THE HIGH COURT

JUDICIAL REVIEW

[2016 No.774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 4)

RULING of Mr. Justice Richard Humphreys delivered on the 17th day of October, 2017

1. The applicant's original statement of grounds was delivered on 4th October, 2016. On the 13th December, 2016, I gave leave to amend the statement in relation to a first application to revoke the deportation order under s. 3(11) of the Immigration Act, 1999. On 13th March, 2017, in *Y.Y. v. Minister for Justice and Equality (No.1)* [2017] IEHC 176, I refused substantive relief on a telescoped basis. On 24th March, 2017, in *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185, I refused leave to appeal to the Court of Appeal and on the same date in *Y.Y. v. Minister for Justice and Equality (No. 3)* [2017] IEHC 334, I declined to continue the stay that had been in place against actual removal from the State. By a determination in *Y.Y. v. Minister for Justice and Equality* [2017] IESC DET 38, 30th March, 2017, the Supreme Court gave leave to appeal on three identified questions, and in its judgment in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, 27th July, 2017, the Supreme Court quashed the first s. 3(11) decision and remitted the issue of the validity of the original deportation order back to this court. The applicant then made a second s. 3(11) application which has now been refused by the Minister. On 2nd October, 2017, I permitted amendment of the amended statement of grounds to ensure that the correct format for the amendment previously allowed was appropriately reflected (see *Doyle v. White & Anor* [2017] IEHC 44), and on 17th October, 2017, I heard the applicant's motion to allow a further amendment to take into account the decision on the second s. 3(11) application and his application for liberty to put in a further affidavit. I am now dealing primarily with that application.

The discretion of the court in relation to quashing a flawed decision

2. It seems to me that the attitude I should adopt to an amendment depends on the conceptual approach that should be taken to the question of how the court should respond to a flaw in an original decision. In my view it would be totally unfair on an applicant to treat him or her adversely in a review of a deportation order because he or she had made an application for revocation. While the Supreme Court did refer to the fact that the original decision and the affirmation decision were part of a chain of decisions and should be taken together, that has to be put in the wider context that the applicant could not be treated adversely for having made that application. The Supreme Court thus should I think be taken to have been likely to have made the same order (that is, an order remitting the question of the validity of the original decision to the High Court with liberty to the applicant to make a revocation application) even if there had been no prior revocation application. Such an approach is best conceptualised in my view in terms of the discretion of the court. Thus it is not automatic that a legal error results in the quashing of a decision. The Supreme Court found that there was an inadequacy of reasons in the original deportation order, but nonetheless did not quash that order. It remitted the question of the validity of that order to this court. If there had been no s. 3(11) application to have been considered with that remittal it would have been just as appropriate to remit the original issue and to require or at least permit a s. 3(11) application to be made. The exercise of discretion in this case hinges on a point made in para. 81 of the Supreme Court judgment that "*This is not a case however where it can be said that the Minister was not entitled in any circumstances to come to such a conclusion, or conversely that there was no reasonable basis upon which any Minister could conclude that there was no real risk of a breach of Article 3. Accordingly, the matter must be remitted to the Minister for further consideration.*" An assessment of all circumstances including those referred to in para. 82 of the decision, which mentions the chain of decision-making, meant that it would be appropriate to quash only the revocation decision and remit the original decision. In my view (although I accept that the Supreme Court did not state this specifically) this consideration of all circumstances must include any consideration of public interest in whether the Minister should be allowed to reconsider the matter or whether the original decision should be quashed *simpliciter*. That public interest must include, in all realism, the fact that the applicant is a person with terrorist convictions, who was considered to be a security risk and who is clearly a serious flight risk, being a person with multiple identities who was apprehended in the act of unlawfully leaving the State on false papers. Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.) for the applicant says that the Supreme Court did not particularly articulate those reasons and of course those reasons are not relevant to the art. 3 questions, in the sense that a consideration of real risk of harm is entirely independent of any merits or otherwise of a particular applicant, but they may be relevant to the question of the court's discretion. Mr. Lynn says the reason the Supreme Court gave was that the applicant's case was too generalised and says that is why he now has sought a specific expert's report, thereby significantly broadening the issues now before the court. He essentially suggested the Supreme Court judgment gave him the idea to go down the road of getting Professor Joffé's report. It is true the Supreme Court did not expressly set out public policy considerations as relevant to discretion, but as I say to proceed further it is necessary to assess the conceptual framework within which the remittal to the High Court is best considered and in my view it is best understood as one of a discretion as to the remedy to be adopted to deal with an illegality. Public interest considerations are just one element of the many factors to be considered in the exercise of such a discretion. That discretion is not to be artificially limited; it does not mean that there is either only one bite of the cherry or conversely that there is an endless number of bites. The court at any given point must take into account all relevant circumstances. So in the event of a situation where a decision is flawed, the court retains the discretion to quash that decision, but it also retains the discretion to quash the affirmation decision only and to adjourn the challenge to the original decision pending reconsideration. It retains the discretion to direct further reasons, (see my judgment in *RPS Consulting Engineers Limited v. Kildare County Council* [2016] IEHC 113) or discretion to make no order, if for example an applicant refused to seek the appropriate remedy by declining to make a further s. 3(11) application. Making no order would presumably arise only in very exceptional circumstances (e.g., subsequent diplomatic assurances) if a question under art. 3 of the ECHR were to arise.

The application for an amendment

3. Mr. Lynn has presented a complex series of amendments which he wishes to make to the already amended statement of grounds, which can be summarised under four headings:

(i). Firstly, he seeks to delete issues relating to the quashed affirmation decision of the 6th December, 2016 because that has already been dealt with by the Supreme Court: that is unproblematic.

(ii). Secondly, he wishes to add issues relating to the new affirmation decision of the 27nd September, 2017 under three broad headings: fair procedures, unreasonableness or irrationality, and failure to consider whether any changes in the circumstances in Algeria were significant and non-temporary.

(iii). Next he seeks to delete some issues relating to the original deportation order of the 19th September, 2016, and that again is unproblematic.

(iv). Finally, he wishes to retain with some amendments issues relating to that original deportation order and to add in a further ground. He seeks to retain the original ground (ii) as initially pleaded which is an allegation of inadequate reasoning. Secondly, he seeks to retain ground (vi), which is an allegation that the finding of no breach of art. 3 is unreasonable or irrational, and he also seeks to add reference to it being unreasonable in the light of material subsequently put before the Minister. Finally he proposes to insert a new ground (vii) which contends that in the affirmation decision, the Minister abandoned or failed to adopt the original reasons, and suggests that on that basis, the continuing validity of the deportation order must be assessed by reference to the affirmation decision such that the deportations are now invalid.

4. It seems to me that the deletions are clearly in order and Ms. Sinead McGrath B.L. (with Mr. Remy Farrell S.C.) did not hotly criticise the purposed grounds of challenge to the new s. 3(11) decision. But she did object to the attempt to expand the grounds of challenge to the original deportation order. I do not accept that it is either appropriate or legitimate to go back and add new grounds to the original challenge to the deportation order for a number of reasons. Any new issues regarding the new decision are best considered under the heading of one or other of the grounds pleaded by way of challenge to that new decision. We know that the original deportation order is flawed; but setting it aside is dependent on it being established that it would not be open to the Minister to rationally come to a decision affirming the order or certainly that he has not done so. Ms. McGrath also, I think legitimately, submits that it would be "*extremely confusing*" to try to elide the two decisions. One also has to look at what was properly before the Supreme Court because, as the deportation order was upheld under the *Y.Y. (No. 1)* judgment and as leave to appeal was only granted on three issues, the scope of the remaining challenge to the original deportation order must be viewed through the prism of the determination giving leave to appeal and of the subsequent judgment of the Supreme Court. The three issues on which leave to appeal was granted are set out at para. 13 of the determination. The issues at para. 13(i) and 13(ii), were not upheld and so do not arise, so that only basis on which the applicant can now challenge the original order is that set out in para. 13(iii) of the Supreme Court determination, which relate to grounds (ii) and (vi) of the statement of grounds in their unamended form, so I would allow all of the applicant's amendments expect for the amendment to ground (vi) and the new ground (vii). The grant of the amendment or indeed leave is without prejudice to any argument that could be made by the respondents as to why it would be inappropriate to grant substantive relief on any such ground, such as that the applicant is not entitled to rely on new material not before the decision maker.

De-telescoping and leave
5. There is no objection on either side in principle to the de-telescoping of the proceedings. I originally heard the case on a telescoped basis for the purpose of expedition but it seems (given the somewhat tangled procedural history that has evolved) that it would provide greater clarity to grant leave at this stage; so I will grant leave to the applicant in terms of the amendment that I have allowed. I will direct a relatively short time scale for the pleadings, subject to any difficulty raised by counsel.

The application to put in a further affidavit
6. Mr. Lynn sought to put in a further affidavit indicating that he would have put in a response from Professor Joffé if he had had an opportunity to do so. That seems potentially relevant in that it demonstrates that further submissions could have made a difference. Ms. McGrath objects that any such further material is more appropriate to a s. 3(11) application. That may well be so, but that is a matter I can consider in more detail at the substantive stage. Conversely if that objection is unfounded I can deal with that at the substantive stage also. I will give the applicant liberty to file a further affidavit without prejudice to any objection that may be made at the substantive stage by the respondent when there has been an opportunity to review the content of the affidavit.

De-anonymisation
7. With a view to mitigating any possible argument as to risk to the applicant I anonymised the county of origin in the No. 1 judgment. When the matter came before the Supreme Court however, that anonymisation was removed. Mr. Lynn states that his stance was one of, as he puts it, "*neutrality*". He says that he told the Supreme Court that he did not think that the anonymisation was necessary, but on the other hand he said he had no objection to continuing it. However, he did accept that he himself raised the issue on the outset of the full hearing and it does to my mind raise the question about why the issue was brought up at all given that the anonymisation was a matter of protection for the applicant, Mr. Lynn's position is that it does not matter to his client either way and that there is no practical reality to now maintaining the redaction. He says that he sees the logic, as Ms. McGrath does, of de-redacting the No. 1 judgment given that the cat is now out of the bag and there are no instructions to seek redaction. Given that that is the position I think the only realistic course is for me to de-redact the No. 1 judgment, as I originally indicated I would reserve the right to do. However, I would emphasise that the original redaction was an initiative that I had instigated; it was not at the request of the applicant, although it was intended to be a protection for the applicant. Such an approach reduces publicity and reduces the level of attention upon the applicant. It certainly reduces the risk of anyone tying wider reporting of security issues with this particular applicant. For instance a complaint is now made of adverse publicity in an RTE Prime Time Special program. I have been given very little details of this, but such adverse publicity is hardly discouraged by the wavier of the redaction which I had provided for the benefit of the applicant. Mr. Lynn's position is that the applicant thinks that the Algerians are aware of him anyway so it does not add to his detriment if Algeria is to be identified. That seems to me to be a questionable assumption for a number of reasons, but it is not really a matter for me to consider at this point. However, the fact that the applicant has in effect voluntarily waived a protection afforded to him by the court would be one factor to be considered by anyone at a later stage undertaking a substantive assessment of whether there is a risk under art. 3.

Stay on deportation
8. The final issue then is the injunction or stay to facilitate more time to allow amended pleadings being filed. I extended the stay until further order and now in order to ensure that there is clarity on the subject I will vary the stay further so that there will be a stay only on the actual removal of the applicant from the State, the stay to continue until fourteen days after the determination of the High Court proceedings, on the applicant's continuing undertaking not to challenge the legality of his detention.

Order
9. The order therefore will be:

(i). that the applicant have liberty to file a further amended statement of grounds in terms of the order sought except for the amendment to ground (vi) and the new ground (vii), without prejudice to any argument that could be made by the respondents as to why it would be inappropriate to grant substantive relief on any such ground;

(ii). that the applicant have leave to seek judicial review in terms of the statement of grounds as thus amended;

(iii). that the applicant have liberty to file a further affidavit without prejudice to any objection that may be made at the substantive stage by the respondent;

(iv). that the substantive judgment (*Y.Y. v. Minister for Justice and Equality (No. 1)*) be de-redacted to the extent of permitting publication of the country name; and

(v). that there be a stay only on the actual removal of the applicant from the State, the stay to continue until fourteen days after the determination of the High Court proceedings, on the applicant's continuing undertaking not to challenge the legality of his detention.