THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 686 J.R.]

BETWEEN

TEEJAY ABDULWAHID

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2018

1. A deportation order was made against the applicant on 13th July, 2010. He was required to depart from the State by 7th August, 2010, pursuant to a notice under s. 3 of the Immigration Act 1999 dated 21st July, 2010. He did not so leave the State but presented on 10th August, 2010 and again on 7th September, 2010. This was the last time he presented in the course of his time here.

2. A first s. 3(11) application was made was and refused on 9th September, 2010. A request to present on 13th September, 2010 was responded to by a letter of that date stating that he was in St. Vincent's Hospital and unable to appear. A letter of 17th September, 2010, requiring presentation on 14th October, 2010, went without any appearance by the applicant, as did a further request to present on 2nd November, 2010. In April, 2013 he made an unsuccessful application to remain in Ireland on the basis of parentage of an Irish-born child. The applicant has left me somewhat in the dark as to the circumstances of this application.

3. A second s. 3(11) application was refused on 15th August, 2014. On 17th October, 2014 a further letter was issued seeking the applicant's presentation on 30th October, 2014. Again, he failed to do so.

4. Approximately two months ago, the GNIB commenced an operation to repatriate a number of persons subject to deportation orders, and the applicant in due course became a subject of that operation. He was arrested and made subject to a detention order on 24th July, 2018. On 28th July, 2018 he made a third s. 3(11) application. On 30th July, 2018 he applied for an inquiry under Article 40.4 of the Constitution to Noonan J. (*Abdulwahid v. Governor of Cloverhill Prison* [2018 Record No. 968 SS]). An inquiry was ordered and made returnable for 31st July, 2018.

5. On the return date, the applicant instead sought leave to apply for judicial review. I granted leave subject to the applicant's solicitor's undertaking to file papers on 1st August, 2018 and gave a return date of 1st October, 2018. The applicant then withdrew the Article 40 application, which I struck out with no order. The issue now is whether the applicant should have an interlocutory injunction restraining his deportation pending the hearing of the judicial review.

6. As of the evening of 31st July, 2018, he is due to be removed from the State within a matter of some hours. The present judgment is being delivered at 8:15 p.m., with the applicant due to be escorted from the Four Courts complex at the latest by 9.30 pm to return to Cloverhill Prison in order to be formally checked out of there and to depart for Dublin Airport by 11.00 pm. A number of other individuals are involved in the same removal operation.

7. I have received helpful submissions from Mr. Patrick Martin Giblin S.C. (with Mr. Gerard Martin Byrne B.L.) for the applicant and from Mr. John P. Gallagher B.L. for the respondents. I have received an affidavit from the applicant and oral evidence from D/ Sgt James Doyle of GNIB.

Application for an injunction

8. The test for an injunction in such a situation is set out in the Supreme Court decision in *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152, *per* Clarke J., as he then was. The first issue is whether there is an arguable case and I am taking it that that applies here because I have granted leave.

9. The second issue is to give all appropriate weight to the orderly implementation of measures that are *prima facie* valid and that certainly favours a refusal of an injunction.

10. The next issue is giving such weight as may be appropriate, if any, to the orderly operation of any particular scheme in which the measure under challenged was made. That does not add much to the deportation order as such in the present situation.

11. The next heading is to give appropriate weight (if any) to any additional factors which arise on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings. Here there are a number of quite specific and weighty issues. First of all, there is the applicant's evasion for an eight-year period, which is the vast majority of his stay in the State. Then there is the eleventh-hour nature of the application being made, which heightens the risk to the public interest. That an injunction is sought some four to five hours before the flight is due to depart is a significant reason against granting an injunction. In the present circumstances the applicant waited six days after his arrest to come to court. Had he applied straight away there could have been enough time to litigate the case on its merits in tandem with the injunction application, which is by far my preference in this type of situation.

12. By delaying the application until so close to the deportation time that it is not possible to adjudicate the application by way of a telescoped or accelerated hearing, the applicant has created a situation where the court is forced into the quite unsatisfactory situation that it has to decide on the injunction separate from and in advance of an overall assessment of the merits.

13. The question of an injunction is best addressed when one has full argument on the merits. To bring about a last-minute application unharnessed from the possibility of that being joined with the full hearing undermines the orderly operation of the judicial and administrative systems. The fact that judgment is now been given at 8:15 p.m. on the last day of the legal year only underlines the ramifications involved. It is not a sustainable procedure to provide incentives for such a system of last-minute applications by way of granting injunctions or otherwise. It would also send an inappropriate message to the orderly operation of the immigration system if significant and complex arrangements that have been put in place can be disturbed at the eleventh hour by virtue of a delayed application.

14. The next *Okunade* criterion is to give due weight to the consequences for the applicant of being required to comply with a measure under challenge in circumstances where that measure may be found to be unlawful. As Mr. Gallagher suggested in his submission, this perhaps has limited relevance in the present case because the measure under which the applicant is being detained and is to be deported is not as such the measure under challenge. The deportation order was not challenged in a timely manner or at all and it is that instrument that is the legal basis for the applicant's deportation. Nonetheless, insofar as consequences for the applicant are concerned, clearly the deportation of the applicant will significantly interfere with his family relationships and the relationships with his partner's children.

15. However, these are in the first instance matters for the Minister in the exercise of the executive power of the State to consider, rather than for the court. The Minister will presumably give due consideration to the family rights of the applicant in the context of the s. 3(11) application and if the outcome of that is favourable the applicant can be brought back.

16. Mr. Giblin also relied on the applicant's treatment for HIV. However, it is speculative to suggest that treatment is not available in Nigeria. That is certainly not a significant ground for an injunction here.

17. D/ Sgt Doyle gave evidence that the Irish Prison Service refused to give information to GNIB regarding the applicant's health condition. I find that extraordinary on a range of grounds. Imperative reasons of public policy as well as the interest of the himself require that such information be shared between those who have custody of any given applicant and particularly if custody transfers from one agency to another. I would strongly suggest that the IPS and GNIB urgently and definitively resolve this issue at the general level so that it will not arise again.

18. The next issue is whether damages would be an adequate remedy and that does not arise here.

19. The next issue is the strength or weakness of the applicant's case. Without prejudging the merits of the judicial review, it appears to be very weak indeed. The claim of delay in enforcing the deportation order is very tenuous. Clearly the applicant evaded for an eight- year period, which naturally impeded the enforcement of the order. In any event, delay in enforcing an order is not an established ground for saying that an illegal immigrant ceases to be illegally present. Family rights are the applicant's strongest point, but those need to be put to and considered by the Minister in the meantime. Overall, the balance of justice and the factors against an injunction come out somewhat ahead of those in favour so, I would decline to enjoin the deportation of the applicant.

20. Finally, I would observe that it is not clear to me that all relevant information has been put before the Minister, so I would draw the applicant's attention to the need to make a comprehensive s. 3(11) application as soon as possible and for the Minister to process it speedily, so that if the application is successful he can be returned.