

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 914 J.R.]

BETWEEN

A.K. (SOMALIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of June, 2018

1. The applicant was born in Somalia on 22nd June, 1980. He unsuccessfully sought asylum in the State in 2005. He was then refused subsidiary protection. However, humanitarian leave to remain was granted in 2010.

2. He provided a false Somali passport in November, 2010, which was rejected by the Irish authorities, but ultimately on 21st June, 2016, he was granted a three-year residence on a stamp 4 basis, backdated to 31st January, 2016. That permission allowed for temporary travel outside the State. As the applicant did not have a valid Somali passport he was granted a temporary nine-month Irish travel document, but was directed to obtain a Somali passport. He then produced a further such purported passport, which again turned out to be a false document. However, prior to the discovery of that he was given a stamp 4 permission.

3. In October, 2010, he travelled to the wedding of a friend in Tanzania using that false Somali passport. On 8th November, 2016 on the return leg he was stopped in Addis Ababa in Ethiopia. The passport was confiscated on the grounds that it was fraudulent. He was detained for a twelve-day period and was then deported to Tanzania. On 1st February, 2017, he sought an emergency travel document from the Minister. That was refused on 13th February, 2017. A review was sought on 27th February, 2017. On 7th March, 2017, that was refused but the applicant was invited to submit original documentation regarding his identity and nationality. On 21st August, 2017, he replied stating that he would be unable to comply. On 21st September, 2017, the Minister again refused to issue a temporary travel document. On 27th November, 2017, approximately one year after the applicant had become stranded in Tanzania he was granted leave to seek judicial review of the refusal of a temporary document. On 11th April, 2018, the respondent issued a motion seeking security for costs of the present judicial review proceedings. It is clear that there is no basis to think that the applicant has any means to provide such security. His current permission expires on 30th January, 2019.

4. I have received helpful submissions from Mr. David Conlan Smyth S.C. (with Ms. Eva Humphreys B.L.) for the respondent and moving party and from Mr. Colm O'Dwyer S.C. (with Ms. Patricia Brazil B.L.) for the applicant.

The test for security for costs

5. It is clear that in a situation such as this the defendant has to meet three criteria:

- (i). that he or she has a *prima facie* defence on the merits.
- (ii). that the applicant is ordinarily resident outside Ireland, the EU or a Lugano country; and
- (iii). that the exercise of the court's discretion favours the making of the order: see *Delany and McGrath on Civil Procedure*, 4th Ed., (Round Hall, 2018) p. 556.

Prima facie defence on the merits

6. The replying affidavit of the State in the proceedings meets the test of a *prima facie* defence on the merits, as established in the case law and embodied in O. 29 r. 3 of the Rules of the Superior Courts, which states that a defendant will not be entitled to an order for costs unless he establishes by "satisfactory affidavit" that he has "a defence upon the merits" (see *Power v. Irish Civil Service (Permanent) Building Society* [1968] I.R. 158).

Applicant's place of ordinary residence

7. The applicant has a current stamp 4 permission to be in the State valid until 2019. On the facts he must be regarded as ordinarily resident in Ireland. He is present outside the State for various reasons but one of them is the Minister's refusal to facilitate his readmission which is challenged in the proceedings. Given his ordinary residence in the State, it is not appropriate to grant security for costs: see *Salthill Properties Ltd. v. Royal Bank of Scotland* [2010] IEHC 31 at para. 5.5 [2011] 2 I.R. 441 at 454, and *Farrell v. Bank of Ireland* [2010] IESC 42 [2013] 2 I.L.R.M. 18 at 4.20 *per* Clarke J., as he then was. It is true that the applicant had been present in Tanzania for about a year when he sought judicial review, but in the circumstances that is not a sufficiently established basis of residency to displace his ordinary residence in Ireland.

Discretion and balance of justice

8. The overall principle is that of balancing the right of a defendant to recover costs in the event of being successful with the right of a plaintiff to have access to the court: see *Farrell v. Bank of Ireland* [2013] 2 I.L.R.M. 183 at 192 *per* Clarke J., as he then was. There are a number of relevant factors here:

- (i). This is a first instance matter rather than on appeal where a court can take a more in-depth view of the likelihood of prospects of success or otherwise: see *Farrell* at p. 197.
- (ii). There is the human rights nature of the application being made to the court.
- (iii). There is also the fact that, given that the applicant has no assets, granting the order would determine the action. Such a situation is a factor against making an order for security for costs, although not automatically a reason not to so

order: see the conflicting case law discussed in Delaney and McGrath, 4th ed., at p. 567 para. 13–41. While art. 6 of the ECHR, as applied by the European Convention on Human Rights Act 2003, generally does not apply to non-criminal public law proceedings (such as these), the traditional test for ordering security for costs in a case where art. 6 *does* apply could raise an issue under that provision: see *Ait-Mouhoub v. France* (Applications nos. 103/1997/887/1099, European Court of Human Rights, 28th October, 1998) at para. 57, *García Manibardo v. Spain* (Application no. 38695/97, European Court of Human Rights, 15th February, 2000) at paras. 42 – 45.

(iv). It is clear that impecuniosity due to the wrong being challenged is normally not a basis for an order for security for costs: see *Collins v. Doyle* [1982] I.L.R.M. 495 *per* Finlay P. Relatedly, here, the applicant's continued absence from the State involves a number of factors but one them is the alleged wrong being challenged.

9. Overall, I do not consider that the balance of justice favours the application.

Conclusion and order

10. Neither the element of ordinary residence outside the State (and the EU and Lugano area), nor the requirement of balance of discretion or justice apply. Either criterion being missing would have been fatal; the absence of both reinforces that conclusion. More generally, this sort of application is the type of preliminary skirmish that can only have the effect of delaying progress of cases in the asylum list and slowing down their resolution. For broader systemic reasons I would be slow to encourage such developments, whether related to this or other types of purely procedural preliminary motion. I would have, by this stage, heard and determined the substantive application in the time that this motion has taken, had the proceedings not been shunted off onto the present side-track.

11. The application for security for costs is dismissed.