[2018] IEHC 537

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 8)

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

1. In *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018), I decided that in principle there would be an order of *certiorari* directed to a decision under s. 3(11) of the Immigration Act 1999 whereby the Minister declined to revoke the deportation order against the applicant. As regards the appropriate relief, I posed four questions on which I wished to hear further submissions:

(i) whether the order of *certiorari* should be directed to the whole, or only to a part of, the decision;

(ii) whether the matter should be remitted to the Minister;

(iii) if so, whether specific directions as to the procedure to be adopted should be given; and

(iv) if not, what would be the consequences for the deportation order.

2. I have now received helpful submissions on these matters from Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.) for the applicant and from Mr. Remy Farrell S.C. (with Ms. Sinead McGrath B.L.) for the respondent.

Whether the decision should be quashed in whole or in part
3. In the present case, the flaws identified are too central to the decision and cannot in any meaningful sense be severed from it, so the decision must be quashed in whole.

Whether the matter should be remitted to the Minister
4. It is clear that the jurisdiction to remit or not to remit is a discretionary one: *Prendeville v. Medical Council* [2007] IEHC 427 [2008] 3 I.R. 122, *Nevin v. Crowley* [2001] I.R. 113, *Usk and District Residents Association v. An Bord Pleanála* [2007] IEHC 86 [2007] 2 I.L.R.M. 378. That approach seems preferable to the idea canvassed in *Pendred v. Employment Appeals Tribunal* (Unreported, Kearns P., 28th November, 2014) that the reactivation of a process following *certiorari* does not require remittal. The *Pendred* approach would eliminate the well-established discretion of the court as to whether to remit or not to remit.

5. In that regard, in the present case, in *Y.Y. v. Minister for Justice and Equality (No. 6)* [2017] IEHC 811 [2017] 12 JIC 2111 (Unreported, High Court, 21st December, 2017), I identified a series of factors favouring and disfavouring the notion of remittal at that particular point in time. Most of those factors continue to apply, although the balance has improved from the applicant's point of view in the sense that there has been further error in the decision-making process, there is the fact that that involved a failure to give effect to the recommendations of the court regarding giving of notice of material and there is the further passage of time. Notwithstanding those elements, the balance overall is still in favour of remittal, broadly for the reasons referred to in the No. 6 judgment.

Whether directions as to the procedures to be adopted should be given
6. One major factor as to why there is a need to give more specific directions in the present case is that I have already attempted the route of making recommendations, which were disregarded, or at least not applied in the decision-making process, so there certainly is no point in making further recommendations. In written submissions on behalf of the Minister, Mr. Farrell accepted that the court could give what he called recommendations, although in oral submissions he broadened that to accept that the court could give directions. By contrast, in Mr. Lynn's written submissions he accepted the court could and perhaps should give directions, but entirely resiled from that in oral submissions and argued against. It is hard off-hand to see how it is in the applicant's interests for the Minister not to be directed to act lawfully in the next step in the process, unless the objective is to game the system and to hope there is further error so that the applicant can cry "three strikes and you're out". If the inference is to be the latter, that could be a factor in favour of allowing considerable further latitude to the Minister into the future. Certainly the applicant's current position that the Minister should not be specifically directed to act lawfully – and the bizarre half-suggestion that the court would be improperly aligning itself with the Department of Justice and Equality if it so ordered – conveys to the observer a sense of legal gamesmanship rather than of great confidence by the applicant in the merits of his case. An important object of fair procedures is to promote good administration and the making of the best possible decision: as put in Hogan and Morgan, *Administrative Law*, 4th ed. (Dublin, 2010) at vii-viii, "*there is truth in the basic theory here, namely, that fair procedure encourages an appropriate substantive result*". If the applicant has a good case for revocation of the deportation order, directions to ensure fair procedures can only help him make that case. That the applicant's lawyers have now argued passionately against such directions really speaks for itself.

7. There is a well-established jurisdiction to give directions as to how matters would be reconsidered if a decision is quashed. That is already routine in the case of quashing a decision of a tribunal where orders are regularly made that the matter be dealt with by a member other than the member in question: such a procedure is noted in de Blacam, *Judicial Review*, 2nd Ed. at p. 556 3rd ed., pp.853 and 858 and similar British cases are cited in Fordham, *Judicial Review* Handbook, 6th Ed. (Oxford, 2012), at para. 3.1.3. Order 84, r. 26(4) of the Rules of the Superior Courts, inserted in 2011, provides that the court may, when it quashes a decision, "*in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court*." That necessarily involves a jurisdiction to set out findings and procedures which the decision-maker must comply with on such remittal.

8. It is clear a court can make a mandatory order requiring procedural steps to be taken: see the authorities cited in Fordham at para. 24.4.5(e); for example, requiring that an *inter partes* hearing take place before a decision is given. Fordham at paras. 3.1.5 and 3.1.6 discusses cases where a power to give directions when a matter is remitted back has been exercised, and in that regard I should note that the UK Senior Courts Act 1981 s. 31(5) is similar in content to the Irish O. 84. Examples would include *R. v. Lord Chancellor* ex parte *Law Society* (1994) 6 Admin LR 833, where *"procedural irregularities will make it appropriate for a court to quash . . . and to declare that a further decision should only be reached after proper consultation has taken place."* Likewise, in *R. (A.) v. Lord Saville of Newdigate* [2001] EWCA Civ 2048 [2002] 1 W.L.R. 1249 at para. 47, a matter was remitted to the Saville Inquiry "*with a direction that the soldier witnesses' evidence should not be taken in Londonderry".*

9. It is a matter of form rather than substance as to whether such requirements are set out as directions or as declarations as to the legal obligations of the decision-maker or the legal consequences of the order of *certiorari*. De Blacam, 2nd Ed. at p. 462 3rd ed., p.704 refers to the declaratory option by saying "*If the court quashes a decision, it may wish to clarify the consequences of that quashing and can do so by declaration in an appropriate case"*, but an order by way of directions comes to the same thing.

10. Overall, the purpose of directions in such a situation is to facilitate the compliance with legal obligations, something which should be in the interests of all parties but also to save time and costs, especially court time that would be wasted if errors were repeated. The present case provides a startling example of that, where this is the eighth High Court judgment in this matter (the tenth written decision of the Superior Courts, if you add the Supreme Court determination and the subsequent judgment), a case which as it happens has consumed far more time than any other case currently in the asylum and immigration list and probably enough time to get through a goodly part of any given term's work on the list overall. Having said that, of course, I do not hold that against either party and will give the case as much time as it needs. But the fact that it has already consumed so much in the way of scarce court resources is surely a reason to positively consider directions that might nudge matters towards finality, one way or the other – at least as far as the High Court is concerned.

11. The directions should be dictated by what is necessary to address the errors that have previously been made, so that the decision-maker, in this case the Minister, is put right on these errors of law. A similar example in the asylum context was *M.A.M.A. v. Refugee Appeals Tribunal* [2011] IEHC 147 [2011] 2 I.R. 729. I would repeat, however, that the features of the present case are unusual and the directions that are required in this case should not in any sense be taken as a precedent for what is normally required, still less as a minimum requirement, or as any sort of benchmark by which the garden-variety case should be assessed. It is only because demonstrated previous errors of law have been made that specific directions are appropriate on remitting the matter to the decision-maker. Such directions are necessary to avoid further endless iterations of decision-making and review in the present case.

12. The four errors that have been identified in the course of the proceedings are as follows:

> (i) Failure to give a reason for disagreeing with the Refugee Appeals Tribunal member, Mr. Conor Gallagher B.L. That can be dealt with by a straightforward direction that in the reconsidered s. 3(11) decision, the Minister should give such a reason if he is minded to disagree again.
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> (ii) A failure to give the applicant notice of material relied on by the Minister. This is something that has happened not simply once but twice, notwithstanding a recommendation in that regard. Accordingly, directions are amply justified and the only meaningful direction that will address this problem is to require the Minister to prepare and deliver to the applicant a schedule of all of the material being relied on, whether country material, caselaw (including from Strasbourg or from other jurisdictions) or other documents, and to give specific notice at a later stage if the Minister intends to add to that. Lest there be any misunderstanding in terms of other cases, such a direction goes beyond what is required in terms of fair procedures in the common or garden case, but is necessary here given the sheer level of confusion that has arisen as to what matters the Minister should keep the applicant abreast of. Normally, only unusual material needs to be notified, but since the Department has twice incorrectly interpreted that concept in the present case, there is simply no point framing a direction in those more limited terms.
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> (iii) The application of an incorrect test. Again, that can be dealt with by a very straightforward direction that the applicant be treated as having overcome the *prima facie* hurdle of providing evidence capable of giving rise to a risk under art. 3 of the ECHR (as applied by the European Convention on Human Rights Act 2003) and that the decision-maker should then approach the matter by reference to whether doubts in that regard can be dispelled by the Minister in accordance with the ECHR caselaw.
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> (iv) Failure to provide reasons for differing from the conclusion that would be suggested by the Strasbourg Court's decision in *M.A. v. France* (Application no. 9373/15 , European Court of Human Rights, 1st February, 2018), arising out of para. 64 of the judgment of O'Donnell J. in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109. In that regard, to avoid a shifting set of goalposts, the applicant should be required to specify what are the cases or other important matters that should be addressed by reason of para. 64 of the judgment of O'Donnell J. It will then be up to the Minister to decide whether to give specific reasons in that regard or not, although certainly reasons should be given as regards the *M.A.* case itself if the Minister is minded to come to a conclusion that differs from that suggested by that case. Again, to avoid misunderstanding, such a direction has little relevance to a run-of-the-mill administrative law case. It is the combination of the absolute nature of art. 3 of the ECHR and the very strict manner that has been interpreted by the Strasbourg court that heightens the duty to give reasons in that context for differing from what might be suggested by a crucial matter such as a comparable contrary authority: see paras. 8 to 20 of the No. 7 judgment in this case.

Consequences for the deportation order

13. Having regard to the foregoing, I will postpone that issue until the s. 3(11) issue is dealt with.

Order

14. Accordingly, the order will be:

> (i). that there be an order of *certiorari* removing for the purposes of being quashed the entirety of the s. 3(11) refusal;
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> (ii). that the s. 3(11) application be remitted to the Minister with the directions set out in the judgment;

(iii). that the challenge to the deportation order be adjourned pending the outcome of the s. 3(11) process;

(iv). that within 2 weeks from the oral pronouncement of the order the respondent provide a schedule of material (including country information, caselaw and documents as set out in the judgment) to which regard is intended to be had in dealing with the s. 3(11) application;

(v). that the applicant have 2 weeks from the oral pronouncement of the order to make any further submissions to the Minister and to also provide a summary list of the comparable cases and other important points which would require to be addressed that the applicant contends come within para. 64 of the judgment of O'Donnell J. in the present case;

(vi). that within 2 weeks from receipt of such further submissions and the delivery of the list set out in the foregoing paragraph, the respondent provide an additional schedule of material proposed to be relied on if there is an intention to rely on any such additional material;

(vii). that within 1 week of the delivery of any such schedule, the applicant will have 1 further week to deliver any further observations to the respondent;

(viii). that the respondent have 4 weeks which will commence either on the delivery of the further observations or on his notifying the applicant that there is no further material being relied on, within which to make a decision on the s. 3(11) application; and

(ix). that the matter be listed for mention on this day 9 weeks which is Tuesday 27th November, 2018.