Neutral Citation No.: [2008] NIQB 119

Ref : **McCL7293**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **21/10/08**

O8/103341/01

_____

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

AN APPLICATION FOR JUDICIAL REVIEW BY
ELENA KOTRAYENKO
[NO. 2]

_____

McCLOSKEY J

[1] I refer to paragraphs [1] – [2] of my judgment in the other, inter-related judicial review application brought by this Applicant. In the present application, the proposed Respondent is, once again, the Secretary of State for the Home Department.

[2] The Applicant being a litigant in person, it is unsurprising that the formal documents before the court do not identify with clarity the nature of her challenge. However, following some probing, this became clear as the hearing progressed. Paragraph 2 of the Order 53 Statement recites:

> "*The relief sought is … an Order of Mandamus requiring the Secretary of State to withdraw the statement made in point (ii) of the Decision as unlawful, ultra vires and of no force or effect*".

The Applicant confirmed that the words "*the Decision*" refer to a letter dated 17th September 2008 from the Crown Solicitor's Office, written on behalf of the Respondent. This letter states:

> "*I refer to the above matter and would advise as follows:*
>
> *(i) UK Borders and Immigration Agency do not, as a matter of law, consider you to be Ukrainian, but*

> *(ii) UK Borders and Immigration Agency have reason to believe that, if an application was made, you would be granted Ukrainian citizenship on grounds of your birth in the territory of Ukraine*".

[3] In reply to a question from the court, the Applicant confirmed unequivocally that her case is that paragraph (ii) of the aforementioned letter is an unlawful statement, which the Respondent should withdraw. The Applicant submitted that the second of the statements contained in this letter (a) has the character of a "*decision*" and (b) is an unlawful decision. The Applicant seeks an Order of Mandamus accordingly. No other form of relief is requested. The Applicant advanced the case that the offending statement infringes (without particulars) the European Convention on Human Rights and Fundamental Freedoms, Article 18 of the European Convention on Nationality, British Law and Ukrainian law. The materials which the Applicant invited the court to consider in support of these contentions are contained in pp. 29-44 of the bundle submitted by her.

[4] The context in which the letter from the Crown Solicitor's Office was written is informed by consideration of a "Notice of Decision" issued by the Respondent, dated 9th March 2004. This document is entitled "*Decision to Remove an Illegal Entrant/Other Immigration Offender or a Family Member of such a Person*". It recites that on the same date the Applicant was served with Form IS151A "*… informing you of your immigration status and your liability to detention and removal*" and it continues:

> "*As a consequence, a decision has been taken to remove you from the United Kingdom. You are entitled to appeal to the independent appellate authorities against this decision on one or more of the following grounds …*
>
> ***Removal Directions –*** *Directions will be given for your removal from the United Kingdom to Ukraine*".

It was confirmed to me by counsel for the Respondent (Mr. McGleenan) that no removal directions have been made in respect of the Applicant at any time.

[5] It is averred in paragraph 10 of the Applicant's affidavit that she entered the United Kingdom from the Republic of Ireland on 7th May 2002. She further deposes that on 9th May 2008, she was interviewed by a representative of the Belfast Enforcement and Compliance Unit (Border and Immigration Agency), an authority which operates under the superintendence of the proposed Respondent. This is confirmed by a letter dated 6th May 2008 from the Agency, an exhibit to her affidavit. This letter states:

> "*If you are unable to produce evidence that leave to enter* [the United Kingdom] *was lawfully obtained your case may be referred to an Immigration Officer who may serve you notice that*

> *you are an illegal entrant as defined in Section 33(1) of the Immigration Act 1971*".

This statement suggests that reliance is not currently being placed by the Respondent on Form IS151A, dated 9th March 2004 and the corresponding "Notice of Decision" [Form IS151A, Part 2 – *supra*]. The interview on 9th May 2008 seems to have been arranged to consider also the completed Form IS33, which is entitled "Application for an Emergency Travel Document" and relates to the Applicant. I was informed by Mr. McGleenan, in terms, that there has been effectively a moratorium in the Applicant's case, having regard to the various legal challenges mounted by the Applicant and her husband (Mr. Fedorovski).

[6] The offending Statement in the Crown Solicitor's letter dated 17th September 2008 must also be considered in conjunction with paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971. Paragraph 8 concerns directions which may be given by an Immigration Officer to the owners or agents of a ship or aircraft. It provides, in material part:

> "*(1) Where a person arriving in the United Kingdom is refused leave to enter, an Immigration Officer may, subject to subparagraph (2) below, - …*
>
> > *(c) give those owners or agents … directions requiring them to make arrangements for his removal from the United Kingdom in any ship or aircraft specified or indicated in the direction to a country or territory so specified being either –*
> >
> > *(i) a country of which he is a national or citizen; or*
> >
> > *(ii) a country or territory in which he has obtained a passport or other document of identity; or*
> >
> > *(iii) a country or territory in which he embarked for the United Kingdom;* ***or***
> >
> > ***(iv) a country or territory to which there is reason to believe that he will be admitted***".

[Emphasis added].

It was confirmed to me by Mr. McGleenan that paragraph 8(1)(c)(iv) *could* become operative in the Applicant's case in the event of removal directions being made. It is not difficult to identify a nexus between this statutory provision and paragraph (ii) of the letter dated 17th September 2008 from the Crown Solicitor's Office.

[7] I consider that the offending statement in the letter dated 17th September 2008 from the Crown Solicitor's Office falls to be analysed in two ways. Firstly, it is a

statement on behalf of the Respondent giving expression to a belief held by the Respondent. This belief is to the effect that if the Applicant were to apply for Ukrainian citizenship, she would succeed. This, in my view, is an entirely unexceptional and innocuous statement. While questionable whether it should be subjected to scrutiny by the barometer of legality, I am satisfied that the offending statement is lawful, as it does not infringe any statutory or other legal requirement.

[8] The analysis in the immediately preceding paragraph is inextricably linked to a second and further assessment of the offending statement. The judicial review jurisdiction of the High Court exists to supervise acts, decisions and determinations of, *inter alia,* public authorities. However, it is not every act or decision or determination of a public authority which is vulnerable to challenge, and review, in this way. Rather, as a general rule, the High Court will supervise only those acts, decisions and determinations of public authorities which have legal effects and consequences. This general principle is captured in the following passage in ***Administrative Law*** (Wade and Forsyth, 9th Edition, p. 611):

> "*It cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision …*
>
> *As the law has developed certiorari and prohibition have become general remedies which may be granted in respect of* ***any decisive exercise of discretion by an authority having public functions,*** *whether individual or collective …*
>
> ***[P. 612]*** *They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is* ***a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affects rights itself*** ".

[Emphasis added].

The requirement that the impugned act or decision or determination of the public authority concerned must have legal effects or consequences is illustrated in ***Regina –v- Independent Television Commission, ex parte TSW Broadcasting Limited*** [1994] 2 LRC 414 (per Lord Goff especially) and, in this jurisdiction in ***Re Kinnegar Residents Action Group and Others' Application*** [2007] NIJB 90, at paragraphs [24] and [25] especially.

[9] I am satisfied that the offending statement in the letter does not have the character of an act or determination or decision on the part of the Respondent having legal effects or consequences. Nor does it constitute, in the language of Wade and Forsyth, "*a prescribed step in a statutory process which leads to a decision affecting rights*". Rather, it falls to be analysed and evaluated in the manner set out in paragraph [7] above.

[10] The offending statement may, or may not, prove to be correct. However, the fundamental question for this court is whether it is appropriate to view this statement through the prism of legality. I conclude without hesitation that it is not. The High Court does not exist to exercise a supervisory jurisdiction over material of this kind. If I am wrong in this conclusion, I hold, in the alternative, that there is nothing unlawful about the offending statement. It does not infringe any of the domestic laws on which the Applicant relies. Insofar as the Applicant contends that it infringes Ukrainian law, this court is not competent to adjudicate on an issue of this kind: see ***Re Federovski's Application*** [2007] NIJB 119, per McLaughlin J, paragraph [16]. Insofar as the Applicant contends that the offending statement infringes the European Convention on Nationality and Article 18 in particular, I hold that this is an instrument of international law which does not confer on the Applicant any right enforceable in domestic law. I hold in any event that the offending statement does not infringe Article 18 of the Convention. Finally, I hold that there is no breach of any Convention right enjoyed by the Applicant under the Human Rights Act 1998.

[11] While the Applicant's case was considered by the Court on previous occasions, leave to apply for judicial review was not granted. The court conducted a very full inter-partes hearing (on 16th October 2008). During this hearing the Applicant confirmed that she did not wish to present any further evidence to the court. If this had proceeded as a more conventional leave hearing, the court would probably have declined to grant leave to apply for judicial review. However, in the particular circumstances, I grant leave to apply for judicial review and, having concluded that the Applicant's challenge is without foundation for the reasons explained above, I dismiss the application.

[12] The issue of costs will be determined when I have considered the further submissions of the parties.