

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2020 No. 21 J.R.]**

**BETWEEN**

**SAILENDRA BASNET**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on 10th February, 2020**

1. The applicant entered the jurisdiction from Nepal on 13th September, 2013 on a student permission which was renewed until 31st October, 2017. He sought renewal of that permission on 18th March, 2018 although counsel informed me that it is believed that this was not positively refused. On 19th July, 2019 the Minister wrote to the applicant informing him of an intention to make a deportation order. Submissions resisting that were made on 3rd August, 2019, and on 2nd October, 2019 a deportation order was sent to the applicant, that required him to leave the State or failing that, to present on 13th November, 2019. I am informed that he did not present on that date, but instead showed up himself on another day, apparently with his solicitor. He was then given a further presentation date of 14th January, 2020. There was some confusion about whether he showed up in December or November, but it seems to be accepted that the most likely date was 14th November, 2019.
2. On Tuesday 14th January, 2020 the required time of presentation was 10.00 a.m. The applicant did not so present, but instead his lawyers applied to Barrett J. at 11.00 a.m. for a stay which they obtained in unusually wide terms for the *ex parte* context, staying any enforcement of the deportation order (not simply removal from the State), for a period until the determination of the proceedings (as opposed to for a limited period such as the next mention date or even until the determination of the leave application). The leave application was adjourned to the following Monday. The State was not put on even informal notice of the intention to seek a stay. Also, it seems to have been sought at the very last minute. It is not particularly clear why such informal notice could not have been given. Counsel was not aware of the non-presentation at 10.00 a.m. that morning, so the court was not so informed, and nor indeed was counsel aware of the previous non-presentation in November, which the court wasn't informed of either.
3. When the matter was next listed on Monday 20th January, 2020, counsel for the applicant was unavailable, so the matter was adjourned for one week. On Monday 27th January, 2020 counsel was not present for the first or second calling so the matter was again adjourned for another week. On Tuesday 28th January, 2020, counsel for the applicant mentioned the matter specially, and I directed that the application be listed on 10th February, 2020, on notice to the respondent, and gave liberty to the applicant to put in further evidence on the question of extension of time. The Chief State Solicitor's Office was not, however, actually informed of the stay until 10th February, 2020.

4. What is now before the court is (a) the applicant's application for an extension of time, for leave and for an order that the stay be left in place, and (b) the respondent's application to discharge the stay. I have received helpful submissions from Mr. Shane Kiely B.L. for the applicant and from Mr. John P. Gallagher B.L. for the respondent. It makes sense to consider the application to discharge the stay first.

**Should the stay be discharged?**

5. Mr. Gallagher submitted that the stay should never really have been granted because stays in judicial review should only be granted after the grant of leave, relying on Order 84 rule 20(8) of the Rules of the Superior Courts, inserted by the Rules of the Superior Courts (Judicial Review) 2011. I do not accept that objection. While there is a statutory jurisdiction in the rules of court to grant a stay following the grant of leave, that is not exhaustive of the court's inherent jurisdiction, which must include the power to grant a stay in an urgent case before the grant of leave. Generally, the court must have whatever jurisdiction as is wide enough to do justice. The day of narrow legalistic restrictions based on the particular wordings of rules of court is over: see *per* Lynch J. in *D.P.P. v Corbett* [1992] I.L.R.M. 674 at 678 that "*the day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party*".
6. Proceeding then on the basis that the court most certainly had jurisdiction to grant the stay originally, prior to the grant of leave, should that stay now be discharged either on the basis of the applicant's failure to comply with his statutory presentation requirements, or his failure to inform the court when getting the stay *ex parte* of his breach of those obligations, or both?
7. It seems to me that the applicant has taken an altogether too casual approach to his legal obligations. He certainly should have complied with the obligation to present on the particular days notified. Presentation on a DIY basis on dates of his own choice is not a substitute. He also certainly should have made sure to adequately inform the court of such failures, in accordance with the obligation of disclosure in an *ex parte* application. Maintaining the stay is thus inappropriate on normal equitable principles even having due regard to the criteria in *Okunade v Min for Justice and Others* [2012] IESC 49, [2012] 3 I.R. 152.
8. Even if, counterfactually, a stay was appropriate, it might be worth observing that the existing stay is in too wide terms in the circumstances. In particular, it is worth emphasising that any stay needs to be conditional on an applicant's continued presentation. Otherwise the court is facilitating an applicant in litigating from the shadows. That is an abuse of the process of the court. It is to approbate those aspects of the law that favour an applicant and reprobate those aspects that disfavour him or her. Such a pick-n'-mix approach to one's legal obligations cannot be tolerated.

**Order**

9. Accordingly, the appropriate order is:

- (i) that the *ex parte* stay be vacated, noting that the applicant will be given a new presentation date by 11.00 am on 12th February, 2020 to present by the end of this week pursuant to the Immigration Act 1999;
- (ii) that the leave application be adjourned to 17th February, 2020. Any favourable consideration of the leave application, will, all other things being equal, have due regard to the applicant's compliance or otherwise with his presentation obligations.