THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 148 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED}, AND IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED), AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

A. C.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 7th day of March, 2013

Background

1. The applicant is a national of Togo born on 3rd May, 1960. She arrived in Ireland on 6th July, 2007, and applied for asylum. ORAC recommended that she not be granted refugee status and the applicant appealed to the Refugee Appeals Tribunal which confirmed the recommendation of ORAC.

2. The applicant then applied for subsidiary protection under the provisions of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). This was refused and notified to the applicant by letter dated 7th December, 2010. The applicant also applied on 2nd December, 2009, for leave to remain in the state pursuant to s. 3 of the Immigration Act 1999. This application was considered by the Minister's officials on 9th, 10th and 16th November, 2010, and the 18th January, 2011, in an examination of the applicant's file under s. 3 of the Immigration Act 1999. A recommendation was made that the Minister make a deportation order in respect of the applicant and that the granting of leave to remain was not warranted notwithstanding her disability.

3. On 26th January, 2011, the Minister for Justice and Law Reform personally signed a deportation order in respect of the applicant. This was communicated to the applicant and her solicitors by letter dated 2nd February, 2011, together with the examination of file analysis conducted under s. 3 of the Immigration Act 1999, and s. 5 of the Refugee Act 1996.

4. No issue arises in this case in respect of a refusal by the Minister for Justice and Law Reform to grant the applicant's application for refugee status or in respect of any aspect of the refusal of the application for subsidiary protection in the relief sought.

5. The applicant seeks leave to apply by way of judicial review for an order of *certiorari* quashing the deportation order made by the respondent in respect of the applicant and a declaration is also sought that s. 3 of the Immigration Act 1999, is unconstitutional or incompatible with the European Convention on Human Rights. The applicant also seeks an interlocutory injunction restraining the respondent his servants or agents from taking any step to deport the applicant pending the determination of these proceedings.

6. In the course of argument counsel confined submissions in relation to the application to Grounds 1 and 9 of the statement of grounds focusing on the applicant's medical condition and Grounds 3 and 5 in respect of the constitutionality of s. 3 of the Immigration Act 1999. In addition, an argument was made in Ground 10 that the Minister had not personally considered the deportation order in respect of the applicant or, in the alternative, that there was no sufficient evidence that he had done so. Other arguments advanced were that the deportation decision was disproportionate and failed to adequately consider all representations made and, in particular, the contents of a letter on 27th January, 2011, under Grounds 7 and 8. Other grounds were not pursued.

The Applicant's Medical Condition

7. The main submission made to the court in relation to the applicant's medical condition is summarised at para. 4 of the submissions on behalf of the applicant as follows:-

> "In making the deportation order, the Minister noted medical evidence that the applicant was unable to undergo "car/bus/plane trips" owing to acute back pain, but thereafter found that having considered the humanitarian information on file there was nothing to suggest that the applicant should not be deported.
>
> This finding is irrational in the light of the medical evidence and submissions made to the Minister.
>
> The failure of the Minister to consider the practicalities of effecting the deportation of the applicant was in breach of his constitutional duty to protect and vindicate the personal rights of the applicant. The Minister failed to respect and vindicate the constitutional rights of the applicant as guaranteed by Article 40.3 of the Constitution, the Convention rights as guaranteed by Articles 2 and 8 of the European Convention on Human Rights, the Charter rights as guaranteed by Articles 4, 9 and 10 of the EU Charter of Fundamental Rights - see *Aslam v. MGE* (Unreported, Hogan J.- 29th December, 2011)."

8. The evidence advanced which supported this proposition is set out briefly in the applicant's affidavit. The applicant states that a report of the Health Service Executive outlining the applicant's medical circumstances was submitted to the Minister on 4th January, 2011. In paragraph 12 she stated:-

> "No assessment took place of the effect of deporting me in my particular circumstances. My medical condition is such that I cannot go outside my residence without the use of a wheelchair, and am unable to undergo bus or airplane trips."

9. The report submitted to the Minister was that of a public health nurse, Frances McArdle, who stated that she had acted as a public health nurse to Ms. C. since she transferred to the Mosney accommodation centre in early 2000 from an accommodation centre in Galway. She stated:-

> "(Ms. C) suffered polio as a child which has left her with significant disability/weakness to her left leg and to her left arm. When in Togo she tells me she was physically abused by prison guards which resulted in back problems and pain. She has attended consultants in both the Mater and Merlin Park University Hospital for assessment of her condition. Due to her pain and mobility problems she uses an electric wheelchair to get around outside the home.
>
> (Ms. C) receives ongoing services from the HSE Meath Disability Team. She remains sad and very troubled due to her difficult past, her present difficult situation and her fear of being deported back to Togo.
>
> I would observe (Ms. C) to be a resilient and kind person who does her very best to be as independent as possible."

That is the limit of the medical evidence put forward to the Minister as part of the leave to remain sought under s. 3 of the Immigration Act 1999. A full report following examination of file under s. 3 of the Immigration Act 1999, as amended, was prepared by Mr. Oliver Gainford on 9th December, 2010. At p. 3 of that assessment in respect of humanitarian considerations under s. 3(6)(h) of the Act, the submission made on behalf of the applicant in relation to her physical disability was considered. It stated:-

> "It is submitted that the applicant suffers a physical disability which, in some way, interferes with her ability to walk. A letter dated 30th July, 2007, from the Mater Misericordiae University Hospital indicates that, at that time, the applicant was unable to undergo "car/bus/plane trips" owing to acute back pain. A letter dated 29th November, 2007, from the Physiotherapy Department of Merlin Park University Hospital, Galway, indicates that the applicant was offered a physiotherapy appointment."

The next sentence in the original report stated:-

> "No further medical reports have been submitted to substantiate the applicant's current medical condition."

It is clear that at that time Mr. Gainford did not have the opportunity to consider the further report of Ms. McArdle which was submitted on 4th January, 2011. Mr. Gainford's report, however, was submitted to and further reviewed by Ms. Máire Ní Fheinneadha, HEO, on 10th December, 2010, who agreed with Mr. Gainford's recommendations but without the benefit of the later report. The examination of file papers were again reviewed by Mr. Michael Flynn, Assistant Principal, on 16th December, 2010,again without the benefit of the further report, who agreed with the recommendation to deport the applicant and did not consider that the granting of leave to remain was warranted in her case notwithstanding her disability.

10. Mr. Flynn conducted a further review of the file on 18th January, 2011, in light of the additional report of 16th December, 2010, submitted on 4th January, 2011. He noted:-

> "File reconsidered in light of correspondence from legal representatives and others highlighting disability. I remain of the view that the Minister should make a deportation order in respect of Ms. C.."

He also amended the examination of file report in that he deleted the sentence "no further medical reports have been submitted to substantiate the applicant's current medical condition" and substituted the following:-

> "A recently received medical report from the HSE (dated 16th December) and submitted via Trayers & Co Solicitors has been received and states that Ms. C. suffers from disability."

11. In respect of the humanitarian information on file, it had originally been noted that there was nothing to suggest that Ms. C. could not be returned to Togo, to which Mr. Flynn added the clause "and the care of her family". This referred to the fact that Ms. C. had a partner who lived in Togo. She also had four children, all of whom lived there and though her father was deceased, her mother continued to live in Togo. This section of the file was amended in the terms already quoted.

12. It was accepted in the examination of the file that if the Minister decided to deport the applicant, this had the potential to be an interference with her right to respect for her private life under Article 8(1) of the European Convention on Human Rights. This related to her work, education and other societal ties that she had formed in the state as well as matters relating to her personal development since her arrival in the state. It was not considered that the deportation would constitute such interference that it would have consequences of such gravity as potentially to engage the operation of Article 8 and, consequently, deportation would not constitute a breach of her right to respect for private life. Apart from a number of references to the applicant's disabilities which were said to result from polio, very little in the way of material evidence confirming the nature and extent of her condition or its prognosis was submitted. There is reference to difficulties which she had in negotiating the accommodation provided at Mosney during the course of her stay there which resulted in considerable frustration since she was unable to negotiate the doors in the premises with her wheelchair and felt obliged to leave the centre as a result. A number of persons have provided character references for her in the course of her various applications to the Minister which commend her courage for the maintenance of a positive outlook and personality, notwithstanding her difficulties. In addition, her applications for subsidiary protection and under s. 3 of the Act for leave to remain concentrate for the most part on the alleged difficulties that she experienced by reason of her political involvement in Togo and the fears she had for her safety if she were to be returned.

13. No substantial submission was made to the effect that her health or life would be threatened seriously by her being returned to Togo by reference to any alleged inadequacy of health care or facilities available to persons suffering from disabilities. The factual case made on her behalf concerned her lack of mobility and that it would be in breach of her constitutional rights to health and bodily integrity and/or her Convention rights under Article 8 to carry out the deportation. However, there was ample evidence to suggest that when it was necessary to leave Mosney and, indeed, to travel to other locations, the applicant was able to do so, though that may have been with some assistance. There is no evidence to suggest nor was it submitted that the authorities in effecting the deportation order would not give appropriate consideration to the applicant's disabilities and carry out their duty with due regard and respect for her person, dignity and health. Thus, in practical terms it is difficult to accept that the process of deportation in the circumstances of this case could in any way give rise to a ground for complaint by way of judicial review.

14. The court is satisfied that the applicant has failed to establish a "substantial ground" which would warrant the granting of leave to apply for judicial review in respect of Grounds 1 and 9 of the statement of grounds.

15. The court has considered the decision cited by the applicant of *Aslam v. Minister for Justice and Equality* (Unreported, Hogan J., 29th December, 2011).

16. In that case it was proposed to transfer a very heavily pregnant applicant to the United Kingdom by ferry as that was the place in which the applicant should have applied for asylum status given that she had resided there for some time prior to coming to Ireland. An interlocutory injunction was granted by the court restraining her transfer by sea or air to the United Kingdom by reason of the potential threat to the life and health of the applicant and her unborn child given her then medical condition. Hogan J. did not restrain the removal of the applicant in that case by road to Northern Ireland under Article 7 of Council Regulation (EC No. 343/2003 (the Dublin Regulation)).

17. The relevant factors determining the decision in *Aslam* are entirely distinguishable from the facts of this case. There is no medical evidence to suggest that the applicant in this case could not be conveyed by road, rail or air notwithstanding the disability with which she lives.

The Constitutionality of Section 3 of the Immigration Act 1999
18. A challenge to the constitutionality of s. 3(1) and s. 3(11) of the Immigration Act 1999, and the declaration sought pursuant to s. 5 of the European Convention on Human Rights Act 2003, to the effect that those provisions are incompatible with the state's obligations under the provisions of the European Convention on Human Rights, raise the same issues as were addressed by Kearns P. in *Sivsivadze & Ors v. Minister for Justice and Equality, Attorney General and Ireland* (Unreported, High Court, Kearns P., 21st June, 2012). Following full argument, Kearns P. upheld the constitutionality of the section and refused the declaration under s. 5 of the 2003 Act, which I respectfully adopt and apply in this case. I do so on the basis that the judgment in that case is a judgment of a court of equal jurisdiction to which I must have regard on the basis of the principle of comity of courts. In addition, no further arguments have been addressed to this Court beyond those submitted to the learned President and no submissions have been made that that decision was made without the benefit of other authorities. I am satisfied, therefore, that no substantial grounds have been raised in respect of the constitutionality of these provisions or their compatibility with the provisions of the European Convention on Human Rights on which to grant leave to apply for judicial review as requested in respect of Ground 3.

The Decision of the Minister
19. It was submitted by the applicant that the Minister erred in failing to consider the refoulement issue personally under s. 5 of the Refugee Act 1996, in Ground 10. Section 5(1) of the Refugee Act 1996, provides that a person shall not be expelled from the State or returned to the frontiers of territories where "in the opinion of the Minister" the life or freedom of that person will be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. It is clear that the deportation order in this case was made by the Minister for Justice and Law Reform on 26th January, 2011, and is signed by him. The deportation order recites the power exercised under s. 3(1) of the Immigration Act 1999, subject to the provisions of s. 5 of the Refugee Act 1996, and also recites that the provisions of s. 5 of the 1996 Act have been complied with in the case of the applicant. An order was made in excess of one week after the review of the file by Mr. Michael Flynn and the court notes that the examination of file under s. 3 is stamped "approved by Minister". The court is satisfied that the applicant's case was carefully prepared and examined by the officials who furnished a recommendation to the Minister in the form of the examination of file as outlined above. Thereafter, the Minister is said to have approved the recommendation and made the order based upon it.

20. The letter dated February, 2011 by which the applicant was informed of the Minister's decision enclosed a copy of the order and "a copy of the Minister's considerations pursuant to s. 3 of the Immigration Act 1999 (as amended) and s. 5 of the Refugee Act 1996 (as amended)".

21. It is noteworthy that the applicant's claim in respect of non-refoulement is based on the same facts as ultimately led to the refusal of refugee status under s. 17(1) of the Refugee Act 1996. She alleged that in June, 2007 militia attached to the ruling party in Togo sought her out and destroyed her market stall after she had made some critical comments of the government in an interview with a newspaper journalist. She claims that previously in 2005 she had been detained and beaten by the army following her involvement in anti-government demonstrations. She claimed that it was unsafe for her to return to Togo. She also claimed that the authorities in Togo were unable or unwilling to provide sufficient protection for her. In that regard the Refugee Appeals Tribunal considered all relevant documentation in the case, including all country of origin documentation relevant to Togo. It found her credibility "wanting to such degree that the very basis of her claim was not believed".

22. The applicant's solicitors later submitted further country of origin information. An extensive review of country of origin information was contained in the examination of file considered by the Minister, which was referred to in the letter of 2nd February. It is clear from the submission of 9th December, 2010, by the applicant's solicitors that the conclusion reached in the examination of file that the applicant's claim in respect of fears of returning to Togo was substantially the same claim in respect of which her credibility was rejected before the ORAC and the Refugee Appeals Tribunal which recommended that she be refused refugee status. Nothing additional in that regard was advanced apart from further country of origin information which was considered prior to the making of the deportation order.

23. The court is not satisfied that any substantial ground has been demonstrated upon which to grant leave to apply for judicial review in respect of the consideration by the Minister personally of all matters relevant to the issue of non-refoulement under s. 5 of the Act.

24. The court is also satisfied that there is no substance in the matters contained in Grounds 7 and 8 in which it is contended that the deportation decision was disproportionate and that there was a failure to adequately consider all the representations made on behalf of the applicant. Having considered the examination of file, the court is satisfied that it contains a detailed consideration of all relevant matters and all submissions made and reached conclusions that were clear and cogent. Other grounds set out were not pursued.

Conclusion
25. The applicant has failed to establish any substantial ground upon which the court might grant leave to apply for judicial review pursuant to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

26. For the reasons set out above, the court refuses leave to apply for judicial review on the grounds advanced.