

## THE HIGH COURT

## JUDICIAL REVIEW

[2018 No. 248 J.R.]

BETWEEN

J.A. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of May, 2018**

1. The applicant arrived in the State in 2002 at the age of ten with his mother and siblings. His asylum application was rejected in 2004. On 8th November, 2006 he applied for subsidiary protection. That application was withdrawn on 10th May, 2010.

2. On 24th July, 2012 he was granted a permission to remain which was renewed on two occasions up to 2015. On 9th May, 2012 he accumulated his first conviction for handling stolen property, for which he received a custodial sentence. In the following years, there followed a series of further convictions for possession of drugs, possession of drugs for the purpose of sale or supply for which a custodial sentence was imposed, handling stolen property, possession of drugs which also attracted a custodial sentence, handling stolen property which attracted a custodial sentence, possession of drugs for supply which attracted a custodial sentence, no insurance, driving with excess alcohol, and possession of a mobile telephone in prison which attracted a custodial sentence.

3. On 22nd September, 2015 there was a proposal to deport the applicant. On 30th October, 2015 he made an application for leave to remain and submissions under s. 3 of the Immigration Act 1999 referring to an address (different to that last notified) in Moate, County Westmeath. His last notified address had been in Athlone.

4. Section 6(1) of the 1999 Act as amended provides for three ways under which a notice under the Act may be served on a person:

(i). by delivering it directly to him or her,

(ii). by sending by post to the address most recently furnished to the registration officer or the Refugee Applications Commissioner or

(iii). in the case in which an address for service has been furnished, by posting to that address.

5. Thus simply writing a letter to the Department is insufficient. Formal notice of change of address needs to be given to the registration officer, that is the GNIB, or the Refugee Applications Commissioner, or alternatively an address for service should be furnished. Certainly including information about a change of address as part of a wider letter written for some other purpose is most decidedly insufficient. Consequently, in this case, service on the applicant's previously notified address continued to be valid in accordance with the 1999 Act notwithstanding the s. 3 submissions.

6. On 22nd January, 2016 a deportation order was made supported by a lengthy analysis in which the Minister weighed all the issues both in favour of and against the applicant. The subsequent s. 3(11) decisions under the Immigration Act 1999 must be read in conjunction with this original analysis.

7. On 17th February, 2016 the deportation order was notified to the applicant and his solicitor. There is no question but that the applicant was aware of this at the time. The order was not challenged within the time provided for by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

8. After the deportation order, and on top of the convictions in 2012, 2013, 2014 and 2015, the applicant accumulated further convictions, unfortunately not referred to in the applicant's written legal submissions, dating from 2016, 2017 and 2018.

9. On 20th April, 2016 the applicant gave notice of intention to marry an Irish national in a proposed legal ceremony which never took place. On 24th May, 2016 the applicant "married" that Irish citizen in an Islamic ceremony which was not legally binding. He has since separated from that partner.

10. On 8th August, 2016 the applicant made a first application for revocation of the deportation order under s. 3(11) submitted by his then solicitors, KOD Lyons. On 23rd September, 2016 the applicant consulted AC Pendred & Co. solicitors. KOD Lyons indicated that they would send the file to the new solicitors. On 28th April, 2017 a letter refusing the first s. 3(11) application was notified firstly to the applicant at his last formally notified address in Athlone, which service was in accordance with the 1999 Act and therefore valid, and secondly to the solicitors of which notice had been given to the Department, namely KOD Lyons. No authority to change solicitor had been furnished to the Department by that stage.

11. KOD Lyons forthwith sent the letter to AC Pendreds, as has been made clear by a letter being exhibited dated 3rd May, 2017 enclosing "*correspondence from INIS which was received in our office yesterday*".

12. In the meantime, on 25th April, 2017 a second s. 3(11) application was made by AC Pendreds. While presumably at that particular point in time AC Pendreds were unaware of the decision on the first s. 3(11) application, they became so aware on receipt of the letter of 3rd May, 2017.

13. The applicant's instructions as deposed to in a hearsay manner by his current solicitor in her affidavit of 1st May, 2018 are that neither set of previous solicitors notified him of this seismic development. While it is well within the bounds of the possible if not probable that KOD Lyons did not so notify him given that their instructions had been terminated at that point, it would be an extraordinary breach of duty if AC Pendreds solicitors failed to notify the applicant on foot of the letter received by them from KOD

Lyons; and I do not accept for a moment that it is likely or even remotely plausible that they failed to comply with their duty to notify the applicant in that regard, the applicant's solicitor's hearsay account of the applicant's instructions notwithstanding.

14. On 9th May, 2017, the s. 3(11) application was resubmitted as an error had been made in the first application. On 27th March, 2018 the applicant was arrested. The applicant has been represented by a third set of solicitors, Aonghus McCarthy solicitors, since March, 2018.

15. I have received submissions from Ms. Sunniva McDonagh S.C. and Mr Pádraig Langsch B.L. for the applicant and Ms. Kilda Mooney B.L. for the respondent.

#### **Procedural history**

16. Over the Easter vacation the applicant got a late night injunction from Barniville J., the duty judge on 27th March, 2018, to prevent his removal from the State the following day, 28th March, 2018. At that emergency hearing he presented an unsworn draft affidavit of the applicant's solicitor which was sworn the next day, which states that no decision had been made on the s. 3(11) application. I fully accept the *bona fides* of the applicant's current solicitor but I do not accept that the applicant's instructions given to her were either correct or *bona fide*. As I have said, I think it is overwhelmingly likely that the applicant was informed of the refusal of the first s. 3(11) application by his then solicitors AC Pendred. In all probability aware of this, he gave instructions to his solicitors to swear to the contrary to obtain an *ex parte* injunction.

17. The injunction having been granted, by the time the matter was returned before the regular asylum list on 6th April, 2018, the second s. 3(11) application had been refused. I then fixed a hearing date of 13th April, 2018. The gist of the application at that stage was to seek *mandamus* to make a decision under s. 3(11) but by that stage the decision had been made. Mr. Colman FitzGerald S.C., who at that point appeared for the applicant, indicated that he wanted to challenge that s. 3(11) decision either by an amended statement of grounds or by instituting a second judicial review and wanted the case adjourned, making that application on the morning of the hearing date of 13th April, 2018. I acceded to the application to adjourn the hearing and gave liberty to amend the statement of grounds and fixed a new hearing date of 1st May, 2018.

#### **Reliefs sought**

18. The proceedings were commenced on 27th March, 2018. The substantive reliefs sought in the amended statement of grounds are:

- (i). *certiorari* of the deportation order of 22nd January, 2016 Ms. McDonagh accepts that it is hard to see how she can challenge this given the time issue.
- (ii). *certiorari* of the first s. 3(11) decision of 21st April, 2017 which is almost a year out of time; and
- (iii). *certiorari* of the second s. 3(11) decision of 6th April, 2018.

#### **Limited scope of the s. 3(11) process**

19. It is clear from repeated Supreme Court authority that the s. 3(11) process is a limited one: see *per* Clarke J. as he then was, in *Smith v. Minister for Justice and Equality* [2013] IESC 4 [2013] 1 I.R. 294, *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64. Ms. McDonagh claims that there is a conflict of Supreme Court jurisprudence on the issue, but I dealt with this in *A.B. (Albania) v. Minister for Justice and Equality (No. 2)* [2018] IEHC 36 [2018] 1 JIC 2502 (Unreported, High Court, 25th January, 2018) where I said that it is not contradictory to say that an applicant can make a s. 3(11) submission on any basis he or she wishes, including points that were there originally (see *Sivsvivadze v. Minister for Justice, Equality and Law Reform* [2016] 2 I.R. 403 [2015] IESC 53 (*per* Murray J., at para. 52)) but the Minister is entitled to refuse it unless it amounts to something significantly new (see *C.R.A v. Minister for Justice, Equality and Law Reform* [2007] IEHC 19 [2007] 3 I.R. 603, *per* MacMenamin J.; *Smith v. Minister for Justice, Equality and Law Reform* [2013] IESC 4 [2013] 1 I.R. 294, Clarke J., as he then was).

20. Ms. McDonagh submits that where a breach of fundamental rights is at issue the position is different. However, it seems to me that argument is inconsistent with the clear line of Supreme Court decisions. The upshot is the Minister's decision to refuse to revoke a deportation order is lawful if (a) the Minister has considered the submissions made whether they relate to new factors or not, even if such consideration is not narratively discussed and (b) the Minister is lawfully satisfied that there are no changed circumstances whether factual or legal such as to warrant revoking the order. It seems to me that the challenges to the s. 3(11) decisions are bound to fail on that basis: see also *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289 [2016] JIC 1214 (Unreported, High Court, 12th May, 2016). The procedure adopted by the applicant also exhibits the phenomenon of drip feeding material which the courts have repeatedly said is impermissible: see *K.M. v. Minister for Justice and Equality* [2013] IEHC 566 (Unreported, High Court, McDermott J., 6th December, 2013, and discussion at para. 13 – 09 of John Stanley, *Immigration and Citizenship Law* (Dublin, 2017). The stricture against drip-feeding was approved by MacMenamin J. in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 [2007] IEHC 19.

21. If I am wrong about the foregoing I now turn to the merits of the application such as they are.

#### **Ground 1 – no or inadequate consideration to the applicant's family circumstances and private life**

22. These matters were considered by the Minister and indeed given detailed narrative discussion, although detailed narrative discussion is not necessary. The ground as pleaded that there was inadequate consideration has not been made out.

#### **Grounds 2 and 3 – respondent failed adequately or at all to consider the situation and rights of the applicant especially under art. 8, or deportation would be disproportionate and a breach of art. 8**

23. Insofar as failure to consider relevant matters is alleged, the Minister did consider these and again this does not require narrative consideration although that was afforded. Insofar as disproportionality is alleged, the Minister weighed the matters in favour of the applicant in the balance with those against, including the public interest in deportation, in view of the applicant's offending history and lengthy list of convictions, a number of which attracted custodial sentences. His conclusion was not an unreasonable one.

24. The applicant's status, it seems to me, in terms of the evidence before the court at the hearing of this matter, is that he was present precariously from 2002 to 2004, that is without express permission as an asylum applicant only, then unlawfully between 2004 to 2006 between the refusal of the asylum application and the making of a subsidiary protection application, then precariously again as a subsidiary protection applicant between 2006 and 2010 when that application was withdrawn, then unlawfully between 2010 and 2012, then lawfully with a temporary permission between 2012 and 2015, and finally unlawfully between 2015 and 2018. He cannot on any stretch of the imagination be called a settled migrant because of some very brief period of residence with positive permission

amounting to three years out of a total of sixteen years' presence in the State. It is clear from the ECHR caselaw that deportation of a non-settled migrant breaches art. 8 only in exceptional circumstances. Even in the case of settled migrants, the Minister has a margin of appreciation which is not exceeded here. While the applicant relies on *Maslov v. Austria* (Application 1638/03, European Court of Human Rights, 23rd June, 2008), *Butt v. Norway* (Application no. 47017/09, European Court of Human Rights, 4th December, 2012), *Boutlif v. Switzerland* (Application no. 54273/00, European Court of Human Rights, 2nd August, 2001), *Omojudi v. the United Kingdom* (Application no. 1820/08, European Court of Human Rights, 24th November, 2009), *A.A. v. the United Kingdom*, (Application no. 8000/08, European Court of Human Rights, 20th September, 2011) and *Balogun v. the United Kingdom* (Application no. 60286/09, European Court of Human Rights, 10th April, 2012), the fact that certain offenders have succeeded in Strasbourg on art. 8 grounds does not mean that this applicant or any other applicant has to. A number of those cases related to settled migrants. In any event, such cases are generally fact-specific. I dealt with this issue in *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018) at para. 14, where I pointed out that the focus of the Court must be on what in Strasbourg parlance is called "well-established case law" such as cases like *Üner v. the Netherlands* (Application no. 4641/99, European Court of Human Rights, 18th October, 2006). It is not the case that every outlying high watermark case from Strasbourg has to be taken as a minimum benchmark on which any future applicant, however unmeritorious, can build. There are a number of other cases in which criminal offending behaviour was held to be of significance: see e.g., *Boujlifa v. France* [2003] 30 E.H.R.R. 419 (Application no. 122/1996, European Court of Human Rights, 21st October, 1997), *Krasniqi v. Austria* (Application no. 41697/12, European Court of Human Rights, 25th April, 2017).

25. The question of proportionality is a matter for the Minister. The applicant's submissions conclude with a major peroration setting out various discretionary matters tinged with *ad misericordiam*, which the applicant says makes the decision disproportionate. It is not for the court to make a *de novo* assessment of proportionality; only to assess whether the Minister's examination of the issue is clearly unlawful. For the court to start weighing all of those factors and to start throwing in its own two cents would be to transfer immigration policy from St. Stephen's Green to Inns Quay.

#### **Time issue**

26. The challenges are massively out of time apart from the second s. 3(11) decision. The applicant clearly knew of the original deportation order at the time and did nothing. I do not remotely accept that he was not notified of the first s. 3(11) decision, and am satisfied it is hugely more probable that his solicitors kept him fully informed (I note that not even the slightest attempt to put his former solicitors on notice of the implied allegation of a massive breach of duty was made), but even if somehow I am wrong about that, notice of the decision was lawfully sent to his last notified address. His failure to formally notify the GNIB of the correct address precludes there being good and sufficient reason for an extension of time. However in fairness to the applicant, while it is clear that there is no basis to extend time, since I am dismissing the application on the merits the time issue does not require formal decision.

#### **Duty to enquire and duty of candour**

27. The High Court of England and Wales has recently set out in a detailed and important judgment a number of crucial professional obligations for legal practitioners involved in *ex parte* immigration applications: *R. (Sathivel, Ajani and Ncube) v. Secretary of State for the Home Department* [2018] EWHC 913 (Admin) (Unreported, High Court of England and Wales, 26th April, 2018). I entirely endorse the analysis of Sharp L.J. and Green J. set out in that judgment and consider that the exposition of these critical duties also represents the law in this country. In order to ensure that the court is not misled, it is not sufficient for lawyers in an *ex parte* application to simply regurgitate their instructions. They also have a duty to inquire, to ensure that their instructions are as complete as is required to avoid misleading the court. This includes making all reasonable efforts to obtain papers, especially in the case of a last-minute change of solicitors, and being candid with the court as to what efforts were and were not made in this regard.

28. While the approach of the applicant's lawyers at the *ex parte* application for an injunction in this particular case would not survive the analysis of the duties set out in the *Sathivel* case I do not propose to hold that against them on this occasion, firstly, because deficiencies in the making of *ex parte* applications are unfortunately sufficiently frequent as to make it inappropriate to criticise any one lawyer at this particular point in time prior to the making the requirements clear more generally; and relatedly because I do not wish to retrospectively apply the exposition of the law in *Sathivel*, as endorsed in the present judgment, to an application made prior to that. However, going forward I will be expecting all *ex parte* applications, whether for injunctions or leave or otherwise and whether made to the judge in charge of the Asylum, Immigration and Citizenship List or any other judge, to comply with the strictures of *Sathivel* and the duties of enquiry and candour set out therein. Apart from anything else the applicant got an *ex parte* injunction on the night before his proposed deportation on the basis that no decision had been made on the s. 3(11) application when I am of the view, on the balance of probabilities, that he knew that that was not true. His previous solicitors knew all about it and I think it overwhelmingly more likely than not that they informed the applicant of that. However, that is criticism of the applicant and not of his present legal advisors.

#### **Discretion**

29. Even if I am wrong about all of the foregoing I would refuse relief to the applicant on the discretionary basis as sought in para. 27 of the statement of opposition on the grounds of the applicant's lack of candour and *bona fides* and his flagrant and ongoing breaches of the laws of the State.

#### **Order**

30. The order will therefore be:

- (i). that the application be dismissed on the merits; and
- (ii). that the injunction against deportation be discharged.