[2020] IEHC 69

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 955 J.R.]

BETWEEN

F.R. A.K.A. J.S. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(NO. 1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of February, 2020

Introduction

1. The applicant is an illegal immigrant. She endeavoured to defraud the UK immigration system by using a false name on a visitor application, hence her alias in the title of the proceedings. After that was refused, she arrived in the State without permission and has remained here without such permission ever since, apart from having the purely legal entitlement to not be removed pending determination of a protection claim. During the course of her asylum claim she falsely claimed to have never applied for a visa anywhere. Her asylum and subsidiary protection claims have been rejected in every instance as have all of her immigration applications. Her presence here is entirely unlawful. She now seeks an injunction restraining the State from implementing a *prima facie* valid deportation order dating from 2017 that was unchallenged then, although the applicant has now belatedly indicated an intention to seek an extension of time to challenge it now. Her protection and *refoulement* points have been considered and at all times been rejected. The factors relevant to injunctive relief weigh massively against the applicant.

Factual Background

2. The applicant claims to have been born in Pakistan in 1977. As noted above, she claimed on her asylum questionnaire never to have applied for a visa of any kind. In fact she had applied for a visa to the UK with a false name. That was refused on 13th June, 2007. She did not appeal the visa refusal. The Refugee Appeals Tribunal found her failure to appeal was a factor rendering her account implausible, given that she was claiming persecution at that point. The applicant told the Refugee Applications Commissioner that she left Pakistan on 9th April, 2013 with the help of a people-trafficker, euphemistically and inappropriately referred to as an "*agent*".

3. She arrived in the State and claimed asylum on 11th April, 2013. That claim was rejected by the Commissioner on 16th September, 2013. An appeal to the Refugee Appeals Tribunal was rejected on 24th July, 2014. The Tribunal found her account incredible and her explanations vague and unreasonable, and held that she had not made a genuine effort to substantiate her claim but instead had failed to furnish documentation in respect of "*any aspect of her claim".*

4. A subsidiary protection application was subsequently made, and rejected on 6th November, 2015. An appeal to the Refugee Appeals Tribunal was rejected on 8th

September, 2016 after an oral hearing at which Mr. Ciarán Doherty B.L. and Ms. Margaux Daxhelet appeared for the applicant. The Tribunal member concluded that: "*nothing I have heard and considered has convinced me that the appellant was being truthful*". When contradictions were put to the applicant she "*was unable to give any or any reasonable explanation".*

5. Representations were made under s. 3 of the Immigration Act, 1999 on 14th December, 2016. She was refused permission to remain on 24th January, 2017 and a deportation order was made against her on 17th February, 2017.

6. On 7th June, 2017 she applied under s. 3(11) of the Immigration Act, 1999 Act for revocation of that order. An N.G.O. made submissions on her behalf on 18th September, 2017. The applicant then changed solicitors, and her current solicitors made further submissions on 10th April, 2018 and subsequent dates. On 30th July, 2019, the 1999 Act was amended by s. 95 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act, 2019 by the addition of a new s. 3A of the 1999 Act, embodying a new *refoulement* test as opposed to that in the repealed s. 5 of the Refugee Act, 1996. In addition, previous deportation orders made under the 1999 Act were confirmed by the 2019 Act.

7. On 4th September, 2019, the s. 3(11) application was refused. Instead, an order was made amending the deportation order dated 9th September, 2019 that simply added the applicant's alias. The order did not expressly address the issue of *refoulement* on the basis of s. 3A of the 1999 Act or s. 5 of the 1996 Act. The applicant was notified of these decisions on 27th November, 2019.

8. The present proceedings were filed on 20th December, 2019 challenging the refusal of the section 3(11) application and the amended deportation order also made under s. 3(11). The applicant also wishes to seek an extension of time to apply to amend the proceedings challenging the original 2017 order. She states that she has an explanation regarding time and I have adjourned the substantive matter with directions regarding that amendment.

9. Before the court now is the applicant's application for an interlocutory injunction preventing deportation pending the determination of the proceedings, and I have heard helpful submissions in that regard from Mr. Eamonn Dornan B.L. for the applicant, and from Ms. Sarah K.M. Cooney B.L. for the respondent. I was due to hear the substantive action at this time, but at the last minute Mr. Dornan B.L. asked for an adjournment to amend his statement of grounds, which I (perhaps erroneously) granted, so this judgment is limited to the question of an injunction only.

Criteria for an Injunction

10. The test for an injunction in such circumstances was set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 *per* Clarke J. (as he then was) at page 193.

11. On the first issue of whether the applicant has an arguable case, it is clear that the applicant has overcome that hurdle, but it is not a point in her favour; rather the removal of a negative.

12. The next issue is where the greatest risk of injustice could lie, and in assessing that, the court should "*give all appropriate weight to the orderly implementation of measures which are prima facie valid".* That certainly militates against an injunction, particularly as the deportation order is not as yet challenged.

13. Next the court should give such weight as may be appropriate to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and again, that weighs against an injunction.

14. Next, the court should attach any appropriate weight onto additional factors which could heighten the risk of the public interest of the measure under challenge not being implemented. That is relatively neutral as there is nothing particularly striking that distinguishes the applicant from other failed protection seekers, other than perhaps the deception that occurred in her case. However, I do not attach any particularly strong weight to that for present purposes.

15. The next criterion involves balancing the consequences for the applicant which flow from "*being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful*". An important point to note here is that the deportation order is not, as of yet, a measure under challenge. Any adverse consequences to the applicant, if there are any, arise from that decision and not the s. 3(11) decision.

16. In any event, one can assume it is inconvenient to the applicant to be deported, but whether that has serious consequences for her must be weighed in the context of the previous protection findings and immigration decisions and the adverse findings against the applicant in that regard. The applicant can be brought back should the court ultimately so order, but when weighing up this particular heading, it is important to emphasise again that her protection complaints and her *refoulement* complaints have been rejected at all times.

17. The category of cases where damages might be an adequate remedy is not particularly relevant here.

18. As regards the final heading as to the strengths or weaknesses of the applicant's case, it is not necessary to get into that and I will assume for present purposes that Mr. Dornan B.L. has points of substance that he wishes to make at the substantive hearing. Nonetheless, at the interlocutory stage, it is clear that the balance of justice is firmly against the applicant.

Order

19. The injunction is refused.

20. As noted above I am giving liberty on a *de bene esse* basis to the applicant to file an amended statement of grounds to seek an extension of time to challenge the 2017 deportation order, but that is very much without prejudice to the issue of time which I am reserving to the substantive hearing and in no way prejudging.