

**THE HIGH COURT
JUDICIAL REVIEW**

[2020] IEHC 588

Record No. 2020 / 5 JR

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT,
2000 (as amended)**

BETWEEN/

SAM

APPLICANT

-AND-

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms Justice Tara Burns delivered on 10 November, 2020

General

1. The applicant is a citizen of Brazil, who initially entered the State, as a student, on 29 April 2015. He was granted permission to remain on foot of his student status (Stamp 2) until 3 May 2016. During the currency of that permission, he departed and subsequently re-entered the State on 24 May 2016 and was granted a further Stamp 2 permission until 24 August 2016.
2. On 11 May 2017, when the applicant no longer enjoyed permission to remain in the State, the applicant's solicitor wrote to the respondent seeking permission for the applicant to remain in the State, in circumstances where he had been charged with an offence contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. This matter was listed for trial in April 2018. While awaiting trial, the applicant was on bail and therefore could not leave the jurisdiction pursuant to the terms of his bail conditions.
3. On 7 June 2017, the applicant personally wrote to the respondent referring to his upcoming trial and providing some personal information. This letter is not exhibited in the case.
4. By letter dated 27 October 2017, the respondent refused the application made on behalf of the applicant. It was also indicated that it was proposed to deport him. The letter sets out the following:-

"In accordance with the provisions of section 3(4) of the Immigration Act, 1999 (as amended) the following options are now open to you. It is important that you note that some of these options involve the making of a Deportation Order and that you know what this entails. A Deportation Order will require you to leave this State and to remain outside the State thereafter.

Your options

You now have three options open to you and you must choose one of them as follows:-

Option 1: Leave the State before the Minister makes a final decision in your case:

You may choose to leave the State voluntarily before the Minister makes a final decision in your case. If you choose this option, and your request is approved, you

must contact the Office described below before you make arrangements to leave the State.

Voluntary Returns Unit,

[address given]

Except in very exceptional circumstances, if you exercise this option and your request is approved, a Deportation Order will not be made in respect of you, thus allowing you to seek to legally enter the State (e.g. on a tourist visa, a work permit, etc) at some point in the future.

If you choose the option to leave the State voluntarily, and your request is approved, assistance in relation to the purchase of air tickets may, in certain circumstances, be provided by :-

The International Organisation for Migration [contact information given]

Or

The Voluntary Returns Unit of the Repatriation Divisions of this Department at the postal and email addresses shown above.

If you wish to avail of the voluntary returns option, please contact the Voluntary Returns Unit of the Repatriation Division, quoting this letter and your person id number which is shown above, and they will advise you accordingly.

Option 2: Consent to the making of a Deportation Order.

You can give your consent in writing to the making of a Deportation Order. If you choose this option you must contact us at the address and telephone number shown above within 15 working days of the date of this letter. Arrangements will then be made for your departure. If a Deportation Order is made, you must leave Ireland and remain outside the State.

Option 3: Submit written representations to the Minister under Section 3 of the Immigration Act 1999 (as amended)

You may also make written representations to the Minister, within 15 working days of the date of this letter, setting out reasons as to why a Deportation Order should not be made against you.

If you choose this option it is very important that you understand the following:

The Minister will proceed to decide your case in accordance with the provisions of Section 3 of the Immigration Act 1999 (as amended). If the Minister decides to make a Deportation Order in respect of you, you will no longer have the option of leaving the State voluntarily i.e. without a Deportation Order.

What happens if the Deportation Order is made?

If a Deportation Order is made in respect of you, this will place a legal obligation on you to leave this State and to remain outside the State.

If no response is received to this letter within 15 working days, it will be assumed that you do not wish to return home voluntarily and that you do not wish to make representations against the making of the Deportation Order. In such circumstances, the Minister will proceed to consider your case under Section 3 of the Immigration Act (as amended) on the basis of the information already on your file."

5. The applicant's solicitor responded by letter dated 30 November 2017 indicating that as the applicant was required, pursuant to the terms of his bail bond, to appear in court on 23 April 2017, he was unable to choose either Option 1 or 2. Accordingly, a request was made that the deportation proposal of 27 October be withdrawn.

6. The respondent replied by letter dated 11 December 2017 stating that he would not withdraw the deportation proposal. The letter further stated:-

"[I]n light of your client's circumstances i.e that of a person who is facing a criminal charge in the State, the Irish Naturalisation and Immigration Service is prepared to desist from taking any steps in your client's case, under section 3 of the Immigration Act, 1999, until such time as those criminal proceedings have been disposed of."

7. In May 2019, a *nolle prosequi* was entered by the Director of Public Prosecution in the applicant's criminal proceedings. This outcome was not notified by the applicant to the respondent.

8. On 19 June 2019, the applicant made an application for voluntary return to Brazil under the International Organisation for Migration Voluntary Assisted Return and Reintegration Programme (hereinafter referred to as "the IMO"). In this application he indicated that "he won a court case that made [me] stay here". It is unknown when, prior to 9 September 2019, that information was made known to the respondent.

9. On 3 September 2019, the IMO advised the INIS that the applicant had ceased to engage with his application for voluntary return.

10. On 9 September 2019, without any prior notice to the applicant or his solicitor, a recommendation was made by the respondent's Repatriation Division that the applicant be deported. It is noted that the "Examination of File under section 3(6) of the Immigration Act 1999" document recites that the respondent did not know the outcome of the criminal trial.

11. Arising from this recommendation, a deportation order was made in respect of the applicant on 18 October 2019 which was notified to him by letter dated 29 November 2019.

12. When the applicant's solicitor received notification of the deportation order, he contacted the applicant and was informed by him that the applicant had left the jurisdiction and was residing in Brazil since 13 July 2019. By letter dated 6 December 2019, the applicant's

solicitor informed the respondent of this and requested that the deportation order be rescinded in light of the fact that the deportation order had issued without warning. After a couple of acknowledgment letters, the respondent made a request of the applicant, through his solicitor, seeking documents relating to the applicant's departure from the state, such as full copies of his passport. On 2 January 2020, the applicant's solicitor forwarded a poor quality copy of the applicant's passport and a copy of the applicant's flight booking from Dublin to Brazil. On 3 January 2020, the day before the twenty-eight day time limit to bring Judicial Review proceedings pursuant to s. 5 of the Illegal Immigrant (Trafficking) Act 2000 expired, the INIS emailed the applicant's solicitor indicating that the passport stamp was not acceptable due its poor quality.

13. Leave to bring Judicial Review proceedings seeking an order of certiorari in respect of the deportation order was granted by Humphreys J on 20 January 2000.
14. Before the case commenced, the Court requested that a readable copy of this stamped passport be made available to the respondent prior to the close of the case. Thereupon, a coloured version of this previously supplied document was emailed to the respondent.

Statutory Procedure with respect to issuing a Deportation Order

15. The relevant portions of Section 3 of the Immigration Act, 1999 states:-

"(3)(a) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and...

(b) A person who has been notified of a proposal under paragraph (a) may within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall

(i) before deciding the matter, take into consideration any representation duly made to him or her under this paragraph in relation to the proposal...

(4) A notification or a proposal of the Minister under subsection (3) shall include-

(a) a statement that the person concerned may make representations in writing to the Minister within 15 working days of the sending to him or her of the notification,

(b) a statement that the person may leave the State before the Minister decides the matter and shall require the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving,

(c) a statement that the person may consent to the making of the deportation order within 15 working days of the sending to him or her of the notification and that the Minister shall thereupon arrange for the removal of the person from the State as soon as practicable, and

(d) any other information which the Minister considers appropriate in the circumstances.

(5) The provision of subsection (3) shall not apply to –

(c) a person who is outside the State.”

Fairness in the issuance of the Deportation Order

16. Counsel for the applicant submits that in the specific circumstances of this case, an unfairness arises with respect to the issue of the deportation order: that the respondent should have reverted to the applicant prior to considering whether to issue a deportation order in circumstances where the respondent indicated that it would desist from taking steps under s. 3 of the Immigration Act 1999 until after the criminal proceedings were disposed of; that the applicant never got to exercise any of the options outlined to him in the deportation proposal letter as the process was put on hold. It was further submitted that in circumstances where the applicant intended and wanted to return to Brazil for various personal reasons, that there was no necessity to issue this deportation order and that the respondent had notice of his desire to return to Brazil in light of the information passed onto it by the IMO prior to him making the deportation order.
17. Counsel for the respondent submits that issuing the deportation order was lawful; that it was not issued until after the conclusion of the criminal proceedings (although the outcome of the case was not known to the respondent); and, there was an onus on the applicant to inform the respondent that he was leaving the State, as was notified to him in the proposal letter, which he failed to do.
18. The making of a deportation order is a matter of significance. In *MM (Georgia) v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 529, Hogan J stated:
- "Given that a deportation order is of fundamental and far-reaching importance to any applicant, it is vital that there is fundamental compliance with these procedural requirements as prescribed by statute."*
- For this applicant, the deportation order will have particular consequences for his future travel within the European Union which is of significance to him as he has familial connections with Portugal.
19. While the applicant should have informed the respondent of the conclusion of the criminal proceedings, and that he wanted to, and did in fact, return to Brazil, there was an obligation on the respondent to notify the applicant that he was reviving the s. 3 process, prior to proceeding to issue a deportation order. A person who is the subject of a deportation proposal has certain entitlements as set out in s. 3(3) and (4) of the Immigration Act 1999. When the proposal was notified to him, prior to the conclusion of the criminal proceedings, the applicant was unable to exercise Option 1 or Option 2, due to his bail bond conditions. Neither did he get to avail of making representations to the respondent under Option 3 as the process was put on hold, albeit at his request.

20. Accordingly, once the proposal was put on hold, there was an obligation on the respondent to notify the applicant that he was re-activating the s. 3 process so that the various options available to the applicant could be chosen by him.
21. In the particular circumstances of this case, I am of the view that issuing the deportation order was unfair to the applicant as he did not have the opportunity to avail of his entitlements under s. 3 of the Immigration Act, 1999. I therefore will make an order of certiorari quashing the deportation order made in respect of the applicant.
22. With respect to the provision of a readable passport stamp: it was very disappointing to see that the issue of a poor quality copy being provided to the respondent was not rectified prior to the hearing of this action. However, this was attended to in the course of the hearing, although the copy provided was still not acceptable to the respondent. It was indicated, on behalf of the respondent, that it was a live issue as to whether the applicant had indeed left the State.
23. With respect to this issue, the applicant's solicitor swore an affidavit which averred to the fact that the applicant was resident outside the State; the applicant swore an affidavit indicating that he resided at an address in Brazil and the affidavit revealed on its face that it was sworn in San Paulo. Although, the respondent indicated that it was a live issue as to whether the applicant had indeed left the jurisdiction, a notice to cross examine either the applicant's solicitor or the applicant was not served.
24. In light of the time limits which the applicant was up against when launching these proceedings, and in light of how matters transpired at the hearing after the coloured passport copy was produced, I am of the view that initiating these proceedings was not premature. I therefore make an order for the applicant's costs as against the respondent.