S35

Supreme Court of Ireland Decisions

URL: *http://www.bailii.org/ie/cases/IESC/2017/S35.html*
Cite as: [2017] IESC 35

Judgment

Title:	N.V.H -v- Minister for Justice & Equality and ors
Neutral Citation:	[2017] IESC 35
Supreme Court Record Number:	31 & 56/2016
Court of Appeal Record Number:	2015 263
Date of Delivery:	30/05/2017
Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., Clarke J., MacMenamin J., Laffoy J., Charleton J., O'Malley Iseult J.
Judgment by:	O'Donnell Donal J.
Status:	Approved
Result:	Other

SUPREME COURT

Denham C.J.
O'Donnell J.
Clarke J.
MacMenamin J.
Laffoy J.
Charleton J.
O'Malley J.

Supreme Court No.: 31 & 56/2016

BETWEEN:

N.V.H.

Applicant/Appellant

AND

Minister for Justice and Equality

Respondent/Respondent

AND

The Attorney General

The Irish Human Rights and Equality Commission

Notice Parties

Judgment of O'Donnell J. delivered the 30th of May 2017

1 Section 9 of the Refugee Act 1996 provided that a person seeking asylum is entitled to enter the State and remain here while the application for refugee status is processed. Section 9(4) also provided however, *inter alia*, that an applicant shall not seek or enter employment before final determination of his or her application for a declaration. Pending the determination of an application for refugee status, applicants are required to live in State provided accommodation known as Direct Provision, and provided in addition with an allowance of €19 per week. These are the central legal provisions giving rise to the legal issue in this case.

2 The appellant in this case, is a native of Burma who arrived in the State on the 16th July, 2008, and applied for refugee status on the following day. His application was refused at first instance and on appeal by the Refugee Appeals Tribunal in 2009. That decision was challenged and quashed on judicial review in July 2013. Thereafter the applicant was obliged to re-enter the process, and commenced an application afresh. This resulted in a further refusal which was upheld by the Refugee Appeals Tribunal in November 2013. That decision was however quashed on consent in February 2014, and accordingly the process was required to be recommenced. At that point, the appellant had been in Direct Provision for almost six years and faced a further significant delay before his application was finalised. Even then, in the event that his application was unsuccessful, he could have applied for subsidiary protection which, it was anticipated, could take a number of years.

3 Since his arrival in the State, the appellant has been living in Direct Provision in County Monaghan. In May 2013, he was offered employment in the Direct Provision facility. He is, or at least appears to be, precluded from taking up that offer of employment from the provisions of s.9(4). He had applied to the Minister for Justice for permission to take up the offer of employment. The Minister refused on the grounds that such employment was precluded by s.9(4). Accordingly, the appellant commenced these proceedings seeking to challenge that interpretation of s.9(4) and/or to seek a declaration of the incompatibility of s.9(4) with the Charter of the European Union, the European Convention on Human Rights, and the Constitution. His claim was dismissed by the High Court (McDermott J.) in a careful judgment. The Court of Appeal by a majority, (Ryan P., Finlay Geoghegan J.; Hogan J. dissenting) upheld that decision notwithstanding the considerable sympathy the Court expressed for the plight of the appellant. Hogan J. dismissed the claims in EU law and in relation to the European Convention on Human Rights, but dissented in this regard, that he would have found that the appellant, although a non-citizen, was entitled to rely on the unenumerated right to work protected by Article 40.3 of the Constitution. Hogan J. ruled that whilst the

State had very considerable latitude in this regard, the blanket ban on employment contained in s.9(4) was disproportionate to any legitimate State interest, and accordingly invalid. Since the commencement of these proceedings, the 1996 Act, including s.9(4) has been repealed by s.6 of the International Protection Act 2015 subject to certain transitory provisions contained in Part 11 of that Act, which continued the application of the 1996 Act to certain cases in being. However s.16(3)(b) of the 2015 Act contains an almost identical prohibition on applicants from seeking or entering employment or being employed or otherwise engaged in any gainful work or occupation. Although therefore the precise regime applicable to the applicant may require to be clarified, it is clear that the entry into force of the 2015 Act does not of itself render these proceedings moot or require any further or different analysis. Possible mootness does arise however in a different context.

Preliminary Issue: Mootness

4 This Court granted leave to appeal on the 27th April, 2016. In the period between that decision and the hearing however, the appellant was granted refugee status, and the State respondent now contends that the appeal is moot.

5 Insomuch as the proceedings challenge the decision of the Minister not to permit the appellant to work, the proceedings are indeed substantially moot. The objective of the judicial review proceedings was to quash the alleged decision of the Minister refusing permission, and therefore permit the appellant to have the opportunity to work notwithstanding his position as a person seeking refugee status. As of the date of hearing in this Court, the appellant now has refugee status, and is no longer an asylum seeker. He is therefore free to work. It follows that no benefit would be obtained by quashing the ministerial decision, if such was made. Furthermore, the appellant is no longer affected by the provisions of s.9(4) and its removal would not afford him any practical benefit. Indeed, and in practical terms, the applicant is now better positioned than if the proceedings had succeeded since even success in the proceedings might not have provided the applicant with the full entitlement to work which he now has.

6 However, I have come to the conclusion that the Court should proceed to hear and determine this appeal. First the claim is in substance a constitutional challenge to s.9(4) and that claim is not necessarily moot. A person affected by the operation of a statute which he or she contends is unconstitutional, may be entitled to maintain the claim even if the statute is no longer being applied to them. They have been affected by the operation of a provision which they contend is unconstitutional, and in the normal course are entitled to have that issue determined, and if successful to have the treatment declared unlawful, and if necessary the provision declared unconstitutional. Furthermore, the potential mootness arose after this Court had granted leave to appeal. The grant of leave to appeal to this Court establishes that there is a point of law of general public importance arising here. Accordingly a question mark at best exists over the operation of the provision of s.9(4), and that is a factor (although not a determinative one in every case) that weighs in favour of hearing and determining the case and resolving the legal issue one way or another. Also, this case is plainly a test case supported as it is by the Irish Human Rights and Equality Commission, and therefore, the circumstances will recur. It is probably desirable that it should be dealt with now rather that to wait for another case to make its way through the legal system. The legal issues raised are matters of law, and will gain nothing from being raised in the context of new facts in a different case. For this combination of reasons, I consider the case should be heard and determined.

7 There is a related issue. Counsel for the respondent suggests that the facts of the situation on which this case arose, were highly unusual and indeed exceptional. It was said, correctly no doubt, that the length of time the Applicant had been precluded by s.9(4) from working was a consequence of delays in the decision making process (and

review of that process) in relation to his application for refugee status. That was exceptional. It was wrong to judge the overall system (and by extension s.9(4)) in the context of facts which were extreme). Most cases she suggested were dealt with within a reasonable time, and it was certainly unusual to have two decisions quashed by judicial review. However, the rule that to have locus standi to challenge a provision a person must be directly affected by it, has as its corollary, the fact that if one individual is adversely affected by a provision then they are entitled to challenge it and if correct have it declared invalid, even though the circumstances are unusual and exceptional, and that the Act in question may otherwise operate in an entirely satisfactory and constitutional manner. This does however raise a broader issue in relation to *locus standi*. This matter was not focused on in the hearing, and accordingly was not the subject of any evidence or submission, and there was no evidence in relation to the job offer, and it was treated as almost a formal proof which was required to be established but not investigated. In any event, I do not think it was in fact necessary to show that the applicant had a job offer in order to establish standing to challenge s.9(4). The appellant was plainly affected by s.9(4) in that he wished to seek employment, and s.9(4) clearly inhibited and on its face, prevented that. If however an offer of employment was a necessary proof in order to establish *locus standi*, then I would have considered it necessary to address the question whether it is permissible to seek to create circumstances which will create standing. In other countries, where constitutional litigation is seen as a route to advance essentially policy objectives, it is considered entirely permissible to seek out persons with particular characteristics and experience to act as a nominal plaintiff to allow legal arguments to be made. It may well be that the same conclusion might be reached in this jurisdiction, whether for reasons of principle or pragmatism, but it is perhaps an issue which may require to be considered. However, since for the reasons set out it does not arise in any event here, I do not consider it necessary to address it further. I should make it clear that no question arises, or is being raised, in relation to the employment offer in this case.

8 This matter was argued quite elaborately and there are already three admirable judgments in the courts below. It will accordingly be possible, and I hope with no discourtesy intended, to deal with the non-constitutional arguments reasonably shortly. First, it was argued that s.9(4) was not an absolute bar to employment. Section 9(11) it was argued, made it clear that s.9(4) only applied to applicants who "but for the provisions of this section would not be entitled to enter or remain in the State". This recognises the possibility that an asylum seeker may have a separate and distinct permission to be in the State. If so the prohibition on working under s.9(4) will not apply, since presence in the State is not solely dependent on the application for asylum. Most obviously, s.4 of the Immigration Act accorded to immigration officers a wide discretion to permit a person to enter the State on certain terms, and accordingly if granted such a person may be permitted to work notwithstanding their application for asylum and the provisions of s.9(4). The applicant relies by analogy on the so called Irish Born Child Scheme IBC/05 which was an administrative scheme which granted an entitlement to remain in the State to parents of children born in Ireland. The legal basis for this was the discretion under s.4 of the Immigration Act 2004. Accordingly, it was argued that there was a general discretion on the part of the Minister to permit entry or leave to remain even if that discretion would be exercised sparingly and only in exceptional circumstances. If so the Minister was wrong to consider that she was absolutely precluded by s.9(4) and therefore on that narrow ground the ministerial provision should be quashed.

9 I agree with the reasoning of those judgments which considered this argument and determined that it could not be accepted. Section 9(11) contemplated a situation where a person is lawfully present in Ireland and becomes a refugee *sur place* because of events in their own country. Such a person does not lose the entitlement to work by applying for refugee status. Similarly the operation of European law may grant a person an entitlement to remain in Ireland and if so, s.9(4) did not apply to preclude such a

person from working because the section applied where the *only* basis upon which they were in the country was their application for asylum status. However I cannot agree that s.4 of the Immigration Act 2004 can be utilised in the present circumstances to grant an applicant permission to remain in the State, and to work, thus circumventing s.9(4). The Irish Born Child Scheme operates because circumstances are recognised creating a legitimate claim to remain the State, which is separate and independent of any asylum application for refugee status. Here however, the appellant would only be seeking permission under s.4, and permission would only be granted, for the purpose of circumventing s.9(4). It would in my view be an improper use of the power, and therefore outside the lawful scope of s.4 of the Immigration Act, if it was used to defeat the words and clear statutory intent of s.9(4) of the Refugee Act 1996. If it were to be held that the Minister could (and arguably should) establish a scheme for the grant of leave (and a concomitant right to work) to applicants who had been in the asylum system for more than some defined period of time, that would be to impermissibly amend the statute by administrative decision.

10 Nor do I think that any inherent executive power could avail the appellant here. The control of entry to the State by non-citizens, and the range of activities in which they can engage while here, was as a matter of history, a core function of the executive power. The question as to what extent that executive power can remain if legislation seeks to control the area is an interesting one rarely debated. But even if there remains a residual executive discretion after legislative regulation, it could not be operated to effect the repeal or amendment of a section of legislation which explicitly provided that an asylum seeker should not seek to or obtain employment while in the refugee system. It was after all decided as long ago as 1610 in the *Case of Proclamations* (1610) 12 Co. Rep. 74, that the royal prerogative did not extend to repealing or overriding any legislation, and the same must be capable of being said, *a fortiori*, of the executive power in a constitution which recognises a separation of powers. Finally, for the reasons addressed in the judgments of both McDermott and Hogan JJ., I agree that no issue can arise under the Charter or indeed the European Convention of Human Rights. Accordingly, it is necessary to consider the constitutional arguments made. These arguments raise some important and difficult questions of constitutional law: may a non-citizen, and in particular an asylum seeker without any other connection to the State, rely on any right guaranteed by the Constitution of Ireland, and if so the unenumerated constitutional right to work? If so what is the nature of the right to work guaranteed by the Constitution? If a non-citizen may invoke such a right, what is the nature and extent of the right which must be accorded to a non-citizen and in particular asylum seeker with no other connection to, or claim to remain in the State?

11 As Hogan J. observed, the question of the right of non-citizens to rely on the provisions of the Irish Constitution was raised and debated more than 60 years ago in the important case of *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, but was not resolved there, and has not been resolved since. The position has emerged, whereby non-citizens have been permitted to rely on some rights, but found to be precluded from relying on others which are plainly closely connected to concepts of citizenship and loyalty to the State, such as voting. However, no comprehensive theory has been advanced or accepted and the case law has proceeded on an ad hoc basis. Certainly the problem cannot be resolved solely by consideration of the constitutional text since it is difficult to perceive any consistent pattern of the use of the words ‘citizen’ or ‘person’ in the language of the Constitution. I do not accept however that it is merely for this Court to announce a conclusion on this issue by judicial fiat, or indeed to reach the same result *sub silentio* and without explanation. The outcome, and the reasons for it, must be justified by reference to the Constitution, both in what it says, and implies. Since however this matter was not argued in detail in this case, I merely repeat the suggestion made in *Nottinghamshire County Council v. KB* [2013] 4 I.R. 662 that Article 40.1 may provide a useful insight and approach to this question. For present purposes, I would be prepared to hold that the obligation to hold persons equal before the law “as

human persons" means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status. In principle therefore I consider that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by Article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person. However, it is necessary to consider first what exactly is guaranteed by that right to citizens; second whether the essence of the guarantee relates to the essence of human personality and thus must be accorded to some or all non-citizens who in that regard are entitled to be held equal before the law; third, whether even so a justifiable distinction may be made under Article 40.1 between citizens and lawful residents, and non-citizens and in particular asylum seekers: and finally, whether if any such distinction can be made, such differentiation may extend to encompass the complete ban on employment of asylum seekers contained in s.9(4).

The Right to Work

12 As Hogan J. observed, there is a relatively impressive line of authority recognising that the Constitution Article 40.3, at least, guarantees what has been described as a right to work. That was established in cases such *as Landers v. The Attorney General* (1975) 109 I.L.T.R. 1, *Murtagh Properties v. Cleary* [1972] I.R. 330, *Murphy v. Stewart* [1973] I.R. 97 and *Cafolla v. O'Malley* [1985] 1 I.R. 486. I share however Hogan J.'s view that if the right was not so well established, I would have wished to consider afresh whether such a right was one of the unenumerated rights protected by Article 40.3 and in any event if it could be accurately described as an enforceable right to work. Most of the relevant case law comes from an era when unenumerated rights were discovered if not declared, almost on the basis of propositions with which no one could disagree. However, a socio-economic right is of quite a different order to the personal rights which are explicitly guaranteed by the text. It certainly seems unlikely that the drafters of the Constitution would have set out a right to work in a bald form without considerable explanation and elaboration, and perhaps limitation. This is even clearer since after *Meskell v. CIÉ* [1973] I.R. 121 (a case itself decided in employment context), it appears that the Constitution provides for horizontal enforcement between individuals, albeit without much discussion of the theoretical justification for this development. If there was some general and unspecified right to work, it would arguably be engaged if not infringed, when an economy did not provide for full employment, when a person who was in employment was dismissed or, when someone was precluded from working because of a strike. I find it difficult to believe for example that the Constitution imposes on the Government an obligation (presumably enforceable by action in court) to pursue policies directed towards full employment, as was suggested in some of the international material submitted on behalf of the appellant. It is easier I think to conceive of any constitutional protected interest as a freedom, and in this case, freedom to seek work which however implies a negative obligation not to prevent the person from seeking or obtaining employment, at least without substantial justification.

13 It is interesting that that is how the interest protected is referred to in for example the EU Charter of Fundamental Rights. Thus Article 15 of the Charter is included in the section on freedoms and is headed "Freedom to choose an occupation and right to engage in work", Article 15 provides:

> "1 Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

> 2 Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State."

Similarly we were referred to a commentary by the UN Committee on Economic Social and Cultural Rights on International Covenant on Economic and Social Rights which referred to the right as the "right to be able to work" or the "right not to be deprived of work unfairly". That no doubt is why the right has so rarely moved beyond the sphere of the rhetorical: it is rare for a person to be precluded by law from seeking employment. However it does arguably arise here. Section 9(4) is a blanket prohibition on employment. Indeed asylum seekers are prohibited from even seeking employment. If this provision were applied to a citizen, it would be difficult if not impossible to justify. It becomes important therefore to consider if an asylum seeker may rely on that right, and if so with or without restriction. This involves on my analysis, a consideration of the nature of the right guaranteed to Irish citizens, in order to consider whether to deny any protection to the applicant would be to fail to treat him equally as a human person. This involves a consideration of whether the right is in essence social, and tied to the civil society in which citizens live, in the way that it might be said that voting is limited by belonging to the relevant society, or whether the right protects something that goes to the essence of human personality so that to deny it to persons would be to fail to recognise their essential equality as human persons mandated by Article 40.1.

14 This is undoubtedly a difficult issue. The area of employment within the State is one area where the State may, and probably all states have, made very clear distinctions between citizens and permitted residents and non-citizens. As Finlay Geoghegan J. points out, it was always a core part of the executive function not merely to control access to the State, but also to regulate the activities of non-citizens while here. In general no non-citizen has any right to come here seeking employment, any more than an Irish citizen can go elsewhere and demand the right to be entitled to commence business or seek employment. Clearly the position is different in relation to citizens of the European Union, and other countries with who Ireland may have specific agreements, but the basic position in both national and international law, is that in the absence of any agreement, the State may limit, and indeed refuse entry to its territory, may limit activities on its territory, and most importantly can regulate, and indeed prohibit the taking up of employment. It may be said therefore that the right to work is very much linked to the economy, and the society, to which the individual is attached. To that extent any right to work guaranteed by the Constitution could be argued to be capable of being enjoyed only by citizens or perhaps those with some established connection to the State.

15 As already observed there is much rhetoric, some of it overblown, attaching to the idea of the freedom to work, and the lack of specificity of the unenumerated right held to be guaranteed by Article 40.3, only adds to the problem of analysis. Much work is drudgery, often the subject of complaint rather than celebration, and most often an economic necessity as a means to live a chosen life rather than an end in itself. However even approaching the matter with a healthy dose of scepticism, it must be recognised that work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote. It can be said of the Constitution, if anything more aptly than of the European Convention on Human Rights that in its fundamental rights provisions, it is intended to permit, and perhaps encourage, without outside interference, the development of the human personality in his or her relations with other persons: *Botta v. Italy* (1998) 26 EHRR 241 at p.256. Set on a foundation of the essential equality of the human person, the Constitution guarantees first life and then personal liberty, and freedoms radiating outwards from that: freedom of thought and conscience, freedom of expression, freedom to associate with others, family rights and

the right to acquire, hold and transfer property among others.

16 The appellant cites an extract from the UN Committee on Economic Social and Cultural Rights which encapsulates the idea that a right to work, or at least to be allowed to work is closely connected to those rights specifically enumerated and protected:

> "The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his /her development and recognition within the community."(General Comment No.18 on the Right to Work, adopted on 24th November 2005, at para.l)

It is not necessary to endorse every aspect of this to recognise that the thinking is broadly consistent with that which was the background to the Constitution.

17 Accordingly I have concluded that a right to work at least in the sense of a freedom to work or seek employment is a part of the human personality and accordingly the Article 40.1 requirement that individuals as human persons are required be held equal before the law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens. However that raises the question as to whether in so doing, legitimate distinctions may be made between citizens and non-citizens, and in particular those whose only connection to the State is that they have made an application for asylum status which has not yet been determined. In my view, it is plain that the differences between citizens and such non-citizen applicants are clear and would in particular justify significant distinction in the field of employment, largely for those reasons of the connection of the labour market to the economy of the State which are discussed in the judgment of Finlay Geoghegan J. Accordingly this Court must face a particularly difficult question as to whether the extent of such difference justifies the statutory distinction made in this case. That task is more complex again because the question of both the State's employment market and the control of entry to the State are matters consigned to the other branches of government and the Court must give considerable latitude to those legislative, and (where appropriate) executive, judgements.

18 There are a number of legitimate considerations justifying a distinction between citizens and non-citizens who are asylum seekers and in particular permitting a policy of restriction on employment. First, the State is entitled to take account that the number of successful asylum seekers is a small minority of those who apply for that status. The State has argued that if there was a capacity to work, that would create a strong "pull factor" for potential applicants. On one previous occasion when there had been a limited period during which applicants had been entitled to seek employment, there had been a significant upsurge in applications for asylum. This is precisely the type of judgement which the Government and Oireachtas are required to make, and it is a judgement which courts should be extremely slow to second guess, even by reference to a proportionality standard. Given the limited basis upon which an asylum seeker is entitled to be present in the country, it is also legitimate to seek to maintain the situation in some form of status quo so that if the application is determined adversely to the applicant, that no development has occurred which makes it more difficult to remove the unsuccessful applicant from the State. Even if some employment is permitted after some time, it does not follow that any employment should be permitted: it may be legitimate to limit that to defined areas of the economy, perhaps where there is a demonstrated need.

19 However, s.9(4) does not merely limit the right severely: it removes it altogether. If there is no limitation on the time during which an application must be processed, then s.9(4) could amount to an absolute prohibition on employment, no matter how long a person was within the system. Of course it is correctly observed that part of the difficulty here lies within the considerable time which has elapsed within the system for the determination of the application in this case. It may be the case that if there was a legal or practical limitation upon the amount of time during which an application for asylum status could be processed, then a provision in terms of s.9(4) itself unlimited as to its time span, could be permissible. However, there is no such limitation on the length of time the asylum process can take. That must then be taken as the background against which s.9(4) is to be assessed. I cannot accept that if a right is in principle available, that it is an appropriate and permissible differentiation between citizens and non-citizens, and in particular between citizens and asylum seekers, to remove the right for all time from asylum seekers.

20 In this case the applicant was in the system for more than eight years, and during that time was prohibited from seeking employment. In my view, the point has been reached when it cannot be said that the legitimate differences between an asylum seeker and a citizen can continue to justify the exclusion of an asylum seeker from the possibility of employment. The damage to the individual's self worth, and sense of themselves, is exactly the damage which the constitutional right seeks to guard against. The affidavit evidence of depression, frustration and lack of self-belief bears that out.

21 Accordingly, in principle I would be prepared to hold that in circumstances where there is no temporal limit on the asylum process, then the absolute prohibition on seeking of employment contained in s.9(4) (and re-enacted in s.16(3)(b) of the 2015 Act) is contrary to the constitutional right to seek employment. However, since this situation arises because of the intersection of a number of statutory provisions, and could arguably be met by alteration of some one or other of them, and since that is first and foremost a matter for executive and legislative judgement, I would adjourn consideration of the order the Court should make for a period of six months and invite the parties to make submissions on the form of the order in the light of circumstances then obtaining.