if such application is made that it be on notice to the respondent;

(iii) that the applicant serve the CSSO with a copy of this judgment in any event within 7 days; and

(iv) that the injunction granted on 2nd September, 2016, be discharged with effect from the oral pronouncement of this judgment if and insofar as it continues in force.