Neutral Citation: [2017] IEHC 611

THE HIGH COURT

[2017 1065 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

BETWEEN

J.A. (CAMEROON)

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY

(No. 3)

RULING of Mr. Justice Richard Humphreys delivered on the 20th day of October, 2017

1. Ms. Rosario Boyle S.C. for the applicant has applied for a stay on deportation pending the lodging of an appeal in circumstances where, these being Article 40 proceedings, the only relief sought is the release of the applicant and not any challenge to the deportation order, which in any event is well beyond a challenge at this stage by reason of its antiquity.

2. The argument for a stay is that it preserves the *status quo* and it is more convenient to do so, at least from the applicant's point of view. It is said that a point of major importance arises regarding the issue relating to Article 26 of the Constitution but that was a point I decided in favour of the applicant, so he cannot seek to appeal on a point in his favour.

3. In *P.I. v. Governor of Cloverhill Prison* [2016] IESCDET 145 at para. 3 the Supreme Court did contemplate the possibility of stays on deportation in Article 40 proceedings, but I do not read that as a finding that such stays must be granted. In any event the jurisdictional question remains to be decided by the Supreme Court in the substantive disposition of that case.

4. The argument against a stay is made by Ms. Sara Moorhead S.C. first of all by reference to that jurisdictional question as to whether it is appropriate to grant a stay on a deportation order which is not itself being challenged. The definitive resolution of that question must await the Supreme Court decision in *P.I.*

5. Secondly, there is no meaningful protection issue in this case. All submissions made by the applicant have failed. Importantly, the eight week period for detention is about to run out and expires on the 11th November. While the applicant has proffered an undertaking not to make an issue of that, consent of the applicant is not a basis to set aside statutory obligations and it seems to me that the Governor would be required to release the applicant on the expiry of that period irrespective of the applicant's views on the matter. The eight week period can be extended where there is a judicial review of the deportation order but unlike the European Arrest Warrant Act 2003 (see ss. 15(3), 16(6) 18(5)) there is no provision for extension where Article 40 proceedings are brought.

6. It seems to me there is no reasonable prospect that the entire appellate process could be put through to finality by the 11th November. Thus this is not about preserving the appellate jurisdiction of the courts. The situation is different from cases where there is a judicial review of the deportation order and where the balance of justice and convenience leans in favour of a stay. The case does potentially highlight a possible *lacuna* in the legislation as it seems to me there is no clear reason why a judicial review should stop the clock but a *habeas corpus* application should not.

7. It seems to me then that there is a very severe risk that the granting of a stay could determine the issue irrespective of merits. The Court of Appeal in *Agrama v. Minister for Justice and Equality* [2016] IECA 72 did consider a similar issue in terms of circumstances where a grant of leave could determine the ultimate event; and that Court was of the view that the higher test than would normally apply should be satisfied in such a situation. It seems to me where the merits of the application have already been rejected the applicant is in some difficulty under that heading.

8. General equitable principles, insofar as they are relevant to immigration injunctions, very much lean against the applicant. He has played ducks and drakes with the immigration system having been an evader for a lengthy period and having made multiple and repeated applications – the latest of which I held was *prima facie* abusive. Those applications have given rise to a series of unchallenged decisions. The only reason he is in detention at all is by reason of his breach of the statutory requirement to cooperate with his deportation, a breach which as I have mentioned is a criminal office. On the basis of *Okunade v. Minister for Justice and Equality* [2012] IESC 49 and applying the criteria set out in that case, it seems to me that he is not an applicant that should benefit from a stay.

9. The application for a stay is a bit of a Hobson's choice because the options essentially are to grant a stay with the effect that the applicant will have to be released on the expiry of the eight weeks rendering the Article 40 moot unless he is rearrested, or alternatively to refuse a stay with the possibility that the applicant will be deported, also arguably rendering the proceedings moot. Although perhaps an appellant court would hear the matter anyway, as in *P.I.*, under the recognised doctrine that matters capable of repetition but evading review may be an exception to the general principle. Alternatively perhaps I might add that one could envisage an application to stay the statutory provision itself regarding time, as opposed to its enforcement, but that might be an adventure in judicial creativity too far, absent exceptional circumstances.

10. What tips the balance in that sort of situation is my substantive finding that the detention is lawful, so in terms of the stay I should then make whatever order is least likely to thwart that finding. It would be a perverse approach to legal obligations if not to the rule of law if, having lost a case, a party could reverse the decision by the purely technical manoeuvre of seeking a stay.

11. So unfortunately, even if one assumes for the sake of argument that I have jurisdiction to grant a stay in a case where the deportation order is not challenged, I will have to refuse any stay on the deportation order.