[2019] IEHC 735

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 937 J.R.]

BETWEEN

NALINI CHENCHOOLIAH

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of October, 2019

1. The applicant is a third country national who arrived in the State from Mauritius in February, 2005 on a student visa. That visa was renewed from time to time but expired on 7th February, 2012. In the meantime, she married a Portuguese national on 13th September, 2011. Simply by his or her presence here, an EU citizen or family member becomes a rights-holder under art. 6 of the free movement directive 2004/38, but that only lasts for six months: see art. 6(1). The applicant then applied for a residence card under art. 7 which allows for residence for more than three months. That application was rejected on 11th September, 2012 as the applicant had failed to show that the spouse was exercising EU Treaty rights. The letter sent to the applicant informing her of this was marked not called for.

2. The applicant subsequently made contact with the Department of Justice and Equality and sought an extension of time for seeking a review of the refusal. An extension of time was allowed but the actual review application form was not furnished so the applicant's case was sent for consideration of the making of a removal order. The applicant's spouse in the meantime was convicted of a drugs offence in Portugal and was imprisoned there in June, 2014.

3. On 21st October, 2016, the Department wrote to the applicant stating that it had been decided not to proceed by way of removal order but instead that the Department was going by way of deportation. The main point in the present proceedings was whether the removal of a third country national who is not a beneficiary of current rights under the free movement directive 2004/38 but formerly enjoyed such rights should be dealt with by way of removal order under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) implementing the directive or under purely national law by way of a deportation order under s. 3 of the Immigration Act 1999.

4. A secondary issue in the case was, if the removal procedure applies, are the grounds for removal limited to the narrow grounds of public policy, public security and public health and the corresponding procedural protections set out in Part VI (arts. 27 to 33, other than 30 and 31, which apply anyway) of the directive or can the broader circumstances that arise, such as where the spouse is not exercising treaty rights, as set out in art. 12 to 15 of the directive, apply.

5. The applicant filed a statement of grounds dated 8th December, 2016 seeking an order of *certiorari* quashing the respondent's decision declining to make a removal order and an injunction restraining her deportation. The applicant did not challenge the proposal to deport as such. MacEochaidh J. granted leave on 12th December, 2016. The matter was listed for hearing on 20th June, 2017, before Keane J. when the first day's hearing took place. The matter was then listed for mention on 26th June, 2017 and 10th July, 2017 and then for a second day's hearing on 18th July, 2017. It was then listed for mention on 27th July, 2017, 3rd, 17th and 26th October, 2017 and 7th and 24th November, 2017 and the questions in the case were then referred to the CJEU by Keane J. by means of a reference signed on 16th January, 2018. A formal High Court order was not drawn up to refer the proceedings, but that does not really make any difference. The reference document was drafted by counsel for the respondent and then agreed to by both sides following discussions and was signed by the learned Judge. It set out two questions, in essence addressing both the main question and the subsidiary question I have referred to above.

6. Judgment was subsequently given by the CJEU in Case C-94/18 *Nalini Chenchooliah v. Minister for Justice and Equality* (10th September, 2019). In essence the court resolved the main question in favour of the applicant and the subsidiary question in favour of the respondent: see para. 86 of the CJEU judgment.

7. The decision of the Luxembourg court has the clear consequence that the judgment of Hogan J. in *Igunma v. Governor of Wheatfield Prison* [2014] IEHC 218 (Unreported, High Court, 29th April, 2014) is to that extent wrong in EU law. Hogan J. opined at para. 30 of his judgment in *Igunma* that his conclusion that the directive "*applies*" (present continuous) to an art. 6 beneficiary later refused art. 7 status (as apparently opposed to "*applied*" (past tense)) "*seems clear beyond argument*". But the CJEU thinks otherwise (see paras. 59, 67 of its judgment). I had previously pointed out that *Igunma* was wrong in Irish law in that it failed to apply an earlier Supreme Court decision that was directly on point *(Rachki v. Governor of Cloverhill Prison* (Unreported, Supreme Court, 5th December, 2011) *ex tempore* (Fennelly J.)): see *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017) and *S.S. (Pakistan) v. Governor of Midlands Prison* [2018] IEHC 442 (Unreported, High Court, 17th July, 2018)).

8. The judgment of the CJEU also seems to have the consequence (although I say so *obiter* because counsel for the applicant is reserving his position) that in accordance with the principle of conforming interpretation, art. 3(1)(b)(iii) of the 2015 regulations where it refers to a family member who "*seeks to remain with the Union citizen in the State*" should be interpreted as encompassing a case such as this where the applicant sought to remain with the Union citizen in the State at the date on which the application was made, even if the Union citizen has left the State by the time the application falls to be considered. The State has made clear in any event its intention to update the 2015 regulations in line with the CJEU judgment and there may well be other situations that may have to be considered one way or the other such as where the Union citizen has left

the State before the application for residence is actually made (although I should not be taken as implying any view on how such other situations should be addressed: those do not arise for consideration here).

9. Keane J. did not propose to retain seisin of the proceedings due to a change in assignments, so the matter reverted back to the Asylum List on 7th October, 2019 to fix a date. The earliest available date was provided. On 22nd October, 2019, the applicant first learned of the respondent's change of position in written submissions delivered by the respondent indicating that the proposal to deport is being withdrawn and that the matter will proceed by removal order. Accordingly the actual reliefs sought in the proceedings no longer arise and the substance of the case can be struck out by consent. The remaining issue then is costs and in that regard I have heard helpful submissions from Mr. Conor Power S. C. (with Mr. Ian Whelan B.L.) for the applicant and from Mr. Noel J. Travers S.C. (with Ms. Sarah-Jane Hillery B.L.) for the respondent.

10. In accordance with the Supreme Court jurisprudence, particularly *Cunningham v. President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222, *Godsil v. Ireland* [2015] IESC 103 [2015] 4 I.R. 535 and *Matta v. Minister for Justice and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016) (MacMenamin J.), which I endeavoured to summarise in M.K.I.A. *(Palestine) v. International Protection Appeals Tribunal* [2018] IEHC 134 [2018] 2 JIC 2708 (Unreported, High Court, 27th February, 2018) there are two key issues which arise on facts such as these.

11. The first issue is whether there is an event; and here there is an event. The proposal to deport has been withdrawn.

12. The second question is whether there is a causal nexus between the event and the proceedings. It is clear that the change in the respondent's position was brought about by the CJEU judgment. That is obvious anyway; but it can't be doubted in the light of the respondent's legal submissions.

13. Mr. Travers nonetheless submitted that the applicant should not get full costs and suggested that she should get not more than three-quarters of the costs. It is a tribute to Mr. Travers' intimidatingly immense learning and scholarship that each iteration of his argument seemed to the frail judicial mind to produce new preambular subtleties and qualifications, so that the path of reasoning which one had with difficulty managed to glimpse on the horizon turned out to be a mirage, and a new vista opened up in a different direction; a direction which at the same time one somehow knew would prove to be an equally false trail. It was an argument of such fluidity that grasping the same formulation of it twice was as futile as trying to step for a second time into Heraclitus' river. His lengthy and detailed submissions defy summarisation any more than it would be possible to adequately describe a command performance of kabuki theatre using mere words. But painting with a broad brush, I don't think that it does undue violence to that argument to summarise it as consisting of two main prongs.

14. The first argument was that there was no actual decision, only an implicit decision not to remove the applicant and a proposal to deport; and that a challenge to a new proposal, particularly on the basis of lack of reasons, was misconceived. In fairness it appears that it is not correct to say there was no decision. There was an express decision on the face of the letter of 21st October, 2019 not to proceed by way of removal order. Insofar as the case was a challenge to a mere proposal, while that is generally inappropriate, one can challenge a mere proposal if it is inherently and necessarily *ultra vires.* That is essentially the situation here. If one has more refined points of administrative law to make they are best made to the decision-maker first and then any adverse decision can be challenged in due course. The reasons argument in the particular circumstances of this case appears to be referable to the *vires* argument, or as Mr. Power quite plausibly put it, to find out "*what the* vires *are*". Thus it was not an entirely free-standing point on these particular facts.

15. The second prong of Mr. Travers' submission was that the "*most important point*" before Luxembourg was the second issue on which the State prevailed. While that might have been the most important point from the State's perspective, on any view it was a subsidiary issue. The wording of the two questions referred, even though they were amalgamated by the court in the ultimate answer given, reflects that subsidiarity because the question the State won on was question 2, which begins with the words *"if the answer to the above question is that the expulsion must be made pursuant to the provisions of the directive …*", the State having lost on question 1, in effect. Mr. Travers' submission was essentially to reduce the applicant's costs because the applicant was not successful on all issues. That is a *Veolia Water* approach (see *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2006] IEHC 240 [2007] 2 I.R. 81), even though he did not originally refer to *Veolia Water* when making that submission orally. Mr. Travers very fairly did not disagree that the case probably would have gone into a second day even if the reasons point had not been brought into the case. Mr. Power submits that the length of the hearing would not have been substantially different if he had limited his points to the issue he won on.

16. The case was just not long enough or complex enough to warrant a *Veolia Water* approach and in any event, even if it was, on the particular facts here it is not clear that if Mr. Power had been more economical in the points made that there would have been a huge saving of time. If I had to apply *Veolia Water* to a two-day case that would be a fairly radical extension of the circumstances in which such an exercise would be adopted. That would be totally counter-productive. The pointlessness of such an approach is in fact usefully demonstrated in this case in that the hearing of the contested costs matter took the bulk of the day and well into the afternoon as opposed to being dealt with in under a minute at 11 o'clock on an unopposed basis. The fact that the costs were hotly contested necessitated my getting quite deeply into the issues. The vast bulk of the airtime in the costs hearing was taken up with detailed and helpful submissions on behalf of the respondent. I do not in any way blame counsel for that because this is a technical matter, but the outcome shows the great practical value in rules of thumb (such as the need for costs to follow the event) without getting into an elaborate and florid

undergrowth of sub-rules. The net effect of the respondent's stance on costs has really only been to add a further day's costs to the applicant's tally. In principle, costs should follow the event and should be full costs: see *per* Clarke J., as he then was, in *A.C.C. v. Johnston* [2011] IEHC 500 (Unreported, High Court, 24th October, 2011) at para. 2.6: *"the starting position should be that the party who wins the event gets full costs"*. There is not sufficient reason to depart from that starting position here. It is certainly not a case where the applicant's counsel wasted the time of the court on irrelevant points.

Order

17. Consequently I will award the full costs of the proceedings to the applicant against the respondent, including reserved costs and the costs of proceedings before the CJEU.

18. By way of postscript, having heard counsel further, the order will include the costs of the costs hearing itself. It can be left to taxation as to whether that should be dealt with on the basis of being a fresh hearing date and attracting fresh brief and instruction fees, or whether it should be dealt with on the basis of a second refresher for a continued hearing. On reflection one could make the argument for the former, because the original judge did not retain seisin and thus a re-started hearing was required. I express no settled view and can leave that to the taxation process. Either way it is worth clarifying that it must be on the basis of more than a mere costs hearing because the matter was in fact listed for substantive hearing on the day, long before the respondent threw in the towel at the last minute.