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THE HIGH COURT

[2004 No. 236 J.R.]

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

ERIC HYACINTHE KOUAYPE

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND AIDAN EAMES MEMBER OF THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

Judgment of Mr. Justice Clarke delivered the 9th November, 2005.

1. Background Information

1.1 By order of MacMenamin J., made by consent on 8th March, 2005 the applicant ("Mr. Kouaype") was given leave to apply by way of judicial review for an order of certiorari quashing a deportation order made by the Minister for Justice Equality and Law Reform ("the Minister") on 5th January, 2004. The application for leave was out of time but an extension was given by MacMenamin J. Furthermore the original application for leave also sought to challenge by certiorari the decision of the second named respondent in his capacity as a member of the Refugee Appeals Tribunal ("RAT"). However no leave was given in that respect. The only challenge which, therefore, is now before me is in relation to the deportation order.

1.2 It is common case that the procedures followed in this case (and, it would appear, followed in most cases where consideration is being given to the making by the Minister of a deportation order) is that the matter is considered initially by a clerical officer in the Minister's department who sets out the factual position in a paper. That paper is then considered by a more senior executive officer who makes recommendations based on the facts. These recommendations and all relevant papers are in turn considered by the Minister who makes a decision. The recommendations of the executive officer are again, typically and in this case, reduced to writing. Both the report of the clerical officer and the recommendations of the executive officer in this case are available to the parties and have been proved in evidence.

2. Issues

2.1 The core of Mr. Kouaype's challenge focuses on what, it is contended, is the reasoning set out in the recommendation by the executive officer to the Minster from which, it is said, it is possible to infer the matters taken into account by the Minister in making his decision to make the deportation order. In analysing and challenging the recommendations made by the executive officer in this case the applicant has placed heavy reliance on a series of cases in this court where both at the leave and substantive hearing stages the court has considered the manner in which adverse decisions of the RAT have been arrived at. While it is necessary to consider, to some extent, the underlying reasons behind that jurisprudence in due course it is clear from a number of the relevant authorities that this court has been prepared to permit challenge to the decisions of the RAT in cases where it can be demonstrated that the reasoning by which the member of the RAT concerned arrived at important aspects of his or her determination (such as key reasons as to why the credibility of the applicant was doubted) was based either on no rational analysis or an erroneous rational analysis.

2.2 However a key legal difference between the parties in this case is as to the applicability of that jurisprudence to the separate decision making process in which the Minister is engaged when deciding whether to make a deportation order as opposed to the process which the Refugee Applications Commissioner ("RAC") or the RAT is engaged in when deciding whether to make a recommendation to the Minister as to the Refugee status of a party who has applied for it.

2.3 It therefore seems to me that it is necessary to turn first to the question of the differences between the statutory regimes applicable to both the RAC and the RAT on the one hand and to decisions of the Minister in relation to making a deportation order on the other hand.

3. The Decision to Make a Deportation Order

3.1 The relevant statutory restrictions on the power of the Minister to make a deportation order would appear to be contained in s. 5 of the Refugee Act 1996 ("the 1996 Act") and s. 3 of the Immigration Act 1999 ("the 1999 Act").

Section 5(1) of the 1996 Act provides as follows:-

> "5(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group of political opinion.
>
> (2) Without prejudice to the generality of sub-s. (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).

3.2 Section 3 of the 1999 Act permits the Minister, subject to the provisions of s. 5 of the 1996 Act, and subject to the other provisions of s. 3 to make a deportation order in a variety of cases including, (and of applicability here) in the case of a person whose application for asylum has been refused by the Minister (see s. 3(2)(f)). However s. 3(6) provides that in determining whether to make a deportation order in relation to, *inter alia*, such a person the Minister shall have regard to a range of factors including the age and family circumstances, length of time in and connection with the State and other humanitarian considerations "so far as they appear or are known to the Minister".

Subsection (3) requires the Minister, where he proposes to make a deportation order, to notify the person concerned of his proposal so that the person so notified can (under subs. 3(b)) make representations in writing to the Minister which the Minister is required, under that subsection, to take into consideration.

3.3 Thus in general terms there are two statutory prerequisites to the making of a deportation order.

> (1) The Minister is required to be satisfied that none of the conditions set out in s. 5 of the 1996 Act are present; and

(2) The Minister is also required to consider the humanitarian and other factors set out in s. 3(6) of the 1999 Act insofar as they are known to him. In this latter context it obviously follows that the Minister is required, inter alia, to have regard to any representations on those matters which are made by or on behalf of the person concerned.

3.4 Finally it does need to be noted that the reasons on which the Minister is prohibited from making a deportation order under s. 5 of the 1996 Act are virtually identical to the basis upon which a person qualifies for refugee status in Irish law.

4. The Case Law

4.1 In the connected cases *of P. v. The Minister for Justice Equality and Law Reform*, *L. v. The Minister and B. v. The Minister* (Unreported, Supreme Court, Hardiman J., 30th July, 2001) the Supreme Court considered the legislative framework within which Deportation Orders are made. There are many similarities between the decision taken by the Minister in those cases and the decision challenged in this case. Each of the applicants in *P. L.* and *B.* had applied for asylum and had been refused. Each of the applicants applied for what Hardiman J. described as being "often referred to as humanitarian leave to remain" but which, as he points out, is more properly described as the making of representations in writing, pursuant to s. 3(3)(b) of the 1999 Act, to the Minister urging the Minister not to make a deportation order despite the existence of an unchallenged refusal of asylum.

4.2 While noting that the statutory regime had changed since the previous decision of the Supreme Court in *Laurentiu v. The Minister for Justice* [1999] 4 I.R. 26 Hardiman J. indicated that the approach of Geoghegan J. in *Laurentiu* was one which could be applied to the new statutory regime with which the Supreme Court was concerned in the cases before it (which is the same statutory regime with which I am concerned in this case). In *Laurentiu* Geoghegan J. said:-

> "I do not think that there was any obligation constitutional or otherwise to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds has been refused. The letter makes clear that all the points made on behalf of the applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating the first respondent did not consider the detailed reasons sufficient to warrant granting the permission to remain in Ireland on humanitarian grounds. It was open to the first respondent to take that view and no court can interfere with the decision in those circumstances".

4.3 Hardiman J. went on, at p. 20, to note that in the circumstances of the cases then before the Supreme Court, "the Minister was bound to have regard to the matters set out in s. 3(6) of the 1999 Act". However he noted that in that context the Minister was also entitled to take into account the fact that the applicants were in each case failed asylum seekers. In those circumstances he went on to indicate that:-

> "Once it was held that they were not entitled to asylum their position in the State naturally falls to be considered afresh, at the Minister's discretion. There was no other legal basis on which they could be entitled to remain in the State other than as a result of a consideration of s. 3(6). In my view, having regard to the nature of the matters set out at sub-paragraphs (a) to (h) of that subsection the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the Minister. These factors must be considered in the context of the requirement of the common good, public policy, and where it arises national security".

4.4 While, therefore, it does not appear that specific representations were made to the effect that an order should not be made deporting the applicants in P. L. and B. on the grounds that so to do would be in breach of s. 5 of the 1996 Act, it seems clear that the Supreme Court was of the view that the Minister was entitled to take the fact that the applicants had already been through the statutory asylum process and had failed to establish their entitlement to asylum status, as an important factor to be taken into account in considering whether a deportation order was to be made. Indeed it would be strange if it were otherwise.

4.5 The legislation provides a detailed system for the consideration of applications for asylum. Asylum seekers have their application considered initially by the RAC. In the event that the RAC recommends against conferring refugee status, an appeal lies to the RAT. If either of these bodies recommends to the Minister that the applicant concerned be given refugee status then the Minister is required to confer that status. Thus, in substance, the regime to which I have referred confers upon persons who can establish their entitlement to refugee status legal rights to remain in the State. The Acts provide for the substance of the procedures to be followed and the hearings to be conducted by the two statutory persons or bodies referred to ("the statutory bodies") which process must, of course, be conducted in accordance with the principles of natural justice.

4.6 It should also be noted that the development of much of the jurisprudence of this Court in relation to the decision making process of the statutory bodies (whether on the basis of substantial grounds at leave stage or, in the small number of cases which have gone that far, as a matter of substantive law) has derived much assistance from the jurisprudence of the courts of other comparable jurisdictions which were engaged in a like process. In those comparable jurisdictions in one way or another, entitlement to recognition of refugee status under the provisions of the Geneva Convention has become part of the law. Various bodies have been established to determine applications for such refugee status. The courts in those jurisdictions exercise a variety of roles but at least in some jurisdictions the review role conferred upon the courts is similar to that exercised by this court in this jurisdiction.

4.7 There are particular reasons why it is important that there be a like interpretation of the implementation of measures designed to protect persons covered by the Geneva Convention in different jurisdictions. It is for that reason that the courts in this jurisdiction have regarded decisions in respect of like processes in like jurisdictions as being particularly persuasive. Equally, and for similar reasons, this court has, in a number of cases, (see for example *Z. v. Minister for Justice* (Unreported, High Court, Finnegan J., 29th March, 2001)) regarded the United Nations High Commissioner for Refugees Handbook as being persuasive as to the procedures and process that should be engaged in, in a consideration of an application for refugee status.

4.8 However it is clear that all of the above materials are concerned with the process that leads to the formal determination of the entitlement of a person to refugee status with all the consequences that flow. It does not seem to me that similar considerations apply in the case of a failed asylum seeker in circumstances where the Minister is entitled, as was pointed out in *B. L.* and *P.*, to have regard to that failure in considering whether to make a deportation order. If the Minister is considering whether s. 5 of the 1996 Act applies so as to debar an entitlement to deport he is, in substance, considering whether the person concerned is entitled to refugee status for the terms in which the prohibition under s. 5 are set out are the same as the terms upon which a person qualifies for refugee status. Given that statutory regime it would be surprising if the Minister were not entitled to place a heavy emphasis indeed on the fact that the person concerned had, as a result of going through the asylum process, every opportunity to make out a case for that status and thus had every opportunity to make out a case which in substance would mean that s. 5 prohibited their deportation. Having failed to establish that status in the refugee process it is difficult to see how, in the absence of special or

changed circumstances, the Minister could be under any heavy obligation to review that aspect of the matter further. The Minister is, of course, also required to consider the matters set out in s. 3(6) of the 1999 Act.

4.9 In *Baby O. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 169 the Supreme Court again had to consider the statutory regime in respect of deportation orders. While many of the issues which were relevant in that case do not arise here, the court did consider grounds raised by the applicant in Baby O based upon s. 5 of the 1996, Act. The decision of the Minister in that case (insofar as it was concerned with s.5) was the same as in this case i.e. "the Minister has satisfied himself that the provisions of s. 5 (Prohibition or Refoulement) of the Refugee Act 1996 are complied with in your case".

In respect of that decision of the Minister, Keane C.J. said the following:-

> "I am satisfied that there is no obligation on the first respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of the decision; that was done and accordingly this ground was not made out".

4.10 It is clear, therefore, that the Supreme Court in *Baby O* was also of the view that the obligations upon the Minister when considering making a deportation order are different from those which arise in the case of the statutory bodies charged with the task of determining whether to recommend that a person be granted refugee status. Finally, although I do not attach great weight to this issue, it is worthy of some note that the Minister does have a limited but real role in respect of substantive refugee applications themselves. At a formal level a successful applicant for refugee status receives (under s. 17(1)(a) of the 1996 Act) a declaration from the Minister declaring that the applicant is a refugee. In that context it is worthy of note that the Minister is required by that section to give the declaration of refugee status where either the RAC, or in the case of a rejection by the RAC, the RAT on appeal, makes a recommendation to that effect. However where the RAC recommends against granting such declaration and, if there be an appeal, the RAT affirms that decision, the Minister under s. 17(1)(b) "may" refuse to give the applicant a declaration. It is clear therefore that the Minister retains a discretion to grant a declaration even in cases where the final recommendation of the statutory bodies is to the contrary.

4.11 Having regard to all of the above it seems to me that the role of the court in reviewing that aspect of the decision of the Minister to make a deportation order which requires the Minister to be satisfied that the provisions of s. 5 of the Act 1996 do not apply to the case under consideration is, in all cases but in particular in cases where the applicant concerned has already been the subject of a decision to refuse a declaration of refugee status, necessarily significantly more the limited than the role of the court in considering the determination of the statutory bodies in respect of the refugee process itself.

4.12 In the absence of unusual, special or changed circumstances or in the absence of there being evidence that the Minister did not consider the matters specified by s. 5 in coming to his opinion, it seems to me that it is not open to the court to go behind the Minister's reasoning. It should, in addition, be noted that the decision concerned is that of the Minister. It may well be that, as a matter of practice, the Minister will obtain reports and recommendations from officials within his department. However it is likely (and would appear to be the case on the facts of these proceedings) that the Minister will have before him (when making his decision) all of the relevant materials including the evidence which was before the statutory bodies and the decision of those bodies.

4.13 In that regard the Minister plays a role in the process which is not dissimilar to the role played by An Bord Pleanála in planning matters. The Board will undoubtedly receive a detailed report from a planning inspector which will contain recommendations as to the view which the Board might take. However the Board has before it all of the relevant materials that were considered by the Inspector and, it is well settled, the Board is free to make its own decision provided there be materials upon which it could come to the view which it takes. Given that amongst the materials that will be before the Minister in the case of a failed asylum seeker will be materials which have led to an unchallenged determination by the appropriate statutory body that the person concerned does not qualify for refugee status and did not, therefore, at least as of the time of that decision, come within the scope of s. 5 of the 1996 Act, it would require special circumstances before it could be said that the Minister had an obligation to engage in any significant reconsideration of that aspect of the matter of deportation.

4.14 Clearly one such possibility may arise where it may be contended that there has been a significant change in material circumstances so that it could be argued that notwithstanding the view taken, at the time of its decision, by either the RAC or the RAT, the situation had changed to a sufficiently significant extent as to arguably lead to a different conclusion.

4.15 As pointed out at para. 3.3 above there are two aspects to the Minister's decision to make a deportation order. Having set out the basis upon which this (court should review that aspect of the Minister's decision which involves determining whether deportation is prohibited by s. 5 of the 1996 Act, I now turn to the other aspect of the decision, that is a consideration of s. 3 of the 1999 Act.

4.16 It seems to me that similar considerations apply, though for different reasons, to that aspect of the Minister's decision to make a deportation order which requires him to consider the factors identified in s. 3(6) of the 1999 Act. It is clear from the above authorities that the only obligation that arises in those circumstances is to afford the person concerned an opportunity to make submissions and, provided that the submissions are made in accordance with the Act, to consider them or, if no submissions be made, to consider the matters set out in s. 3(6) "so far as they appear or are known to the Minister". The weighing of the various matters which might legitimately be taken into account under the section and which have been loosely described as "humanitarian grounds" is, in accordance with those authorities, entirely a matter for the Minister. In the absence of evidence that the Minister did not give the person concerned an opportunity to make submissions in accordance with the statute or did not consider those submissions, it does not seem to me that that aspect of the Minister's decision is reviewable by the courts.

4.17 As irrationality was not argued in this case I express no concluded view on the extent to which a decision of the Minister to make a deportation order could be challenged on that ground. In most circumstances the existence of a recommendation against conferring refugee status by the statutory bodies would make it difficult to suggest that a decision by the Minister that s. 5 of the 1996 Act did not apply was irrational. Similarly given the very wide discretion conferred on the Minister in weighing the factors specified in s. 3(6) of the 1999 Act a challenge to the Minister's decision on that aspect of the process on the ground of irrationality would also be fraught with difficulty.

5. Conclusions on Reviewability

5.1 For all of the above reasons it seems to me that the grounds upon which a decision by the Minister to make a deportation order in the case of a failed asylum seeker, can be challenged are necessarily limited. Without being exhaustive it seems to me that it would require very special circumstances for such a review to be possible unless it can be shown that:-

(a) the Minister did not consider whether the provisions of s. 5 applied. Where the Minister says that he did so consider and in the absence of any evidence to the contrary this will be established;

(b) the Minister could not reasonably have come to the view which he did. It is unlikely that such circumstances could arise in practice in most cases of failed asylum seekers given that there will already be a determination after a quasi judicial process which will in substance amount to a finding that the prohibition contained in s. 5 does not arise. However it should be noted that it is incumbent on the Minister to consider any matters which have come to his attention (whether by way of submissions or representations on behalf of the applicant or otherwise) which would tend to show a change in circumstance from the position which obtained at the time the original decision to refuse refugee status was made;

(c) the Minister did not afford the applicant a statutory entitlement to make representations on the so called "humanitarian grounds"; or

(d) the Minister did not consider any such representations made within the terms of the statute, or the factors set out in s. 3(6) of the 1999 Act, or (possibly) the Minister could not reasonably have come to the conclusion which he did in relation to those factors.

6. Application to Facts of this Case

6.1 The grounds relied upon in this case in respect of the challenge to the Minister's deportation order are stated in the most general terms. It is said at para. E (ii) that the Minister failed to act in accordance with the requirements of natural and constitutional justice. It is further said at para. E (iii) that the Minister failed to have regard to relevant considerations in reaching his decision to make the deportation order in relation to the applicant. However the grounding affidavit refers to the submissions made by the Refugee Legal Service on behalf of the applicant in response to the proposal by the Minister to make a deportation order. The applicant makes the point at para. 5 of his affidavit that those submissions referred to a threat from a body known as "the operational command" and also makes reference to certain country of origin information exhibited which, he says, highlights ongoing human rights abuses in Cameroon and the wrongful conduct of many of the state agents in that country. In para. 6 of his affidavit the applicant exhibits the Minister's file which includes the two official reports to which I have referred. He goes onto assert that it is clear from that file that the Minister "has not considered the country of origin information submitted on my behalf nor indeed the information in the document attached" by the Minister's officials which represents further country of origin information undoubtedly critical of many aspects of the State in Cameroon.

6.2 In reply there was filed an affidavit from Tony Butler who is an Assistant Principal Officer within the Minister's department. Mr. Butler makes clear the extent of the materials which were before the Minister which clearly included the submissions or representations made on behalf of the applicant and also the papers which had been generated in the course of the applicant's failed refugee claim. Amongst those papers was the decision of the RAT in the applicant's case. It is clear from that decision that the Tribunal formed the view that any difficulties which the applicant might encounter in Cameroon stemmed from a family dispute and that he was not, therefore, subject to a well founded fear of persecution for a so called convention reason. No challenge is now made to that decision. Save for one matter, to which I will return, it seems to me that the substance of the representations made on behalf of the applicant to the Minister in order to persuade the Minister not to make a deportation order by reason of s. 5 of the 1996 Act were encompassed within the claims already made by the applicant in the course of his refugee application. Given that all of those materials were before the Minister (including the decision reached by the RAT in relation to those materials) it does not seem to me that it is open for the court to review the reasoning which the Minister adopted.

6.3 Therefore there is ample evidence that the Minister actually considered all relevant materials.

6.4 Given that those materials included the decision of the RAT and the materials upon which that decision was based, there was, in principle, more than ample evidence from which the Minister could conclude that the prohibition contained in s. 5 of the 1996 Act did not apply.

6.5 The one outstanding matter to which I have referred is an issue raised in the submissions to the Minister concerning the position of failed asylum seekers returned to the Cameroon. This would not appear to have been an issue raised before the RAT and was not, therefore, considered by that body. It was, however, raised as an issue on behalf of the applicant in the submissions to the Minister. However there was before the Minister country of origin information which suggested that the Cameroonian authorities are not informed when a failed asylum seeker is returned to Cameroon and also suggested that such individuals were not routinely stopped detained or questioned. The relevant documentation further suggests that there is no legislation in Cameroon for the prosecution of individuals seeking asylum abroad even if the authorities were informed of the names of every returning failed asylum seeker. On that basis it seems to me that it was open to the Minister to form the view that the new issue raised (if it be a new issue) was not one which would alter the substance of the applicant's position so far as s. 5 of the 1996 Act was concerned.

6.6 Next it should be said that it is clear that the applicant was afforded the opportunity to make representations in accordance with the statute as to why a deportation order should not be made, including representation on the so called humanitarian grounds.

6.7 Furthermore the evidence suggests that the Minister did in fact consider those representations but came to a view adverse to the applicant.

6.8 There does not, therefore, it seems to me, appear to be any basis for the court interfering with the decision of the Minister in this case.

7. The Scope of the Applicant's Case

7.1 Finally I should comment briefly on an issue that arose in the course of the hearing before me. Objection was taken on behalf of the Minister to certain arguments which were addressed on behalf of the applicant which, it was said, were first made when written submissions were filed on behalf of the applicant on the day before the hearing. It is, of course, the case that it would be totally unfair to the Minister if he was required to meet substantive new points of which no notice had been given. However, having regard to the serious consequences that would lie in the event that a deportation order was made in circumstances where, perhaps on one view, it ought not, I would be reluctant to shut out a party from making an argument which might have some chance of success even if it had not been properly brought to the attention of the respondents in the papers filed for the court. Any such leeway would, of course, be subject to the entitlement of the Minister to have a reasonable opportunity to consider and reply to such argument.

7.2 However having regard to the narrow view which I have taken as to the scope of review available in respect of a decision by the

Minister to make a deportation order subsequent to a failed asylum application, I do not believe that any of the matters canvassed would have advanced the applicant's case. In those circumstances there would not seem to me to be any point in allowing an expansion of the applicant's case to include such grounds.

8. Conclusion
In all the circumstances therefore it seems to me that I must refuse the relief sought.