

THE HIGH COURT

[2023] IEHC 556

[Record No. 2022/391JR]

BETWEEN

KA

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Bolger delivered on the 12th day of October 2023.

1. The applicant seeks *certiorari* of the deportation notification issued to him under s.3(3)(a) of the Immigration Act 1999 by letter dated 25 March 2022. He also seeks an extension of time pursuant to O.84, r.21.

Background

2. The applicant is a citizen of Egypt who arrived in Ireland in April 2019 and made an application for international protection that he did not pursue. By what is known as a Three Options Letter dated 25 March 2022, he was advised of the Minister's proposal to deport him. A copy of that letter is attached at Appendix 1 to this judgment. This application is a challenge to the deportation notification in that letter and in particular, option one of the three options the letter offered to the applicant.

3. The applicant received the letter on 30 March 2022. The time for applying for leave to seek judicial review expired on 22 April 2022. The applicant seeks an extension of time on the basis of the intervening legal vacation and more particularly, due to an outbreak of COVID-19 in his solicitor's office. The applicant says his excusable delay has not caused any prejudice to the respondent.

Extension of time

4. The period of delay was relatively short, somewhere between thirteen and twenty days. I accept that the outbreak of COVID-19 in the applicant's solicitor's office caused operational difficulties that led to the delay in the institution of these proceedings, which did

not actively prejudice the Minister and constitute good and sufficient reason for extending time. I therefore allow the extension of time sought.

The parties' submissions

5. The applicant claims that the wording of option three in the Three Options Letter (hereinafter referred to as 'the option') is an unlawful attempt by the Minister to reserve to herself a right to make a Deportation Order against the applicant in what the Minister refers to as "*very exceptional circumstances*", with no further explanation of what that might entail. The applicant claims that the Oireachtas did not provide any statutory basis for the Minister to make a Deportation Order where a person leaves the State voluntarily before the Minister makes a final decision on her proposal to make a Deportation Order. He has averred on affidavit that he cannot make an informed decision in relation to the options given to him, that he found the letter confusing as to how the options would operate, that he had no knowledge of the "*very exceptional circumstances*" in which the Minister would exercise her power to make a Deportation Order against him even if he left the State voluntarily, that he did not want to have a Deportation Order made against him and that he would have seriously considered exercising the option of leaving the State voluntarily but could not do so because, *inter alia*, he lacked clarity as to the consequences of such a decision.

6. The applicant emphasises the right of a person who chooses to engage with the Deportation Order process to make representations. Such a person may be the subject of a Deportation Order depending on the Minister's consideration of the matters set out at s.3(6) of the Act, including consideration of any representations that are made. A person who leaves voluntarily loses the right to make such representations and must, therefore, be able to make an informed decision about their options, which the applicant says he was unable to do due to the lack of any understanding of the "*very exceptional circumstances*" referred to and of the legal basis for reserving a right to rely on them.

7. The Minister describes the impugned option, which sets out the consequences of leaving the State voluntarily, as simply furnishing information as s.3(4)(d) expressly permits her to do. In the Statement of Opposition, the Minister pleads her entitlement to "*draft such notices in terms which make allowances for unforeseen circumstances or occurrence*" and at para. 6 sets out the following non-exhaustive examples of what exceptional circumstances might arise:

“One such instance is where a person initially complies with the option to leave voluntarily, and does so, but then subsequently returns to the State some weeks, months or years later. Such a person could be the subject of a deportation order upon the occurrence of that eventuality and notwithstanding their earlier voluntary compliance. Another would potentially arise in respect of a serving prisoner: such a person could choose immediate voluntary departure but their circumstances may dictate that this course of action is not available to them; they too may be the subject of a deportation order to ensure their orderly removal from the State notwithstanding their ostensible consent.”

Section 3 of the 1999 Act

8. This is essentially a case of statutory interpretation *i.e.*, what s.3 means and whether the impugned option is within or without the Minister’s statutory powers pursuant to that section. Section 3 subss. 1 to 6 merit full quotation:

“3.—(1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 , and the subsequent provisions of this section, the Minister may by order (in this Act referred to as “a deportation order”) require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.

(1A) A person the subject of a deportation order under this section may be detained in accordance with the provisions of this Act for the purpose of ensuring his or her deportation from the State. (as amended by the Illegal Immigrants (Trafficking) Act 2000)

(2) An order under subsection (1) may be made in respect of—

(a) a person who has served or is serving a term of imprisonment imposed on him or her by a court in the State,

(b) a person whose deportation has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence,

(c) a person who has been required to leave the State under Regulation 14 of the European Communities (Aliens) Regulations, 1977 (S.I. No. 393 of 1977),

(d) a person to whom Regulation 19 of the European Communities (Right of Residence for Non-Economically Active Persons) Regulations, 1997 (S.I. No. 57 of 1997) applies,

(e) a person whose application for asylum has been transferred to a convention country for examination pursuant to section 22 of the Refugee Act, 1996 ,

(f) a person whose application for asylum has been refused by the Minister,

(g) a person to whom leave to land in the State has been refused,

(h) a person who, in the opinion of the Minister, has contravened a restriction or condition imposed on him or her in respect of landing in or entering into or leave to stay in the State,

(i) a person whose deportation would, in the opinion of the Minister, be conducive to the common good.

(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, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.

(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 representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.

(4) A notification of 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 provisions of subsection (3) shall not apply to—

(a) a person who has consented in writing to the making of a deportation order and the Minister is satisfied that he or she understands the consequences of such consent,

(b) a person to whom paragraph (c), (d) or (e) of subsection (2) applies, or

(c) a person who is outside the State.

(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

(a) the age of the person;

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy,

so far as they appear or are known to the Minister."

Deportation Order: Section 3(1)

9. Section 3(1) confers a discretionary power on the Minister to make a Deportation Order, which requires a person to leave the State, remain thereafter out of the State and precluding them from ever re-entering the State unless or until the order is amended or revoked by the Minister in accordance with s.3(11). There is also the possibility of such an

order falling away after a period of three months but in circumstances that do not arise here. Subjecting someone to a Deportation Order is very significant, as was recognised by Burns J. in *SAM v Minister for Justice* [2020] IEHC 588. At para. 18 of her judgment she quoted Hogan J. in *MM (Georgia) v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 529, “[g]iven 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.”

Notification of the proposal: Section 3(4)

10. Section 3(4) sets out what the proposal “shall include”. The subsection is not worded in terms of when a Deportation Order can or cannot be made but given the recognition in s.3 and the importance of a person exercising their constitutional and convention rights to make representations (discussed below) s.3(4) is part of the legal entitlements of a person who is the subject of the proposal and feeds into the legal consequences of any failure to comply with the subsection. The subsection requires the proposal to include “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”. That means that a person can leave the State before the Minister decides the matter *i.e.*, before the Minister decides whether or not to exercise her power to make a Deportation Order in accordance with s.3(1).

The right to make representations

11. Section 3(4)(a) requires the Three Options Letter to advise a person that they may make representations and s.3(3)(b)(i) requires the Minister to take them into consideration in determining whether to make a Deportation Order in relation to that person. The importance of the right to make representations is also reflected in the case law. In *AB & Ors. v The Minister for Justice* [2016] IECA 48 the Court of Appeal held at para. 58 that “the scheme provided in s.3 of the 1999 Act safeguarded the right to make representations in accordance with the Constitution and the Convention”. The Supreme Court in *L v Minister for Justice* [2019] IESC 75 analysed the rights conferred by s.3 on a person seeking to make representations and said “the Minister was not obliged to tell the applicants what the legal position was, or what matters the applicant could or could not address, so long as the Minister did not preclude submissions on any relevant matter.”

12. Section 3(5)(c) removes that right to make representations from, *inter alia*, persons outside the State and persons who have consented to a Deportation Order but only where the Minister is satisfied that they understand the consequences of their consent *i.e.*, they understand that they lose the right to make representations (s.3(5)(a)). Thus, the legislation recognises that in order for consent to be understood, the person giving such consent must be aware of the consequences of what they are doing.

Very exceptional circumstances

13. In seeking to justify the reference to “*very exceptional circumstances*” in the impugned option, the Minister offers two examples: firstly, where a person returns to the State in the future and secondly, where a person is in prison. I do not accept either situation could, on their own, permit the Minister to make a Deportation Order in respect of a person who has availed of the permission conferred by s.3(4)(b) to “*leave the State before the Minister decides the matter*”. The example of a person seeking to return to the State without permission relates to something that may occur at some time in the future. A voluntary departure from the State before the Minister makes a decision on a Deportation Order does not and could not preclude the Minister from ever again considering the legality of that person’s subsequent presence in the State or the consequences thereof, including the possibility of a Deportation Order made in accordance with s.3. That is common sense and is also recognised by s.3(2) which permits the Minister to make a Deportation Order in respect of various persons including at (g) “*a person to whom leave to land in the State has been refused*”.

14. Neither do I find the example of a person in prison to be convincing as that person is not, by virtue of their incarceration, in a position to even consider, never mind engage with, the option to leave the State voluntarily which requires them to be in a position to make arrangements to leave. Again that is common sense but is also supported by the dicta of MacMenamin J. in *AGAO v The Minister for Justice* [2006] IEHC 251, [2007] 2 IR 492 at para. 52:

“*[t]hus a person exercising a voluntary option to leave the State must not only inform the first respondent in writing of such intention but must also supply the first respondent with information concerning his or her arrangements for leaving the jurisdiction. It is clear that the purpose and the intent of the Oireachtas was to ensure that the State should be in a position to be satisfied that the intended*

deportee has in fact left the country voluntarily rather than accepting a mere assertion that he or she has such intention."

15. The statutory scheme of s.3 means that where a person who leaves voluntarily and in doing so foregoes the right to make representations and engage in the Deportation Order process, are no longer at risk of a Deportation Order arising from the circumstances of that period of residence in the State. If they were to re-enter the State in the future that is a different situation which could, of course, lead to the making of a Deportation Order subject to the Minister's compliance with the statutory scheme. I am fortified in this view by the fact that there is nothing in s.3 eliminating the possibility that a person who voluntarily left the State could still be the subject of an exclusion order pursuant to s.4 of the Act.

16. The Minister disputes that the impugned option asserts an entitlement to reserve a power unto herself to cover exceptional scenarios and describes that option as information or an explanation, which is expressly permitted by s.3(4)(d). The wording of the impugned option and in particular the reference to the making of a Deportation Order in exceptional circumstances, does not fit within the simple concept of information or an explanation. The option indicates the possibility that a Deportation Order could be made in spite of the person leaving the State voluntarily. Unless the statutory scheme of s.3 confers a power on the Minister to make a Deportation Order in respect of a person who has voluntarily left the State in the event of exceptional circumstances arising, there is no basis for her asserting an entitlement to do so. For the reasons I have set out above, I am not satisfied that the statutory scheme confers such a power on the Minister.

17. That s.3(4)(b) means that a person can leave the State before the Minister decides on a Deportation Order, is supported by the wording of the Three Options Letter in stating, after option three (which allows a person to engage in the Deportation Order process and make representations) that it is important for the person to understand that:

"The Minister will proceed to decide on 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."

Thus, the process of determining whether or not to make a Deportation Order had not been completed as of the date of the letter when the impugned option was offered to the applicant. That accords with s.3 which sets out a detailed process which requires the Minister to have

regard to eleven separate matters set out at s.3(6). How then could the Minister assert a power to make a Deportation Order in unspecified exceptional circumstances in respect of a person who avails of the option to leave voluntarily? This is not the Minister seeking to exercise her powers efficiently and providing for unforeseen circumstances or occurrence (as claimed by the Statement of Opposition) but rather it is reserving a power to make a Deportation Order in respect of a person who has availed of the option to voluntarily leave the State and in so doing, to forego their constitutional and convention rights to make representations to the Minister before the Deportation Order is made. Such a power is reserved to the Minister by s.48 of the International Protection Act 2015 but not by s.3 of this Act.

18. The Minister cited the decision of O'Donnell J. (as he was then) in *L v Minister for Justice* [2019] IESC 75 where he stated:

"The applicants also argue in this regard that they were not told that this was the case, and had they been told, they would have addressed those findings. [...] However, the Minister was not obliged to tell the applicants what the legal position was, or what matters the applicant could or could not address, so long as the Minister did not preclude submissions on any relevant matter. The applicants here were not under any constraint as to the matters they sought to advance."

The Minister sought to rely on this dicta to justify her position that she is not required to consider to itemise every conceivable eventuality and indicate in advance what her position would be in respect of that eventuality. However O'Donnell J. went on to confirm that the Minister could not preclude submissions on any relevant matter. In claiming a power to make a Deportation Order in exceptional circumstances in relation to a person who has voluntarily left the State and sacrificed their right to make representations on such an order, the Minister is precluding submissions and preventing the applicant from making an informed decision as to which of the options available to him he will choose.

19. I agree with the applicant's submissions that his consent to leave voluntarily must be an informed consent. I find support for that in the dicta of Burns J. in *SAM* at paras. 19 to 21...

"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.

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.

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."

Burns J. recognised the applicant's right to choose from the three options. To do so, they must be given a basic understanding of the consequences of each option – a concept recognised by the letter's emphasis on the importance of the applicant understanding that "the Minister will proceed to decide on your case" and may make a Deportation Order **if** the applicant chooses the third option of making representations and engaging in the Deportation Order process. As an alternative, s.3(2) permits a person to leave voluntarily without the risk of a Deportation Order at least in relation to their unlawful residence that led to the issuing of the notification to them. Even if they do exercise their option to leave voluntarily, they could still be the subject of an exclusion order pursuant to s.4 of the Act.

Jus tertii objection

20. The Minister says that the applicant has not evidenced any sincere intention to leave the State pursuant to the voluntary option and that his claim is based on the premise of someone else's complaint and should be disposed of by means of a *jus tertii* objection. The affidavit evidence before me does not establish that the applicant had no sincere intent to leave voluntarily. The applicant explained why he has not availed of the option to leave the

State voluntarily, a position which formed the basis of this application for which leave was granted. The Minister, in effect, challenges the applicant's *bona fides* and those of his solicitor whom he says has advised him that the letter is unlawful. I accept that the applicant has genuine concerns, arising in part from the legal advice he was given, and that the impugned option offered to him deprived him of the ability to make an informed decision about whether or not to leave the State voluntarily.

21. The Minister has also raised issues about the applicant's right of residence in Italy about which no further detail has been provided and the Minister relies on this to support her belief that his expressed intention to comply with the voluntary option to leave the State is not sincere. Whilst there is very little detail pertaining to the applicant's situation in Italy and why he does not seem to wish to return there, this does not establish a reason to refuse the applicant relief to which he is otherwise entitled.

Conclusions

22. For the reasons set out above I consider that the impugned option set out in the Three Options Letter involves the Minister reserving the right to make a Deportation Order in the future should exceptional circumstances arise, for which there is no statutory power. The impugned option is *ultra vires* the Minister's powers under s.3 of the Act. I therefore grant an order for *certiorari* quashing the notice issued to the applicant by way of the letter dated 25 March 2022 pursuant to s.3(3)(a) of the Immigration Act 1999.

Indicative order as to costs

23. In circumstances where the applicant has succeeded in the reliefs he sought, my indicative view on costs is, in accordance with s.169 of the Legal Services Regulatory Act 2015, that the applicant is entitled to their costs. I will put the matter in for mention before me at 10.30am on 26 October 2023 for the purpose of hearing such further submissions which the parties may wish to make both in relation to costs and the scope and application of the final orders to be made. Any written submissions should be filed with the court at least 48 hours before the matter is back before me.

Counsel for the applicant: Conor Power SC, Femi Daniyan BL

Counsel for the respondent: John Gallagher BL

An Roinn Dlí agus Cirt
Department of Justice

Seirbhís Eadóirseachta agus Inimírce na hÉireann, 13-14 Cé an Bhúrcaigh, Baile Átha Cliath 2, D02 XK70
Irish Naturalisation and Immigration Service, 13-14 Burgh Quay, Dublin 2, DO2 XK70
T +353 (01) 6167700 | www.inis.gov.ie

[Redacted]
[Redacted]
[Redacted]

Person ID: [Redacted]
Application ID: [Redacted]

REGISTERED POST

Dear [Redacted]

I am directed by the Minister for Justice to notify you that the Minister proposes to make a Deportation Order in respect of you under the power given to the Minister by Section 3 of the Immigration Act 1999 (as amended).

The reason for the Minister's proposal is :

You have remained in the State without the permission of the Minister for Justice.

Accordingly, you are a person whose deportation would, in the opinion of the Minister, be conducive to the common good.

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

Voluntary Returns Unit,
Repatriation Division,

INIS,
Dept. of Justice,
13/14 Burgh Quay,
Dublin 2.

or

E-mail - voluntaryreturns@justice.ie

Except in very exceptional circumstances, if you exercise this option, 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, assistance in relation to the purchase of air tickets may, in certain circumstances, be provided by-

- the International Organisation for Migration (I.O.M.). Tel: 01 6760655, lo-call 1800 406 406 or by e-mail to iomdublin@iom.int

or

- the Voluntary Returns Unit of the Repatriation Division of this Department at the postal and e-mail address shown above.

If you wish to avail of the voluntary return 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.

You can submit written representations against the making of a Deportation Order on the enclosed form or in a similar format. Please note that the completed form must be signed by you personally or, in the case of a minor, by a parent or guardian.

You can attach any additional letters or documents from other people in support of your case when you fill in the form. Please contact us immediately if any of the details you have stated in your representations change after you submit them.

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

The Minister will proceed to decide on 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.

Please complete and return the attached Address Notification Form to the address below. This confirms your current address and advises you of the obligation that you inform the Minister if you change address in the future.

What happens if a 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.

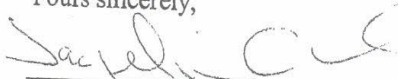
If no response is received to this letter within 15 working days, it will be assumed that you do not wish to return home voluntarily and that you do not wish to make written representations against the making of a Deportation Order. In such circumstances, the Minister will proceed to consider your case under Section 3 of the Immigration Act 1999 (as amended) on the basis of the information already on your file.

It is recommended that you retain a copy of all documentation submitted to the Minister, for your own records.

You should send all correspondence to: repadmin@justice.ie

Should you not have the facility to scan and email documents, or should you need to send original documentation, this can be sent to: Acknowledgements Unit, Repatriation Division, Immigration Service Delivery, Department of Justice, 13/14 Burgh Quay, Dublin 2, D02 XK70

Yours sincerely,



Jacqueline A. Clarke
Repatriation Division
Date : 25/03/2022

Documents enclosed:

- Address notification form,
- Form 3