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2014 No: 094767/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Balogun's (Saheed) Application (Judicial Review) [2016] NIQB 41

IN THE MATTER OF AN APPLICATION BY SAHEED BALOGUN (ON HIS OWN BEHALF AND ON BEHALF OF CECILIA BALOGUN) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT MADE ON OR ABOUT 30 APRIL 2006

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND THE UNITED KINGDOM BORDER AGENCY MADE ON OR 21 JUNE 2013

AND IN THE MATTER OF A DECISION OF THE IMMIGRATION AND ASYLUM CHAMBER OF THE FIRST-TIER TRIBUNAL MADE ON OR ABOUT 17 JUNE 2014

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HORNER J

A. Introduction

[1] The applicant is Mr Saheed Balogun, a Nigerian national, who is married to a Northern Ireland resident, Cecilia Balogun ("CB"). She has dual nationality, holding both a British and Irish passport. The applicant seeks, inter alia, to judicially review the decision of 21 June 2013 to refuse him a European Economic Permanent Residence Card ("Visa") and to challenge the Immigration (European Economic Area) Regulations 2006's failure to make provision for EU citizens who had suffered from permanent incapacity and disability from childhood.

[2] This application for judicial review was opened on 12 May 2015 in what was to be a rolled up hearing, that is one which was to consider both:

(a) whether leave should be granted; and

(b) if so, whether the application for substantive relief should succeed.

[3] At the outset the respondent raised the issue of whether there was an alternative remedy open to the applicant which did not involve judicial review. The applicant and his legal advisors satisfied themselves that this was a genuine alternative remedy. It was agreed that such an alternative remedy should be pursued, although there was no guarantee that the applicant would be successful in obtaining a Visa going down that route. The application was then adjourned. That was in June 2015.

[4] The judicial review returned to this court on 16 February 2016 and was listed for hearing of the leave application on 11 April 2016, some 10 months having passed. It then became apparent that the alternative remedy which was open to the applicant had been closed because the applicant had failed to provide information and details about his income and outgoings, his relevant bank accounts and savings, if any, whether he had access to funds from third parties such as family and friends. No satisfactory explanation was offered for this failure. Mr Christopher Coyle BL for the applicant sought to persuade the court that they should hear the application for leave to apply for judicial review because the alternative remedy was not equivalent to a statutory appeal and that the applicant was entitled to have his case heard. Mrs Murnaghan QC for the respondent urged the court to refuse leave and dismiss the application because of the applicant's abject failure to co-operate with the authorities and to pursue in a bona fide manner the alternative remedy which was open to him.

B. Background Facts

[5] The applicant was born in Nigeria on 9 November 1976. In 2007 he arrived in Dublin to see his brother under a 3 month Visa. He stayed in the Republic of Ireland for a while before moving north, meeting his now wife, CB who was visiting Belfast where she received treatment for her epilepsy. The court was informed that CB was and is significantly disabled. She is and remains unfit for work. A relationship developed between the applicant and CB. Usually he visited her in Londonderry at the weekends. After the relationship grew stronger, he relocated permanently to Londonderry in February 2009 and began living together at 29 Rossdowney Road, Londonderry, a Northern Ireland Housing Executive property. They married on 24 February 2012. His application for a Visa was refused on 21 June 2013. This was the subject of legal proceedings before the Immigration and Asylum Chamber of the First-Tier Tribunal on or about 17 June 2014. These were resolved against the applicant. He did not appeal.

[6] CB receives benefits for her permanent debilitating health condition. The applicant remains unable to work and effectively acts as CB's full-time carer.

However, he is not eligible for a carer's attendance allowance because of his present legal status. Although the applicant had alleged CB had suffered a 50% reduction in her benefits because of their marriage, no satisfactory documentary evidence was adduced to support such a claim. Further the court was not provided with up to date documents vouching the income and expenditure of the applicant and CB.

[7] In this application the applicant complains, inter alia, about his failure to be given a Visa and with it his inability to work and/or to claim benefits. He claims that returning to Nigeria is not an option. Firstly, he is now married and could not leave CB. Secondly, if CB accompanied him, she would be unable to receive the medical treatment she deserves in Nigeria. Thirdly, he considers that their lives would be in danger.

[8] It is important to note that at the hearing before the Immigration Judge Fox at the First-Tier Tribunal, the judge made it clear that if removal directions had been set, then the applicant could have made an application to challenge that decision relying on Article 8 grounds. There is no suggestion that the applicant is at any risk at present of being sent back to Nigeria.

[9] Ms Emma Mooney, a Higher Executive Officer, in the European Casework Department within the Home Office, swore an affidavit on 13 March 2015. In that affidavit she set out at some length why the present application was misconceived. She stated that the applicant's attempt to claim that the 2006 Regulations and Article 7 of Directive 2004/38/EC constituted disability discrimination was bound to fail. The 2006 Regulations are not discriminatory per se given that the applicant's wife, or indeed any disabled person could be a "qualified person" for the purpose of the Regulations either by being self-sufficient, a student, by being in the category of certain people being unable to work, or by being a worker or self-employed person who had ceased activity. In any event it was pointed out that the applicant's wife could not benefit from the 2006 Regulations as Regulation 2 of those Regulations required that the "EEA" National is a national of an EEA State who is not also a British citizen: see the decision of the European Court of Justice in McCarthy v United Kingdom [2011] EU ECJ C-434/09. CB holds dual citizenship of the UK and the Republic of Ireland and therefore is not an EEA national for the purpose of the 2006 Regulations. However, Ms Mooney did go on to point out that there was an error in the decision which was made as it indicated that CB did not have a basis to stay in the UK when CB was in fact a British citizen. In any event the decision of the IAC in June 2014 superseded that earlier decision. Judge Fox noted that the applicant's own representative had conceded the point that the applicant's wife did not meet the requirements of the 2006 Regulations. It can be readily seen that a judicial review will be difficult, complex and is likely to consume considerable court time and resources.

[10] In July 2012 the Immigration Rules were changed. They introduced new requirements for those wishing to enter or remain in the United Kingdom on the basis of their relationship with a family member who is a British citizen or settled in

the United Kingdom. These requirements introduced a minimum income threshold for those sponsoring a non-EEA national partner or dependent child.

[11] Appendix FM to the Immigration Rules provides two routes under the Rules for someone who is in the applicant's position and who relies on family life as a partner when making an application to remain. There are financial requirements when making such an application for a Visa or when making a Leave to Remain application. There are exemptions and exceptions from the financial requirements. The applicant is in a position to make a Spousal Leave to Remain application and thus seek an exemption under Appendix FM. Indeed if all else fails the applicant can argue a case to stay based on exceptional circumstances. However, the applicant must pay an application fee before she can avail of these exceptions and/or exemptions. But the applicant, on the information available to the court, should be entitled to a fee waiver which would mean that he would be exempt from paying such a fee.

[12] To the intense disappointment of the court the matter was referred back to it in February of this year with the applicant looking to renew his application for judicial review. According to a letter of 1 October 2015 from the Home Office the application by the applicant for a fee waiver had not even been considered because of the failure on the part of the applicant to provide the necessary information to allow an adjudication to take place. Inter alia, the applicant had failed to provide details showing his income and expenditure, he had failed to provide details of the benefits paid to his wife, there was an absence of any letters from family, friends, organisations detailing what support, if any was available to the applicant and CB and there was an absence of any evidence as to what bank accounts the applicant might have.

[13] In the circumstances because the applicant's application for a fee waiver could not be considered, the court does not know if an alternative remedy is available to the applicant. Effectively, the applicant appears to have sabotaged the process. As I have said, no satisfactory explanation has been given to the court for the applicant's failure to provide the necessary information to allow the authorities to make a ruling. I have no doubt that any individual being responsible for his own costs, as opposed to one who is supported by the legal aid fund, would have ensured that the form was completed accurately so as to permit the application for a fee waiver to be considered. It may be thought, given the pressure on public funding, that it cannot ever be a good use of public funds to support an applicant whose application for judicial review has only become necessary because he has refused to provide some basic information which might permit him to avail of an alternative, equally efficacious, remedy.

[14] In the circumstances, the issue is therefore whether there is an alternative remedy open to the applicant which is equally effective. To date the evidence before the court is that the alternative route will provide an equally effective outcome, namely the granting of a Visa, if the application is successful.

Alternative Remedy

[15] The text books and legal authorities all talk of judicial review being a remedy of last resort. This is reinforced by Order 1 Rule 1(1)(A) which sets out how the court should deal with litigation justly. That includes, where necessary, saving expense and dealing with a case in ways which are proportionate.

[16] In Re Ballyedmond Castle Farms Limited's Application [2000] NI 174 at 178 Carswell LCJ giving judgment for the Court of Appeal said:

> "It tends to be assumed that an applicant's failure to resort to an alternative remedy open to him will almost inevitably result in the rejection of an application for judicial review. On examination, however, it may be found that the principles governing the exercise of the court's discretion are less rigid and draconian and that a degree of flexibility exists which allows the court to take into account a number of factors in its decision.
>
> The traditional rule is that although the court may retain its jurisdiction to grant an application for judicial review, where a statutory machinery or other alternative remedy is available the alternative should be pursued, save in exceptional circumstances."

It is clear that the fact that a statutory appeal, as here, is not available, is not the end of the matter. Carswell LCJ specifically referred to "statutory machinery **or other effective remedy**" (emphasis added). The issue is whether there is an alternative remedy, and whether that remedy will produce a remedy which is satisfactory for the applicant. It all depends on the circumstances.

[17] In R v Minister of Agriculture, Fisheries and Food ex parte Live Sheep Traders Ltd [1995] COD 297 the court said:

> "It is a cardinal principle that, save in the most exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies are available and have not been used."

[18] This line of authority found favour in the House of Lords in Kay v Lambeth Borough Council [2006] 2 AC 465 at [35] where Lord Bingham said:

> "… the principle is that if other means of redress are conveniently and effectively available to a party they

> ought ordinarily to be used before resort to judicial review."

[19] The applicant is in no danger of being deported, and as he has an alternative route open to him to apply for and obtain a Visa. His attempt to sabotage his application for a fee waiver is a matter which does not reflect well upon him. It is my view that it is normally of paramount importance to avoid litigation in a situation such as the instant one, if this can be done without visiting an injustice on the party who is affected. I have no doubt that the position here is that it is in the interests of justice and in accordance with the overriding objective as set out in Order 1 Rule 1A that the applicant make a proper application to waive his fee and provide all the necessary information so that he can seek to avail of the possible alternative routes open to him to obtain a Visa. The alternative, namely a full scale judicial review in the circumstances which presently exist, is not in the interests of justice, nor in accordance with Order 1 Rule 1A

Conclusion

[20] Judicial review is and should ordinarily be a last resort. The applicant here has an alternative remedy available to him to obtain a Visa, but he has chosen to close that avenue himself by refusing to provide the necessary information that might enable him to obtain a fee waiver. There are two options open to the court. It can adjourn this application or it can dismiss it. I require counsel to address me as to which is in the interests of justice. Regardless of which course I take, this judgment should be brought to the attention of the Legal Aid Authorities.