[2019] IEHC 730

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 356 J.R.]

BETWEEN

IVAN SEREDYCH

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(NO. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of October, 2019

1. The applicant arrived in Ireland from Ukraine in May, 2011 and was granted residency as the father of an Irish citizen child born to him and his first wife in 2001. On 15th July, 2002 he was convicted in the District Court of having no insurance, with four other charges taken into account. In 2006 or 2007 he divorced his first wife and around that time, or in 2008, he met and began cohabiting with a Lithuanian woman. She had three children from a previous relationship and became a naturalised Irish citizen in 2014. On the night of 9th to 10th June, 2012 the applicant committed the offence of sexual assault in the course of acting as a taxi driver.

2. In July, 2015, the applicant and his second wife had their first child and the couple then married on 23rd September, 2015. In November, 2015, the applicant was convicted of the offence of sexual assault in the Circuit Court, after contesting the charge and attacking the evidence of the injured party, which of course he was entitled to do. He was then sentenced to three years' imprisonment. A second child was born in 2016. His appeal against conviction was dismissed in *D.P.P. v. Seredych* [2016] IECA 415 (Unreported, Court of Appeal, 3rd November, 2016).

3. A deportation order was made on 8th February, 2018. On 13th February, 2018, the applicant's solicitor Ms. Wendy Lyon, then of KOD Lyons, applied on his behalf for readmission to the protection process under s. 22 of the International Protection Act 2015. That relatively short application form is a crucial document for present purposes. Ordinarily, while the introduction of a protection element gives rise to a requirement for redaction in proceedings, given that the applicant has been named in so many judgments to date, his counsel has helpfully stated that there is no objection to that continuing, and indeed that is only practical because otherwise it would be very difficult to make sense of the procedural history here.

4. On 15th February, 2018, the International Protection Office rejected the application under s. 22. On 27th February, 2018 the applicant submitted an appeal to the International Protection Appeals Tribunal. I dismissed a challenge to the deportation order in *Seredych v. Minister for Justice and Equality (No. 1*) [2018] IEHC 187 (Unreported, High Court, 22nd March, 2018). I refused leave to appeal to the Court of Appeal in *Seredych v. Minister for Justice and Equality (No. 2)* [2018] IEHC 307 (Unreported, High Court, 23rd April, 2018).

5. The applicant then left the State on 24th April, 2018. The Supreme Court refused leapfrog leave to appeal in *Seredych v. Minister for Justice and Equality* [2018] IESCDET 157 (26th October, 2018).

6. On 11th February, 2019 the IPAT gave a written decision without an oral hearing setting aside the recommendation of the IPO. On 20th February, 2019, the applicant signed an application form to the Strasbourg Court claiming that he was a victim of violations of arts. 8 and 13 of the ECHR. On 26th February, 2019 the respondent consented to the applicant making a subsequent application for international protection. The letter stated that the applicant should attend the IPO within ten days. Obviously he failed to do that because he was in the Ukraine. On 1st April, 2019 the Minister refused a request to revoke the deportation order and wrote to KOD Lyons to that effect. On 3rd April, 2019, Ms. Lyon informed the applicant of the adverse decision and on 12th April, 2019, she left KOD Lyons to set up her own firm of solicitors, Abbey Law. When leaving an existing firm, in the absence of agreement, a solicitor is not allowed by the Law Society to specifically volunteer to clients that she or he is leaving or to take any papers, so it was not until the applicant contacted KOD Lyons that he was informed that the solicitor who had been handling his file had moved on. He then made contact with Ms. Lyon at her new premises on 19th April, 2019.

7. On 25th April, 2019 the Minister declined to give the applicant a visa to return to the State and on the same date the applicant gave Ms. Lyon an authorisation to take up his file. She has affirmed on affidavit that her practice was to forward all such authorities to her former employer although she cannot find the specific original email in this case but did send a reminder on 2nd May, 2019. There was then something of an exchange of correspondence between her and her former employers regarding taking up the file and the final relevant documents seem to have been furnished on 4th June, 2019 apart from the applicant's visa application, which only came through later on 28th June, 2019. The present proceedings were filed on 7th June, 2019. A third child of the marriage was born very recently in or about June, 2019 having been conceived when the wife went to Ukraine last year to visit the applicant.

8. At an early stage of the proceedings, counsel for the respondent complained about the lack of an affidavit from the applicant personally, contrary to High Court Practice Direction HC81, but having considered submissions from both sides I held that the issue in the present case turned on a point of law which did not appear to require personal evidence from the applicant. I then granted leave on 15th July, 2019. On 18th July, 2019 the Strasbourg Court held the application to that court was inadmissible as manifestly unfounded (*Seredych v. Ireland* (Application No. 21718/19)). A statement of opposition was delivered dated 3rd September, 2019.

9. On 22nd October, 2019, the first day of the hearing of the action, I gave liberty to the applicant to file a further affidavit of Ms. Lyon explaining the delay in instituting the proceedings. I also ordered by consent that the affidavits in the first judicial review would be evidence in the present judicial review insofar as they are relevant, and helpfully a

book of affidavits in the first judicial review has been prepared and made available to me. I have received submissions from Mr. Anthony Lowry B.L. who conducted the hearing, and Mr. Michael Lynn S.C., who addressed the court on the post-judgment mention dates, for the applicant and from Ms. Siobhán Stack S.C. (with Mr. John P. Gallagher B.L.) for the respondent.

Statutory framework in outline

10. The basic procedure for a reapplication for international protection is that the applicant has to obtain the consent of the Minister before the actual reapplication can be made. A recommendation is made by the IPO as to whether the Minister should consent to the application or not, and an adverse recommendation can be appealed to the IPAT. If there is a favourable decision from either body, by virtue of s. 22(13) of the 2015 Act the Minister is required to give such consent and following such a consent the applicant then makes an application under s. 15 of the 2015 Act. Only at that point is he or she deemed to be an "applicant" under s. 2 of the 2015 Act.

Complaint regarding breach of O. 84

11. Ms. Stack reruns the complaint about the lack of an affidavit from the applicant personally which had been made by Mr. Gallagher in the directions list at an earlier stage, but this time under the heading of O. 84 of the Rules of the Superior Courts rather than Practice Direction HC81. But O. 84 is not absolute. Normally it does require a personal averment from the applicant but there can be exceptions. If the matter is essentially a point of law it may not so require and this is such a case.

Withdrawn objection regarding time

12. Ms. Stack also initially objected to the proceedings as being out of time but following the delivery of the fourth affidavit of Ms. Lyon the objection was very sensibly withdrawn. In any event, I am satisfied that there is good and sufficient reason for an extension of time.

Objection that mandatory relief is a non-starter

13. Ms. Stack makes the point that the applicant has not expressly claimed any mandatory relief and submitted that *certiorari* of the adverse decisions in and of itself does not do anything practical for the applicant. That submission is unfounded but I will explain why at a later stage.

Objection that the applicant got what he asked for and is not entitled to anything else

14. The argument is made that the ministerial consent furnished under s. 22(13) of the 2015 Act does not imply a right to enter or remain. Such a right, it is argued, depends on actually making a substantive application for protection under s. 15. The contention that the applicant therefore got what he asked for and is not entitled to the additional rights claimed in this action is essentially the gist of the argument made by the State here. But implicitly, the grant of permission to make a reapplication is the start of a process, and the Minister is not entitled to frustrate that statutory process. The principle involved was vividly summarised recently in *Vince, Maugham and Cherry v. Johnson and the Lord Keen of Elie* [2019] CSOH 77 at para. 37 in the context of a suggestion that the UK Prime Minister might act in a manner so as to undermine the objectives of a particular Act of Parliament (the European Union (Withdrawal) (No. 2) Act 2019). The point was

summarised as being "*the public law principle that he cannot frustrate its purpose or the purpose of its provisions"*. That principle is relevant here.

15. Ms. Stack replies that the Minister is not frustrating the re-application and that the applicant "*voluntarily*" left the State, a word that featured prominently throughout her submission. But it does violence to language to call the applicant's leaving a voluntary act for the simple reason that he was required to leave under the express terms of the deportation order. By not re-admitting the applicant the Minister is frustrating the statutory purpose, which is that the applicant should be allowed to pursue his re-application. If, hypothetically, the applicant had presented himself unlawfully in the State despite the deportation order within the ten days following the grant of permission to re-apply, Ms. Stack says that the State would have been obliged to re-admit him to the protection process (I will deal later with whether the ten-day limit is fatal to this application or not). Unfortunately, such an interpretation incentivises illegality. The legal system must work for the person who attempts to comply with the rules and it is strange to hear counsel for the State arguing that the applicant would have been better off legally if he had ignored the express statutory obligation to comply with the deportation order. It does not feel like I would be complying with the declaration to uphold the law of the State if I gave too much mileage to that argument. An applicant should not be disadvantaged because he or she complies with a deportation order as compared with a person who flouts such an order.

Objection that the Minister is entitled to take a different view from the IPAT when dealing with revocation of the deportation order

16. Reliance is placed on 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, to the extent that he upheld an approach which I had taken in that case to the effect that the Minister was not obliged to follow precisely the same reasoning as the tribunal when considering the subsequent question of revocation of a deportation order. That is the position where there are two quite separate processes involved. The Refugee Appeals Tribunal decision in *Y.Y*. was a separate statutory process to the subsequent deportation order, whereas here the question of giving permission to readmit the applicant to a protection process is part of the very same process as the actual re-application itself. Allowing the applicant back into the State to pursue the re-application simply gives effect to the IPAT recommendation – it is not a totally distinct process as in *Y.Y*.

Objection that the 2015 Act does not apply to the applicant

17. Section 15(1) of the 2015 Act provides that only those in or at the frontier of the State can apply for protection. The argument is made that the applicant is not such a person so cannot apply. Reliance is placed on the argument that the right to enter and remain under s. 16 of the Act only applies to an "*applicant*" within s. 2(1). That is a person who has made an application under s. 15(1). That is not this applicant.

18. Ms. Stack is correct that the explicit requirements of the right to remain under the 2015 Act do not apply. Where the obligation to admit the applicant to the State comes from is not so much the wording of the 2015 Act but the general public law principle that the

Minister must not frustrate the statutory process. The applicant has the benefit of a positive IPAT recommendation and should be allowed to act on it. It is certainly true that to be a refugee you have to be outside your country of origin: see e.g. *M.A.M. v. Minister for Justice and Equality* [2019] IECA 116 (under appeal). Reliance is also placed by the respondent on Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford, 2016) at pp. 235 to 238. But one has to ask, why is the applicant outside the State? The answer obviously is because of the deportation order. He complied with that order by leaving the jurisdiction. Judicial review technically is a branch of the equity jurisdiction and would not be equitable to permit the Minister to rely on the applicant's current position outside the State when that position arose from an act of the Minister himself, namely the deportation order.

Objection that if the 2015 Act does apply to the applicant then the only right is to be admitted at the frontier, not to remain or re-enter

19. Again, yes, when literally construed, the 2015 Act does not expressly provide for the right we are talking about here; but the applicant's right to be readmitted to the State arises from the basic public law principle that I have discussed above, so it is implicit rather than explicit.

Objection that no purpose would be served by readmission because the ten-day time limit to make an application has expired

20. The ten days to make the actual re-application set out in s. 22(14) of the 2015 Act had obviously expired without that actual reapplication having been made. The reason that that time limit was not complied with was that the applicant was outside the State, which can be attributed to the deportation order made by the Minister. The Minister cannot therefore rely on his own actions to prevent the applicant from making a re-application. The ten-day period therefore must be taken as commencing to run from the date of the applicant's actual re-admission to the State.

Objection that the applicant is not eligible to make the claim he is making

21. Ms. Stack submits that the applicant's substantive claim relates to one of subsidiary protection under art. 15 of the qualification directive 2004/83/EC and that the applicant is disqualified from subsidiary protection because of art. 17 of the directive and s. 12(1) of the 2015 Act, namely the commission of serious crime. That may or may not ultimately prove to be so but it can only be considered in the context of the actual protection claim and is not something to be determined *a priori* before the re-application is even formally launched.

Other objections in statement of opposition

22. Leaving aside the EU law points for a moment, various other objections were made in the statement of opposition but not particularly pursued in written submissions or in oral argument, but for completeness I have considered all of those objections and do not see any of them as being a bar to relief in favour of the applicant.

European law objections

23. As I am finding for the applicant on domestic law issues I do not need to decide the EU law points. Admittedly there is a possible point of EU law here, namely whether the right to re-apply provisions of arts. 32 and 39 of the procedures directive 2005/85 require a

member state to readmit into its territory an applicant who is granted permission to make a re-application for protection and was present in that territory at the time of applying for permission to reapply for international protection but has left the territory before the determination of that application for permission because the authorities of the member state have made a deportation order requiring such an applicant to leave.

24. Ms. Stack submitted that if I was not with her on the EU law point then the matter was not *acte clair* in favour of the applicant; so it may be that if some other forum thinks I am wrong on the national law point and has to get into the European point, the question of a reference may loom large, but I do not need to deal with that further for present purposes.

Order

25. The applicant has achieved the not inconsiderable forensic feat of having had adverse outcomes in every (non-military) court in the legal system apart from Luxembourg: his convictions in the District Court and, after a full fight, in the Circuit Court, the rejection of his criminal appeal by the Court of Appeal, the dismissal of his first judicial review by the High Court, the refusal of leave to appeal by both the High and Supreme Courts and the rejection of his application to Strasbourg. Only the Luxembourg court is missing and in that regard I might have had to suppress an inner imp urging a reference so that this applicant could complete the grand slam. But merely because someone has had seven adverse court outings does not mean that the eighth one automatically has to be adverse also. If this case was still an immigration case I would have had no problem in holding that it was well within the Minister's discretion to consider that the State's interest in visiting upon the applicant the consequences of his offence against the injured party here outweigh the interests and rights, whether as to family or private life or otherwise, of the applicant, his wife and the seven children potentially affected (being the child of his first marriage, his three step-children and the three children of his second marriage). But this case is no longer an immigration case, it is a protection case and that changes everything. Admittedly it might superficially seem that I am reversing the result of my decision in *Seredych v. Minister for Justice and Equality (No. 1)* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018); but what comes to mind in that context is the phrase often attributed to John Maynard Keynes, "*When the facts change, I change my mind. What do you do, Sir?"* That does not seem to be a verbatim quotation, and is possibly slightly misleading in the sense that one should change one's mind on occasion even if the facts do not change: see John Kay, "Keynes was half right about the facts", ft.com, 4th August, 2015. But here there is a significant factual change - the grant of permission to make a re-application for protection. That changes the legal conclusion. Persistence does not always pay off but on occasion it can, so the outcome here can to a large extent be put down to the persistence of Ms. Lyon and counsel.

Postscript regarding form of the Order

26. This matter was heard on 22nd and 29th October, 2019 on which latter date judgment was given *ex tempore* broadly along the foregoing lines (leaving aside the question of the form of relief). Following the judgment, the matter was listed as to the form of the order on 4th, 18th and 25th November, 2019 and 2nd December, 2019. It is next listed on

16th December, 2019 to deal with leave to appeal. Determining the precise form of the order in this case has been slightly more complicated than usual. Predictably one can put the bulk of that down to judicial fallibility, but hopefully the optimum result can now be arrived at.

27. When originally giving judgment I indicated my intention to grant *certiorari* of the revocation refusal and the visa refusal and said that I would hear from counsel regarding a declaration that seemed appropriate in principle. When preparing the draft unapproved written version I added that on reflection it might be sufficient to give liberty to apply for a declaration.

28. On a subsequent mention date, Ms. Stack suggested a draft wording for a declaration with a written version to follow, accepted that costs followed the event, and then sought both a stay on the declaration and costs as well as leave to appeal in relation to the revocation of the deportation order. However, prior to perfection of the order and while awaiting receipt of the written version of the State's wording, I have reflected on the matter and now think that a proliferation of reliefs in fact overcomplicates this whole matter procedurally to a totally unnecessary extent.

29. At the hearing, Ms Stack originally submitted that the Minister's position was that that *certiorari* didn't do anything for the applicant, and insofar as the intention of the court was to impose positive obligations on the Minister there would need to be some further order such as detailed declaratory relief. This was the premise on which the discussion of further reliefs took place and on which I proceeded to consider the question of a possible declaration. I realise that at this point, the reader will be wondering how I could have failed to see immediately that this was obviously a false premise having regard to the provisions of O. 84 r. 27(4) of the Rules of the Superior Courts. That neither Ms. Stack, whose fallacious submission would thereby have disintegrated, and on whom the primary (and, in this case, undischarged) onus to keep the court right therefore lay, nor counsel for the respondent, mentioned this provision, may conceivably be relevant.

30. The core issue is whether the Department was correct in declining to revoke the deportation order. The answer to that question is "No". Section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to that decision and that is really what this case is about. To grant any other reliefs at this stage might procedurally create the impression that the case was outside s. 5, when at its core it is very much within it. That is obvious if one thinks about what would have happened if the applicant lost. Clearly he would have had to get leave to appeal under s. 5 had he intended to go further (as he was required to seek when he lost his previous judicial review). Indeed Ms. Stack's suspiciously enthusiastic championing of the notion that I should grant a smörgåsbord of reliefs in favour of the applicant can only credibly be explained by her unarticulated desire to have a free run at the Court of Appeal in the hypothetical event of not getting leave to appeal under s. 5. While she was initially reluctant to concede that, or indeed to concede anything, I understood her ultimately to have grudgingly offered some acknowledgment that appealability was a factor in the State's tactics. Even in the unlikely event that if I

am wrong to have understood her thus, that makes no difference because it is obvious at every level that this was what was driving much of the respondent's strategy. It would be a totally distorted and unequal process if a case requires leave to appeal only if the applicant loses, but where the respondent can appeal at will simply by the device of tacking on some kind of purely consequential declaration or even equally consequential *certiorari* of a non-s. 5 issue, and even when such reliefs are ingenuously sought by the applicant (whose counsel Mr. Lynn didn't – indeed still doesn't - seem to fully understand that Ms. Stack's oleaginous invitation into the spider's parlour was not altogether philanthropic). The unfairness of such a free run at an appeal would be compounded in a case such as this where the State successfully opposed the applicant's previous endeavours to appeal in both the High and Supreme Courts and now when the shoe is on the other foot is seeking by stealth to create a situation where such constraints are largely, albeit perhaps not entirely, dispensed with in relation to its proposed appeal.

31. That brings us to whether it is necessary to grant *certiorari* of the visa refusal. That particular refusal was in reality ephemeral and has to be seen in the context of the unrevoked deportation order at that time. If the order is in fact revoked, which is the core issue, and if a visa is in fact required to give effect to the judgment, which is not entirely obvious *a priori*, the applicant can apply for a fresh visa (which the Minister would then be obliged to grant forthwith), although presumably the State won't let it get to that point and if one is necessary, will grant a visa of its own motion. Subject to a valid appeal, not taking the initiative would be a disregard of the rule of law given the basis on which I am quashing the refusal to revoke the deportation order. Presumably such disregard won't arise.

32. Accordingly, by far the simplest, as well as the fairest, order is simply to quash the refusal to revoke the order and to direct the Minister under O. 84 r. 27(4) to reconsider and re-decide the matter forthwith in accordance with the judgment of the court. For the avoidance of doubt, this is a case where the legal basis for the obligation to revoke is clear so there is no discretion – the power to revoke can only be exercised in one way, that is in favour of the applicant. As this follows from the permission to re-apply for protection, there is no need for a further process of submissions or ministerial consideration. Subject to a temporary stay to allow an appeal to be considered, it needs to be done forthwith.

33. I will give the applicant liberty to re-enter if he wishes to apply for any other reliefs in due course, including declarations, mandatory relief, or *certiorari* of the visa refusal, should those be necessary or appropriate, although presumably that won't be necessary given that everyone should be on board with the principle of the rule of law.

34. The net result is that the appropriate order at this stage (that is, before any application by the State for leave to appeal under s. 5 of the 2000 Act is heard) is as follows (superseding the wording that was previously envisaged but was not embodied in a perfected order):

    (i). An order extending time (relief 5);

(ii). *Certiorari* of the decision of 4th April, 2019 refusing to revoke the deportation order (relief 1) and an order remitting that decision back to the Minister with a direction under O. 84 r. 27(4) to reconsider the matter in accordance with this judgment;

(iii). Liberty to the applicant to re-enter the matter should it become necessary to apply for any such other relief;

(iv). An order for the applicant's costs including reserved costs, certifying for two counsel for the leave application; and

(v). A stay on the order for costs and on the remittal under O. 84 r. 27(4) for 28 days and in the event that leave to appeal to the Court of Appeal is granted and such appeal is lodged within 28 days, a stay until the determination of that appeal, or as the case may be, in the event that leave to appeal to the Court of Appeal is not granted, and an application for leave to appeal to the Supreme Court is lodged with that court within 28 days, a stay until the determination of that application for leave to appeal, or if such leave to appeal is granted by the Supreme Court, a stay until the determination of that appeal.