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THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 284 J.R.]

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

BETWEEN

ANDON KOZHUKAROV, BILYANA SPASOVA AND ANDI KOZHUKAROV (A MINOR SUING BY HIS MOTHER AND

APPLICANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 14th December, 2005.

1. Introduction

1.1 The applicants seek leave permitting them to challenge deportation orders and refusals to revoke such orders. The first and second named applicants are partners who are both Bulgarian nationals and who left Bulgaria arriving in Ireland on 15th October, 2002. They both applied for refugee status based on a claimed fear of persecution on the grounds of their ethnic identity as Roma. Those applications were rejected both by the Refugee Applications Commissioner and, on appeal, by the Refugee Appeals Tribunal.

1.2 Subsequent to the final determination of her case by the Refugee Appeals Tribunal, the second named applicant ("Ms. Spasova") was notified, by letter of the 15th December, 2003, that her appeal had been refused. Similarly on 28th April, 2004 the first named applicant ("Mr. Kozhukarov") was notified that his appeal had been refused and the original recommendation in his case upheld.

1.3 After each determination Mr. Kozhukarov and Ms. Spasova were respectively notified that the first named respondent ("the Minister") proposed to make deportation orders in respect of them and was giving consideration to their cases under s. 3 of the Immigration Act 1999. Both were informed that they had 15 working days from the dates of their respective letters to make written representations setting out the reasons as to why they should be allowed to remain in the State.

1.4 The Refugee Legal Service, on behalf of both Mr. Kozhukarov and Ms. Spasova, made representations in separate letters dated respectively 23rd January, 2004 and the 21st October, 2004 in which were put forward reasons as to why the parties ought to be entitled to remain in the State.

1.5 These matters were initially considered by a Clerical Officer in the Repatriation Unit of the Minister's Department who produced a report dated the 24th November, 2004. As appears both from the representations made on behalf of Mr. Kozhukarov and Ms. Spasova and also from that report, the principal ground put forward on behalf of the parties for remaining in the State concerned the fact that Ms. Spasova had given birth to a child on 27th July, 2003 (while in this State) and where, tragically, the child concerned (Donald) died on 4th December, 2003. I will return briefly to the circumstances surrounding the tragically short life of Donald, later in the course of this judgment.

1.6 Having reviewed the circumstances of the case the Clerical Officer concerned made the following recommendation:-

> "Bilyana Spasova and Andon Kozhukarov's case was considered under s. 5 of the Refugee Act 1996, as amended, and under s. 3(6) of the Immigration Act 1999, as amended. Refoulement was not found to be an issue in this case. Therefore on the basis of the foregoing I reluctantly recommend that the Minister sign the deportation orders across."

1.7 It would then appear that, in accordance with normal practice, the matter was next considered by an Executive Officer in the Minister's Department. The conclusions reached by that officer were as follows:-

> "I have read and considered all of the papers on Ms. Spasova and Mr. Kozhukarov's file, including Ms. Hanberry's submission of 24th November, 2004 and although they did not seek recourse for their troubles in Bulgaria, they have experienced a tragic loss and Ms. Spasova is expecting another child in early 2005. In light of this I recommend that Bilyana Spasova and Andon Kozhukarov be granted leave to remain for a period of one year with a review of their cases at the end of that period"

1.8 Thereafter it would appear that the matter next came for consideration by a senior official in the Minister's Department who made the following recommendation:-

> "I have considered the papers on file in this case which is quite complex. The couple have failed the asylum process but suffered the loss of their four month (old) child, born in the State in December of 2003. Ms. Spasova is pregnant and due to give birth in January 2005. While there are obviously humanitarian aspects to this case, Bulgaria has been designated a safe country as regards refoulement. Accordingly, so as to preserve the integrity of the asylum process, I recommend that the Minister signs the orders opposite".

1.9 Subsequently deportation orders were made in respect of both applicants. By letter of the 4th March, 2005, on behalf of the applicants, the Minister was asked specifically to revoke the deportation orders principally because of the tragic family circumstances to which I have alluded. In these proceedings the applicants, at this stage, seek leave to bring judicial review proceedings for the purposes of quashing the deportation orders and the refusal to revoke. In substance the grounds relied upon, while numerous, concern what is contended to be a failure on the part of the Minister to consider properly the applicants request for leave to remain in the State pursuant to s. 3(6) of the Immigration Act 1999 and also a contention that "the refusal of the first named respondent to revoke or suspend the said deportation orders was *ultra vires*, arbitrary and unreasonable, disproportionate, contrary to natural and constitutional justice and was contrary to the respondents obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto".

1.10 Before going on to consider the legal issues which arise I should refer to the particularly tragic circumstances which surrounded the death of the child of Mr. Kozhukarov and Ms. Spasova. As set out in the representations made by letter from the Refugee Legal Service of 20th October, 2004, written on behalf of Mr. Kozhukarov, the following would appear to have occurred.

1.11 Donald Kozhukarov was born on 27th July, 2003 in Limerick Maternity Hospital with multiple congenital malformations secondary

to a significant chromosome anomaly. As noted by Eleanor Jenkins, Head Medical Social Worker at the Children's University Hospital in Temple Street "despite a very poor prognosis his parents worked hard to give him the best possible quality of life and managed to care for him at home for most of this. They accepted some support from this hospital, from Our Lady's and from their local public health nurse but were keen to do as much as possible by themselves". Unfortunately it would appear that Donald died on December 4th 2003 and is buried in the Holy Angel's Plot at Glasnevin Cemetery. It was suggested, not surprisingly, that his parents remained extremely distressed and traumatised and that that situation was exacerbated by the prospect of their being returned to Bulgaria. Further reference is made to the view of Ms. Jenkins to the effect that "access to their child's grave, to the persons who knew their child alive and to appropriate bereavement support services are all vital to healthy grieving and ultimately to an individual's coping and well being … I am unaware of the nature of possible support services to the family in their country of origin and would be concerned given the unusual nature of Donald's medical condition, his short and difficult life and his tragic death that his parents are particularly vulnerable".

1.12 Finally I should note that the third named applicant is the child of the first and second named applicants whose birth was expected at the time of the representations referred to above and who was subsequently born in the State.

2 The Law

2.1 In *Kouaype v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, Clarke J., 9th November, 2005) I considered the circumstances in which it might, in the ordinary way, be open to a failed asylum seeker to challenge a deportation order made by the Minister subsequent to a finding in the refugee process refusing a recommendation that refugee status be granted.

2.2 The decision in *Kouaype* was made after a full hearing in the matter and I see no reason to depart from the views which I expressed in that case as to the applicable law. However a number of aspects of that decision do need to be noted. Firstly the decision was concerned with the contention made to the effect that the Minister, in that case, had not properly applied either or both of ss. 5 of the Refugee Act 1996 ("the 1996 Act") or s. 3(6) of the Immigration Act 1999 ("the 1999 Act"). In that case there was no challenge based on a contention that there might be a breach of the State's obligations under European Human Rights law insofar as that law might affect the legal position in this jurisdiction.

2.3 Secondly, as is clear from the judgment, *Kouaype* was principally concerned with a situation where there were no special or changed circumstances and where, in substance, the case made to the Minister against the making of a deportation order was, so far as s. 5 was concerned, similar to that made to and rejected by the statutory bodies charged with dealing with the refugee process and, insofar as s. 3(6) was concerned did not set out any unusual or special circumstances.

2.4 It seems to me that there are strong grounds for arguing (more than sufficient to establish the threshold of substantial grounds required at this stage) that, in addition to the matters identified in *Kouaype*, it is also, in principal and provided that the appropriate facts can be established, open to a party to seek to challenge the making of a deportation order (or in an appropriate case a refusal to revoke a deportation order) where it can be shown that there are substantial grounds for arguing that the making of (or refusal to revoke) such an order would be in breach of any other legal obligation on the part of the Minister (that is to say an obligation other than those imposed by s. 5 of the 1996 Act or s. 3(6) of the 1999 Act .

2.5 For example a number of cases have come before the courts where reliance is placed on the Criminal Justice (United Nations Convention Against Torture) Act, 2000.. While in most cases it will, as a matter of practice, be the case that a person who has been properly refused refugee status will be unable to establish an entitlement to prevent the Minister from making a deportation order under that Act, there is the possibility that there may be some cases where the facts establish a possibility that a person might be subjected to torture on being returned to a country where that risk could not be said to be for a convention reason sufficient to justify conferring refugee status. It is, therefore, possible that there may be cases where a person would, quite properly, be refused refugee status but would nonetheless be entitled to require the Minister to refrain from deporting them under s. 4 of the 2000 Act. Should a case to that effect be made to the Minister then the Minister must, of course, fully and properly consider any such case and may not, in those unusual circumstances, be entitled, in so considering, to place the same weight that would otherwise attach to the failure of the same applicant to succeed in persuading the relevant statutory bodies as to his or her entitlement to refugee status.

2.6 Similar considerations may apply in respect of family or other rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It seems to me that it is arguable, sufficient for the purposes of leave that, in principle, an independent ground for seeking to challenge a deportation order (that is to say a ground independent of any contention that the Minister failed to properly consider s. 3(6) of the 1999 Act) may be to the effect that the making of a deportation order by the Minister in all the circumstances of the case concerned would amount to an impermissible infringement of the rights which the party concerned might have under the Convention. While, as I pointed out in *Kouaype*, the weighting of the various matters specified in s. 3(6) of the 1999 Act, is, in accordance with the authorities cited in that case and as a matter of pure domestic law, entirely a matter for the Minister, that does not mean that there are not cases where, in order that he act in a manner sufficient to ensure that the State comply with its obligations under the Convention as brought into effect in domestic law, the Minister may be obliged, as a matter of Irish law, to refrain from making the deportation order concerned or, in appropriate cases may be obliged to revoke such an order.

2.7 I am therefore satisfied that there are substantial grounds for arguing that, in addition to the matters set out in Kouaype, there may also be, in an appropriate case, an entitlement to seek to challenge orders or decisions made by the Minister in the deportation process on the grounds that such orders would infringe in an impermissible way the rights of parties guaranteed under the Convention.

2.8 In that context it is necessary to refer to the relevant rights guaranteed under the Convention. While the rights involved may vary in different types of cases, the rights relied upon in this case are those guaranteed by Article 8 of the Convention. The House of Lords in the United Kingdom had occasion to consider the scope of the protections provided for against deportation by Article 8 (and other relevant rights) in *R. v. Secretary of State for the Home Department* (Ex Parte Razgar) (2004) UK HL 27. In the speech of Baroness Hale at paragraph 41 she noted and agreed with the distinction made by Lord Bingham between what he termed "domestic cases" and "foreign cases". As was said:- "Another way of putting this distinction is that in domestic cases the contracting state is directly responsible because of its own act or omission for the breach of convention rights. In foreign cases, the contracting state is not directly responsible: its responsibility is engaged because of the real risk that its conduct in expelling the person will lead to a gross invasion of his most fundamental human rights".

2.9 As was further noted the distinction is of the utmost importance for, in a domestic case, the state concerned must always act in a way which is compatible with Convention rights. There is, therefore, no threshold test related to the seriousness of the violation or the importance of the right involved. However foreign cases represent an exception to the general rule that a state is only responsible for what goes on within its own territory or control.

Article 8 cases (such as this case) were, in the view of Baroness Hale, typically to be found in two different types of situation. As she put it:-

> "Most commonly the person to be expelled has established a family life in the contracting state. His expulsion will be an interference, not only with his own right to respect for his private and family life but also with that of the other members of his core family: his spouse (or perhaps partner) and his children. The Strasbourg Court regards its task as to examine whether the contracting state has struck a fair balance between the interference and the legitimate aim pursued by the expulsion. The reason for the expulsion and the degree of interference, including any alternative means of preserving family ties, will be explored and compared".

2.10 While there may, in certain cases, be other and even more important state interests involved, in many cases the reasons for expulsion will simply be immigration control. There have been certain cases determined by the European Court of Human Rights ("ECHR") in which the degree of interference with the right to respect for the family life of a person sought to be expelled was such as that the interference was found to be disproportionate to the legitimate state aim of maintaining immigration control. See for example *Berehab v. The Netherlands* (1988) 11 EHRR 322 and *Ciliz v. The Netherlands* (2000) 2 FLR 469. In both those cases the person who was challenging his deportation would, in practice, by the deportation if it were to go ahead, have been deprived of contact with a child who was likely, in all the circumstances, to remain in the country concerned.

2.11 It is at least arguable, sufficient for the purposes of leave, that in considering such matters a proportionality test applies. In those circumstances it follows that it is similarly arguable that a lesser degree of interference with family life would suffice to make a deportation impermissible, where the only ground put forward for that deportation was immigration control. A greater degree of interference with the rights of the individual concerned may be required to render a deportation disproportionate where the legitimate aim of the state was one such as the prevention of disorder or crime.

2.12 Before passing from Razgar I should note that there is, in the speeches, a helpful analysis of the different types of cases in which the ECHR has determined that deportation amounts to a disproportionate interference with the rights of individuals. Those categories are not confined to cases, such as this, involving family ties but also include such cases as, for example, the so called "health cases" where, in extreme cases, deportation may be disproportionate where the health consequences of enforcement of the deportation order would be sufficiently severe.

2.13 Finally, it seems to me, that, as a matter of principle, the application of the proportionality test, which is required in respect of deportation where Article 8 rights may be interfered with, may require the Minister, in an appropriate case, to postpone deportation even though the circumstances may be such as would be insufficient to render it disproportionate to refuse to allow the person concerned to remain in the State indefinitely. There may be short or medium term circumstances which would render it disproportionate to impose an immediate deportation but where, on the basis of the facts of the individual case, circumstances were likely to change so as to permit the Minster, in a proportionate manner, to make a deportation order on a subsequent occasion.

3. Application to facts of this case

3.1 While accepting that it is, in principle, sufficiently arguable for the purposes of leave, that a person may be able to challenge a deportation order (or a refusal to revoke such an order) on the grounds that its enforcement may amount to a disproportionate interference with Article 8 rights, counsel for the Minister contends that either:-

> (a) on the facts of this case no Article 8 rights arise; or
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> (b) even if such rights arise they are not such, even on the basis of arguability on a substantial grounds basis, as could be said to be interfered with disproportionately on the facts of this case having regard to the undoubtedly significant weight which does attach to the entitlement of a state to pursue its own immigration policy.

3.2 There are, of course, no additional grounds (beyond immigration policy) relied upon by the State for making the deportation order in this case. In those circumstances the issue, in the substantive proceedings were they to go ahead by virtue of the grant of leave, would be as to whether the applicants have Article 8 rights by virtue of the unusual circumstances pertaining in this case, and, if so, whether those rights are sufficiently substantial so as to outweigh the entitlement of the State to secure their deportation in furtherance of immigration policy. In any such balancing exercise it should also be noted that counsel for the applicants accepted that, on the facts of this case, the applicants entitlement was not necessarily such as to require that they remain indefinitely in the State. What was argued on their behalf was that, in the unusual and special circumstances of their case, the decision to deport at a time so proximate to the death and burial within the State of their son amounted to a disproportionate interference with their Article 8 rights.

3.3 I have come to the view that there is an arguable case, sufficient for the purposes of leave, to that effect. While it was correct for counsel for the Minister to point out that there does not appear to be any decided case of the ECHR which established that Article 8 rights arise in circumstances such as those with which I am concerned here, I must also take into account the fact that the circumstances of this case are highly unusual and that the absence of any decided case on similar facts does not, in those circumstances, necessarily imply that Article 8 rights might not arise. Secondly, while acknowledging as correct the argument of counsel for the Minister to the effect that the case law seems to imply a high threshold of connection with the State concerned in order for a removal from that State to be regarded as a disproportionate interference with the Article 8 rights concerned, I must balance that against the possibility that the applicants may be able to assert a temporary right to remain in the State.

3.4 It is at least arguable, sufficient for the purposes of leave, that when viewed against a temporary entitlement to remain in the State with its consequent limited effect on or interference with the State's immigration policy, the decision to effect an immediate deportation may be disproportionate to the legitimate Article 8 interests and rights of the applicants.

3.5 In those circumstances I would propose giving leave. However it seems to me that a great deal of the grounds set out in the statement required for the purposes of seeking leave are either unsustainable on the basis of *Kouaype* or are repetitious. In substance it seems to me that the applicants are entitled to challenge the decision of the Minister but only on the grounds that that decision, insofar as its purports to give effect to an immediate deportation of the applicants, amounts to a disproportionate interference with the applicants rights as guaranteed under Article 8 of the Convention. The leave will be thus limited.