Neutral Citation [2016] IEHC 758

THE HIGH COURT

JUDICIAL REVIEW

[2016] No. 950 J.R.

BETWEEN

HAYTHAM ELHELAWY

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE COMMISSIONER, AN GARDA SÍOCHÁNA AND THE ATTORNEY GENERAL

RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 21st day of December, 2016

1. This is the judgment of the court on an application in proceedings which appear to have commenced on or about the 8th December, 2016, when an application was made to O'Connor J. for an injunction to restrain deportation. The Judge granted the injunction on an interim basis and the order of the court recites that leave is also granted. The applicant says that this is in error and the respondent accepts the *bona fides* of the applicant's counsel in that respect, though he makes justifiable complaint that the proper approach to remedy an error which appears on an order of the court is to apply to speak to the minutes of the order.

2. This court is not in a position to amend the order of O'Connor J. unless application be made to O'Connor J first, unless exceptional circumstances pertain.

3. The proceedings then came before me on the 12th December, 2016, and I directed that the proceedings should continue by way of notice of motion directing that there be an application for leave on notice. That indicates that counsel for the applicant, Mr. O'Shea, must have told me that leave had not been granted. In any event, a notice of motion issued on the 13th December, 2016, with a return date of yesterday the 20th December, 2016.

4. In that notice of motion the applicant sought in the first place:-

> "(i) A declaration by way of application for judicial review that it would be unlawful to effect the deportation of the Applicant in circumstances where there is an Application under s. 17(7) of the Refugee Act (as amended), 1996, pending.
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> (ii) An injunction restraining the deportation of the Applicant pending the lawful determination of the s. 17(7) application…"

5. The relevant facts are set out as follows:-

> 1. The Applicant who is an Egyptian national arrived in the State at a time unknown to the Respondents but without any permission to enter the State. The Applicant made an application for refugee status on the 6th September 2014 at the Office of the Refugee Applications Commissioner (ORAC) claiming that he feared the Egyptian regime because of his support for the Muslim Brotherhood. The Applicant stated that he had resided in the UK and confirmed that he had never applied for a visa to travel outside Egypt.
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> 2. The Applicant failed to attend for his interview on the 16th January 2015 and did not make any further contact with the ORAC in order to advise of any reason for his non-attendance.
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> 3. By decision dated the 18th February 2015, the First Named Respondent issued a formal decision to refuse the Applicant a Declaration of Refugee Status. The Applicant did not apply for subsidiary protection and thereafter, on the 17th April 2015, a notification of intention to deport issued to the Applicant and this was returned undelivered marked "Not called for". The Applicant's file was then considered under Section 3(6) of the Immigration Act 1999, as amended and Section 5 of the Refugee Act 1996, as amended and a Deportation Order was made in respect of the Applicant on the 29th May 2015.
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> 4. On the 2nd November 2015 the Applicant applied for residency in the State on the basis of his marriage to a Lithuanian national, Ms Kristina Vaikutye. It was submitted that they married on the 14th May 2015 but that his wife had died in Lithuania on the 26th June 2015. The Applicant's application was not granted on the basis that he did not satisfy the requirements of Regulation 9(2) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008.
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> 5. On the 16th September 2016. the Applicant's solicitors submitted a letter to the Removals Unit, Repatriation Section of the First Named Respondent's Department stating that the Applicant had applied for a Residence card and Stamp 4 on the basis of his marriage to an EU citizen who had passed away and sought further permission. A response to this and subsequent supporting correspondence stated that it was being dealt with as a Section 3(11) request to the First Name Respondent to revoke the Deportation Order.
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> 6. The deportation order made in respect of the Applicant was notified to him on the 29th September 2016. It was not challenged by the Applicant.
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> 7. The Applicant was thereafter arrested and detained on 8th December 2016 and remanded in Cloverhill for the purposes of his removal from the State on foot of the deportation order. Later that same day, an application was received from the Applicant's solicitors seeking permission to re-enter the asylum process pursuant to Section 17(7) of the Refugee Act,

1996 (as amended) and an undertaking was required to be given by the First Respondent in advance of that afternoon failing which court proceedings would issue. Also on the 8th December 2016, leave was sought from this Honourable Court (O'Connor J) for a Declaration, *"that it would be unlawful effect the deportation of the Applicant in circumstances where there is an application under Section 17(7) of the Refugee Act (as amended) 1996 pending."* Ground (e) of the Statement of Grounds states at (i) *"Article 7.2 of Directive 2005/83/EU ("the Procedures Directive") make it clear that the Applicant is entitled to a suspension of the deportation order at least until a preliminary decision has been made regarding the admissibility of the application."* Leave to apply for a Declaration was granted and an interim injunction was granted by O'Connor J. and the matter was adjourned to 12th December 2016 whereupon MacEochaidh J. listed the leave application (it appears at the erroneous behest of the Applicant as leave had already been granted) and the application for an interlocutory injunction for hearing on 20th December 2016 and continued the interim injunction.

8. In the meantime by decision dated 9th December 2016 – the day after leave to seek the Declaration by way of judicial review was granted – the Applicant's application pursuant to Section 17(7) was refused. As will be seen below the Respondents argue that this renders the proceedings moot.

9. The Applicant has produced written submissions in relation to two issues: 1. Whether it would be unlawful to effect deportation when an application under section 17(7) is pending, and, if so: 2. Whether injunctive relief ought to be granted.

6. The day after application was made for leave to re-enter the asylum system in accordance with s. 17(7) of the 1996 Act the Minister replied to that application and refused it. In those circumstances, the reliefs sought in this notice of motion at (i) and (ii) are moot because the reliefs sought refer to protection required during the period when an application to re-enter the asylum system was pending and that state of affairs came to an end sometime on the 9th of December, 2016.

7. What then remained of this case? The essential point urged on the court is that there is a state of affairs which the applicant wishes this court to affirm which is that he says that in accordance with Art.7 of the Procedures Directive, a person who makes an application to re-enter the asylum system acquires thereby a right to remain in Ireland until that procedure is complete, and what Mr. O'Shea says is that procedure is not complete until he has pursued in every possible way he can, his right to an effective remedy against the negative decision of the Minister.

8. What is peculiar about the current matter before the court, is that there is not an existing appeal or review against the decision of the Minister in being. The applicant has not yet decided or commenced upon the process of seeking an appeal or a review, or an effective remedy of any kind against the decision of the Minister. Mr. O'Shea explains that the reason this is so is that there was a difficulty because the applicant was in custody. Although no real details were given in respect of any such difficulty, it was not suggested that interviews with the applicant were refused or that the Governor of the prison made it difficult for the applicant's solicitor to have access to him. Indeed, the court notes that it was while the applicant was in custody that the proceedings which are moot appeared to have been put together.

9. The applicant says that the right to remain which arises under Art. 7 of the Procedures Directive extends as I have said to a process permitting the applicant to pursue an appeal or a review or other remedy, and that in particular that the right to remain automatically exists during the period in which the applicant has a right to pursue such an appeal or remedy. In this case in accordance with s. 5 of the Illegal Immigrant Trafficking Act 2000 the applicant has twenty-eight days within which to seek a review of the negative decision of the Minister under s. 17(7) of the Act.

10. Mr. O'Shea's point to me today appears to be that in this period between the negative decision of the Minister and the commencement of an appeal or a review against it, there is an automatic right to remain and he wishes me so to declare in a way that will assist him or have the effect of trumping the extant unchallenged deportation order in this case. The State have a straight forward reply to this suggestion and they say that this point has been determined in a case which is entitled *S.H.M. v. Minister for Justice* [2015] IEHC 829. It is a case in which the counsel for the Minister in this case, Mr. Conlan Smyth S.C., appeared for the Minister and I am told that Mr. O'Shea B.L. also appeared in that case on behalf of the applicant and it is disappointing, to use a neutral phrase, that the authority was not included in Mr. O'Shea's either written or oral submissions and distinguished if that is what he felt he had to do. In any event, Humphreys J. in his judgment in a section entitled "Right to Remain" describes Art. 7 of the Procedures Directive and he quotes upon it and he says at para. 16:-

> "It is clear from the scheme of the Directive that a re-application for asylum is nonetheless a first instance decision for the purposes of the Directive including Article 7."

And he says that:-

> "Appeals procedures are dealt with in an entirely different part of the Directive, Chapter V, which consists of Article 39.

11. At para. 17 he says:-

> "It is clear from Article 7(2) that this right [to] remain is also capable of applying to a re-application"

and I do not understand the State to disagree with the proposition that Art. 7 does indeed produce a right to remain for a person who has made an application referred to in the Directive as a subsequent application made pursuant to domestic law s. 17(7) of the 1996 Act.

12. This court has no difficulty accepting that at all times during the existence of a s. 17(7) application the applicant had a right, whether derived from Irish law or European law or both, to remain in the State pending the outcome of that application. At para. 18 Humphreys J. continues as follows:-

> "It is clear that the right to remain applies while a *"first instance"* decision is being made, but the term *"first instance"* decision does not mean the first decision, it means a decision at the initial rather than appellate level. Crucially the phrase *"first instance"* decision includes a re-application. There is no right to remain pending an appeal against a first instance decision, as is clear from Article 39(3)(a) of the 2005 Directive."

I agree with Humphreys J. and no sustainable argument has been advanced to me as to why I should depart from the reasoning of Humphreys J. and the significant finding he made, that the right to remain produced by Art. 7 of the Procedures Directive applies to the first instance process.

13. The applicant has failed to persuade me that Art. 7 itself is capable of producing a right to remain for any period of time other than that which applies to the consideration by the Minister of a first instance re-application for re-entry into the asylum system. That might appear to be a harsh finding if it were not for the fact that there is a perfectly effective remedy, for an applicant who finds himself in the position of the applicant in this case. Irish law provides a facility whereby a person in a pre-litigation phase can seek the protection of the court and ask the court to grant an injunction before an application for leave is made to protect a person's rights and ensure their security and safety at a time when it is feared that a return to a particular place might cause harm to them.

14. The applicant was repeatedly asked and invited to move an application in accordance with the decision of the Supreme Court in *Okunade v. Minister for Justice* [2012] IESC 49 and he has steadfastly declined the court's invitation insisting instead that there was a clear and obvious right to remain derived from Art. 7 of the Directive. In my view, this was a obdurate attitude by counsel for the applicant and one would have thought that at the very least one might have said "I insist that I do not need anything other than a declaration that I have a right to remain which embraces the original application and any processes associated with the right of remedy, but if I am wrong about that, I am now in a pre-litigation phase pending application to be made to challenge the s. 17(7) application and I apply to the court for protection." *Okunade* itself, I note, was a pre-leave application for an injunction which was granted by the Supreme Court.

15. The applicant is not entitled to a remedy on the basis advanced by counsel for the applicant and I am declining to make a declaration or any order that accords with what I regard as a fundamentally mistaken view of the law, and I note that Mr. O'Shea has declined to make application for a remedy which the court has jurisdiction to grant but for some reason he does not wish to invoke that jurisdiction.