Neutral Citation [2015] IEHC 392

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 180 JR]

BETWEEN

N. B. O., N. L. AND L. O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND) N. L.

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 19th day of June, 2015

1. In these proceedings the first named applicant makes complaint about the affirmation of a deportation order and the circumstances in which he was released from prison and deported to Nigeria. At the request of the parties this judgment is confined to a consideration of the legality of his release from prison.

2. The first and second named applicants are the mother and father of the third named applicant. The first named applicant, Mr. O., is a Nigerian national who arrived in the State in or around October 2008 when he was approximately sixteen years of age.

3. The second named applicant is a French national and their child, the third named applicant, is an Irish citizen, who was born on the 22nd June, 2014.

4. Mr. O. was identified as a potential victim of human trafficking and he was taken into care pursuant to the Childcare Act 1991, in 2009. He was granted leave to remain in the State until 22nd June, 2011. He applied for asylum in June 2010 but withdrew this application on legal advice. In 2010 he reached the age of majority and moved from care accommodation into private rented accommodation. In October 2010 he was involved in an altercation and was charged, pleaded guilty to assault and was ultimately sentenced to three years imprisonment (with eighteen months suspended) in June 2014. His permission to be in the State was not extended beyond June 2011 and by 19th September, 2011 the Garda National Immigration Bureau confirmed to the Refugee Legal Service that they no longer had reasonable grounds to suspect that he was a victim of trafficking. He submitted representations for leave to remain in the State on the 14th October, 2011 but this was refused on the 14th June, 2012. On the 3rd August, 2012 the respondent issued him with a proposal for deportation and further representations for humanitarian leave to remain were submitted on 27th August, 2012.

5. In May 2013 Mr. O. met Ms. L. and they began a romantic relationship. By October 2013 they were expecting a baby and the couple lived together until Mr. O. was sentenced in the Dublin Circuit Criminal Court in June 2014. He was granted bail to be present for the birth of his daughter on the 27th June, 2014. He commenced service of his sentence immediately thereafter.

6. By letter of the 18th August, 2014 Mr. O. was issued with a deportation order. The letter informing him of the making of the order drew his attention to s. 3(9)(a)(I) of the Immigration Act 1999 and says:-

> *"as you are a person, the subject of a deportation order, who is serving a term of imprisonment imposed upon you by a Court in the State, you are required to leave the State upon your release from prison. To facilitate this, you are required to present yourself to a member of An Garda Síochána or Immigration Officer within 3 working days of your release from prison, and comply with any further requirements as may be imposed upon you, pursuant to Section 3(9)(a)(II) of the same Act.*
>
> *You may be directed to present yourself at such other time or place as directed by a member of An Garda Síochána."*

7. On the 19th November, 2014 Mr. O. sought revocation of the deportation order. When making the deportation order the Minister or her officials were apparently unaware that Mr. O. was in a relationship with a French national and had become the father of an Irish citizen child four or five months prior to the making of the deportation order. The revocation application was based upon Mr. O.'s family and domestic circumstances. The revocation application asserted the right to reside in the State under the Citizen Directive 2004/38/EC and the European Communities (free movement of persons) Regulations 2006. The letters stated:-

> *"a stand alone treaty rights application will be submitted in early course to the relevant section of INIS."*

8. The letter also sought an undertaking that the deportation order would not be enforced pending the outcome of the application for revocation. By letter of the 23rd December, 2014 the Irish Naturalisation and Immigration Service wrote to Mr. O.'s solicitor and gave an undertaking that he would not be deported from the State "until all representations submitted in support of his application for revocation of the deportation order made against him were considered".

9. In a further letter dated 13th February, 2015 the I.N.I.S. informed Mr. O.'s solicitors that they were required to submit all outstanding representations in respect of the revocation application no later than the 1st March, 2015 noting that "the Minister will proceed to consider your clients case after that date".

10. By letter of the 3rd March, 2015 further submissions were made in respect of the revocation of the deportation order and a right to reside in accordance with E.U. law was again asserted. Though the representations were a little late I.N.I.S. confirmed by letter of 6th March that the correspondence had been received..

11. At about 16.20pm on the 10th March Mr. O.'s solicitors wrote to I.N.I.S. to say that their client had telephoned them that afternoon. He informed his solicitors that on the 4th March he was visited by an official of the Nigerian Embassy and from I.N.I.S to discuss his deportation. The letter reminded I.N.I.S. of the undertaking of the Minister in respect of not deporting the applicant, expressing concern as to the possible predetermination of any question of deportation and asserting that the applicant "has a separate application" based on E.U. treaty rights and looking for clarification "in respect of our clients deportation order" as a matter

of urgency. There was no response to that letter.

12. The following day, on 11th March at 15.00hrs Mr. O.'s solicitors wrote to the G.N.I.B. to say that they had been informed that the applicant "had telephoned the solicitors to report that he was being brought to Dublin Airport for the purpose of deportation that day". The letter reminded the G.N.I.B. that there was an outstanding application for revocation of the deportation order and that there was an undertaking in place that no deportation would happen until a decision had been taken on the revocation application.

13. I.N.I.S. sent a letter dated the 11th March, 2015 (apparently by fax) enclosing correspondence, also dated March 11th 2015, which had issued to Mr O. informing him that the revocation application had not been successful. The letter said:-

> *"please note the following requirements under the provision of Section 3(9)(a)(I) of the Immigration Act 1999 …..*
>
> *You are required to present yourself to such member of An Garda Síochána or Immigration Officer as may serve you this notice, at the time and place of service, and comply with any further requirements as may be imposed upon you, pursuant to Section 3(9)(a)(II) of the same Act."*

14. That letter was delivered to Mr. O. in The Midlands Prison.

15. Mr. Gareth Byrne from the Department of Justice and Equality has sworn an affidavit in these proceedings which avers that all of the representations made on the revocation application including the slightly late representation of March 3rd were considered by the officials in the decision making process which had been completed on the 4th March, 2015. Mr. Byrne denies that any representative of I.N.I.S. attended at Midlands Prison on the 4th March as had been suggested by Mr. O.'s solicitors. Mr. Byrne's version of events is that:-

> "… the Garda National Immigration Bureau put arrangements in place for the deportation of Nigerian nationals on a chartered flight which was arranged for the 11th March, 2015. The first named applicant was evidently among the persons in respect of whom arrangements were made. It necessarily takes some time to put arrangements in place to effect deportation (especially to countries with which there is no regular scheduled direct flights), the fact that the Garda National Immigration Bureau were able to call to the first named application on the 4th March does not indicate that they had fore knowledge of the outcome of the application for revocation of the deportation order. It does indicate that they were making plans for the potential deportation of the first named application on the chartered flight of the 11th March, in case the deportation order was ultimately affirmed. However, if the respondent had decided to revoke the deportation order, this would have been communicated to the Garda National Immigration Bureau and the first named applicant would not have been deported."

16. This affidavit confirms that I.N.I.S. were aware on the 4th March that the applicant's application for revocation of a deportation order was unsuccessful. The affidavit reveals that the gardaí must have commenced arrangements for the deportation of the applicant in advance of the 4th March, 2015. Such arrangements led to the attendance of the gardaí and an official from the Nigerian embassy at the prison on the 4th March for the purposes of preparing the deportation of the applicant on the 11th March, 2015.

17. The G.N.I.B. received a letter from Mr. O.'s solicitors on the 11th March, advising that if enforcement of the deportation order was attempted an application would be made to the High Court to seek an injunction. The gardaí did not reply to that letter. Instead, they proceeded to deport the applicant.

18. No explanation has been offered as to why I.N.I.S. did not communicate the negative revocation application decision to the applicant and his solicitors until the 11th March, 2015 though it was dated the 4th March, 2015. Had the decision been communicated as soon as it was made I believe that Mr. O.'s fastidious solicitors would have immediately requested an undertaking not to deport and /or sought an injunction to prevent deportation.

19. It is abundantly clear to me that representatives of the respondent were committed to a course of ensuring that Mr. O. was on the chartered flight to Lagos on 11th March, 2015. It is inconceivable that officials had not known weeks, if not months beforehand, of the charted flight to Lagos. It is further inconceivable that when I.N.I.S. wrote to the applicant's solicitors on the 11th March enclosing a copy of the negative decision that the personnel did not know of the intended imminent deportation of the applicant on the chartered flight.

20. By letter of the 14th May, 2015 An Garda Síochána (G.N.I.B.) confirmed to the applicant's solicitors that Mr. O. "was subject of full temporary release on the 11th March, 2015". (sic)

21. Mr. Tony Hickey of the Irish Prison Service swore an affidavit on these proceedings on the 9th June, 2015 where he said as follows:-

> *"2. As an Assistant Principle Officer in the Irish Prison Service, my responsibilities include decisions as to whether or not to make directions for the temporary release of prisoners serving custodial sentences. On or about the 10th March, 2015, the Irish Prison Service received a request from the Gardai National Immigration Bureau for the temporary release of the First Named Applicant for the purposes of facilitating his deportation. The Garda National Immigration Bureau requested "full temporary release" meaning release of the balance of the sentence until the normal remission date. In other words, the First Named Applicant would not have to serve the balance of the sentence or return to prison. This form of application for a temporary release of prisoners to facilitate deportation is not uncommon.*
>
> *3. I considered the application and decided to grant full temporary release. I beg to refer to a true copy of the document recording the decision ….*
>
> *4. On the 11th March, 2015, the First Named Applicant was granted temporary release by the Governor of the Midlands Prison. I beg to refer to a true copy of the temporary release notice of that date, upon which marked with the letter "B" I have signed my name…. The First Named Applicant did not sign the temporary release notice. Again, this is not uncommon and I do not believe that it is a necessary requirement in order for a prisoner to be released if the Governor or Officer in charge of the prison is satisfied to do so."*

22. The documentation exhibited with the affidavit of Mr. Hickey indicated that Mr. O. was due for release from prison on the 18th August, 2015. That documentation says that the temporary release was "for the purpose of deportation. GNIB to collect prisoner from the Midlands prison @ 2.00pm on 11/03/2015".

23. A document also exhibited with the affidavit of Mr. Hickey is the Temporary Release Notice which was not signed by the first named applicant. The notice records that the reason for the temporary release is "pre-release/socialisation". The notice includes what one might consider to be standard conditions attached to such notices saying that the conditions should be complied with during the period of release (e.g. be of good behaviour, keep the peace, shall not enter a pub etc., not to convey messages in and out of prison, shall be of sober habits etc). Incongruously amongst the list of conditions, is the following text:-

> *"Approved full TR for the purpose of deportation from the State".*

24. This is not a condition. But it does confirm what the real purpose of the temporary release was.

Legal Issue:
25. The only legal question to be determined in this judgment is whether the temporary release of the applicant was valid.

26. Temporary release of persons serving sentences of imprisonment is governed by s. 2 of the Criminal Justice Act as inserted by s. 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003 and the rules are as follows:-

> "2.—(1) The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—
>
> (a) for the purpose of—
>
> (i) assessing the person's ability to reintegrate into society upon such release,
>
> (ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or
>
> (iii) assisting the Garda Síochána in the prevention, detection or investigation of offences, or the apprehension of a person guilty of an offence or suspected of having committed an offence,
>
> (b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—
>
> (i) grounds of health, or
>
> (ii) other humanitarian grounds,
>
> (c) where, in the opinion of the Minister, it is necessary or expedient in order to—
>
> (i) ensure the good government of the prison concerned, or
>
> (ii) maintain good order in, and humane and just management of, the prison concerned, or
>
> (d) where the Minister is of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society.
>
> (2) The Minister shall, before giving a direction under this section, have regard to—
>
> (a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.
>
> (b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,
>
> (c) the period of the sentence of imprisonment served by the person,
>
> (d) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison,
>
> (e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,
>
> (f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,
>
> (g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied,
>
> (h) any report of, or recommendation made by—
>
> (i) the governor,
>
> (ii) the Garda Síochána,
>
> (iii) a probation and welfare officer, or
>
> (iv) any other person whom the Minister considers would be of assistance in enabling him to make a decision as to

whether to give a direction under subsection (1) that relates to the person concerned.

27. S.I. No.680 of 2004 is entitled "Prisoners Temporary Release Rules 2004." These rules are made pursuant to the provision I have just quoted. Subsection 7(B) thereof provides "rules under this section may specify conditions to which all persons released pursuant to a direction under the section shall be subject or conditions to which all persons belonging to such classes of persons as specified under the rules shall be subject to".

28. The rules made by the Minister in 2004 provide that:-

> *"the release of a person … shall be subject to the following conditions …. (c) that the person shall return to the prison from which he was released on or before the expiration of the period from which he was released".*

29. Counsel for the applicant say that the decision to grant temporary release to Mr. O. was unlawful because deportation is not one of the purposes for which a person can be released from prison in accordance with the statutory scheme. They say that this is borne out by the regulations made under the scheme which provides that the person being released must return to the prison from which he was released on or before the expiration of the period for which he was released.

30. Counsel for the respondent says that Mr. O. was released in accordance with s. 2(a)(ii) of the Act and the purpose of the release was "preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration." Counsel also says that the notice prepared in accordance with Regulation 4 of S.I. No. 680 of 2004 confirms that this is so by the use of the words "prelease/resocialisation".

31. In my view the only reason Mr. O. was released from prison was to facilitate his immediate deportation from the State. It was not connected in any way with any course of preparation for release from prison at the end of his sentence.

32. Counsel for the respondent has referred to a number of authorities in respect of the power to grant temporary release. *Dowling v. Minister for Justice* [2003] 2 IR 535, concerned revocation of temporary release pending investigation of certain criminal offences. In that case Fennelly J. quashed the revocation on the basis that the mere fact that a prisoner on temporary release was questioned in relation to the commission of other offences was an insufficient reason to revoke the temporary release and that before revoking the release the respondent should investigate the matter to establish whether the prisoner was in breach of any of the conditions of the release and inform him of the reason for the proposed termination of the release.

33. Counsel for the respondent relied on a statement by Fennelly J. as follows at p. 543:-

> *"It is, of course, true that temporary release decisions are entirely within the discretion of the respondent acting in the exercise of executive clemency on behalf of the State."*

34. Counsel sought to persuade this Court that executive power in respect of temporary release enjoyed a wide margin of appreciation. In response to this counsel for the applicant pointed out that Fennelly J., speaking for the Supreme Court, was referring to the significantly simpler regime as to temporary release which predates the rules instituted by the enactment of the temporary release legislation in 2003, amending the 1960 Act. I accept this submission is correct.

35. There is significant difference between the rules embodied in the 1960 Act as originally framed and the amended rules inserted in 2004. The legislator has established a comparatively elaborate scheme under the 2004 Act which sets out the basis upon which the executive can grant temporary release.

36. Counsel for the respondent also refers to the decision in *Ryan v. Governor of Limerick Prison* [1988] I.R. 198 where Murphy J. said at p. 200:-

> *"The temporary release is a privilege or a concession to which a person in custody has no right and indeed it has never been argued, so far as I am aware, that he should be heard in relation to any consideration given to the exercise of such concession in his favour. That being so, it seems to me that the only right of the applicant or any other person in custody is to enjoy such temporary release as may be granted to him for whatever period is allowed and subject to such conditions as are attached to it. The fact that the release may be renewed on a number of occasions and not renewed subsequently does not confer any additional or new right of the prisoner."*

37. This statement was endorsed by the Supreme Court in *Whelan v. The Minister for Justice* [2012] 1 I.R.1.. Counsel submitted that this decision is authority for the proposition that it is not open to an applicant to challenge the validity of a temporary release order. There the Court had found that there was nothing in the system of temporary release that affected the penal nature of a sentence imposed by s. 2 of the Act of 1960. A decision to grant temporary release did not constitute a termination let alone a determination of the sentence judicially imposed and any release of a prisoner pursuant to the temporary release rules was, both in substance and form, the grant of a privilege in the exercise of a discretionary power vested in the executive exclusively in accordance with the constitutional doctrine separation of powers. That privilege might also be withdrawn at any time by the Minister for good and sufficient reason.

38. I do not read any of these decisions as supporting the proposition that it is not possible to challenge the validity of a temporary release order. I fully accept that the executive has discretion in the manner in which they grant the privilege of temporary release. However, my view is that the Oireachtas has significantly curtailed the extent of that discretion and it is now limited by the considerations set out in s. 2 of the 1960 Act (as amended). I have no difficulty in interpreting that legislative provision. I cannot find any ambiguity in the provision.

39. The particular part of s. 2 which falls to be interpreted in this decision is s. 2(1)(a)(ii). My view is that this provides for the temporary release from prison of a person in preparation for ultimate release on the expiration of sentence. The language in the provision may not be stylish but in the clearest terms it provides for temporary release in preparation for ultimate release. Where this provision is relied upon by the executive as the basis upon which a person does not have to serve a portion of a sentence imposed by a court, the executive must demonstrate that the temporary release is genuinely to further the interests of the prisoner. The legislative intention is to provide a period of preparation for a person in custody which will be enjoyed in a noncustodial environment so that the person will be prepared for eventual release.

40. In this case the respondent has sought to shoe-horn the applicant's release for deportation into this legislative provision. It must be recalled that the applicant was transferred from the custody of Midlands Prison via a temporary release order and, presumably an

arrest warrant, to the custody of the G.N.I.B.. Nothing that happened in this transfer from the prison authorities to the Garda authorities was in preparation for the applicant's ultimate release from prison. It's sole purpose was to facilitate deportation.

41. Nothing in s. 2 of the Act permits the executive to release a person from prison and from serving the sentence imposed by a court other than for a reason expressly stated in the section.

42. My view is that the authorities saw an opportunity to deport a young man in custody. A decision was taken not to inform the applicant or his lawyers of the rejection of his revocation of deportation until moments before he was spirited out of the country on a flight to Lagos. There was no opportunity to seek legal advice or to have meaningful access to the courts to challenge the decision on revocation. There was no opportunity to see his partner or child.

43. To facilitate the removal of the applicant, the prison authorities abused their powers to grant temporary release. The face of the temporary release notice mis-states the purpose of the release of the prisoner, characterising the release as "pre-release/re-socialising". The release of the applicant from prison had nothing to do with any such objective. The sole purpose of the release was to facilitate the deportation of the applicant.

44. Counsel for the applicant has informed the Court that he is willing to return to the jurisdiction to complete his sentence of which approximately two months remain unserved. It is not unsurprising that such submission was made in view of the application for an order of *certiorari* in respect of the temporary release order.

45. In my view, it would be inappropriate to quash that order thereby effectively directing the applicant, on his return to Ireland, to return to prison. The Court will however, make a declaration that the temporary release order was made for an unlawful purpose.

46. The Court will hear the parties as to what further hearing may now be required.