[2018] IEHC 392

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 406 J.R.]

BETWEEN

I.I. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 30th day of May, 2018

1. This is an application for leave to seek judicial review which I directed to be on notice to the respondent because it raises an important practical point regarding whether an applicant is entitled to seek or obtain an injunction restraining the making of a deportation order.

2. In this case, the applicant was refused permission to remain in the State under s. 49 of the International Protection Act 2015 on 26th April, 2018. An *ex parte* application for leave to seek judicial review of that decision was made on 17th May, 2018 in which the applicant sought firstly, an order of *certiorari* quashing the decision under s. 49 and secondly "*an injunction enjoining the respondent from signing a deportation order against the applicant pursuant to the provisions of s. 51(1) of the International Protection Act 2015*".

3. On 18th May, 2018 (the day after the leave application) the applicant was notified of a deportation order dated 8th May, 2018, informed under cover of a letter dated 15th May, 2018.

4. I have received helpful submissions from Mr. Conor Power S.C. (with Mr. Ian Whelan B.L.) for the applicant and from Mr. Robert Barron S.C. (with Ms. Michelle Cleary B.L.) for the respondent.

5. The pre-2015 Act procedure was that following the exhaustion of the protection process, the deportation order would be made supported by an "*analysis of file*" which set out reasons for the deportation order. This procedure of an analysis of file does not now seem to apply to orders under the 2015 Act, certainly if this case is anything to go by. The new procedure under the 2015 Act is that where an applicant is refused permission to be in the State under s. 49, a deportation order follows virtually automatically thereafter under s. 51, albeit that in practice a very brief period is allowed, measured in terms of days, to allow an applicant to leave the State voluntarily. Section 51(1) provides in a pertinent part that "*subject to s. 50, the Minister shall make an order under this section* ("deportation order") *in relation to a person where the Minister (a) has refused under s. 47 both to give a refugee declaration and to give a subsidiary protection to the person, and (b) is satisfied that s. 48(5) does not apply in respect of the person, and (c) has refused under s. 49(4) to give the person a permission under that section*". While the making of the deportation order is mandatory after the s. 49 refusal, subject to the statutory conditions, particularly non-*refoulement*, it must be noted that the s. 50 *refoulement* issues are in fact considered in the s. 49 refusal. The only new element is whether the Minister decides to disagree with the international protection office's findings on *refoulement*. If the Minister agrees, he agrees on the basis of the findings of the IPO, so at the s. 49 stage an applicant has all of the information he or she needs to challenge the basis of the proposed deportation.

6. There is no independent basis in law to challenge a deportation order separately from the basis to challenge the s. 49 refusal because the former is made on the grounds of the latter having been issued and on the basis of the reasoning as to *refoulement* set out in the latter decision, save perhaps for the extremely exceptional case where the Minister departs from that reasoning. Given the obligation to make the deportation order on compliance with the statutory conditions, little more can be said as to the reasons for it. That is well-illustrated by the first and second paragraphs of the Minister's letter of 15th May, 2018 in the present case, which note the refusal of refugee and subsidiary protection declarations, the refusal of permission to remain in the State, and the fact of the Minister being satisfied that s. 50 does not apply and that the s. 48(5) option to return voluntarily does not apply. Inferentially, the reasons for the prior decisions are found in those decisions themselves.

7. The problem is that applicants can (as here) exploit the very brief period between the s. 49 and s. 51 decisions, which is intended to benefit them by allowing a voluntary leaving of the State, by seeking to challenge the s. 49 refusal and seeking a stay on the making of the s. 51 deportation order. This allows applicants, if such an injunction is granted, to interrupt an essentially unitary process and to pursue to a final conclusion, on appeal if necessary, a challenge to the s. 49 decision, and then to attack a deportation order separately at a later stage, no doubt relying on the lapse of time in the meantime to put up a fresh smörgåsbord of complaints.

8. Such a procedure would be a massive abuse of process. It is absolutely not appropriate for a court to grant an *ex parte* injunction at the s. 49 stage restraining the making of a deportation order. Such an injunction serves no purpose other than to delay the inevitable because a deportation order follows almost automatically. It would create a situation where the whole merry-go-round of immigration challenges would simply restart after the exhaustion, possibly on appeal, of the first round of complaints against the s. 49 refusal.

9. This is illustrated to some extent by the grounds on which the injunction was sought in the present case at ground F(v) of the statement of grounds to the effect that deportation would be adverse to the health of the applicant and contrary to his rights. That provides no basis whatsoever to restrain a making of the deportation order as opposed to its enforcement.

10. The test set out by the Supreme Court in *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2013] 1 I.L.R.M. 1 [2012] 3 IR 152, *per* Clarke J., as he then was, could not be remotely met in such a situation because the consequences for an applicant of the deportation order being merely made, as opposed to enforced, are minimal, especially if the court has restrained the effecting of the order. It thus may be appropriate for the court to grant an injunction restraining the effecting of any deportation order made on foot of the s. 49 proposal. Furthermore, it would be appropriate for applicants to frame relief sought in those terms when challenging a s. 49 decision. If, following the institution of such a judicial review challenging a s. 49 decision, a deportation order is in fact made,

it seems more likely to save costs if there could be consent to amending the proceedings to facilitate a consequential challenge to the deportation order rather than having to have separate judicial review proceedings.

11. Lest there be any misunderstanding, I want to make clear that if any applicant wishes to dispute such a conclusion in any future case, such applicant's legal representatives are under a personal professional obligation to first draw the present judgment to the attention of any court to which they may make an *ex parte* application challenging a s. 49 decision. Given the variety of judges that may be called upon to deal with *ex parte* applications in vacations and out of hours, such an obligation is essential to avoid procedural abuse.

Order

12. In the circumstances I will grant leave to the applicant to seek relief E(i) on grounds F(i) to (iv) (thus excluding the original attempt to restrain the making of the deportation order). There will be liberty to apply on notice to seek to amend the proceedings in relation to the deportation order and costs will be reserved.