

THE HIGH COURT

[2006/128 JR]

BETWEEN

RUXANDRA GABRIELA GRIEROSU

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr Justice Gilligan delivered on the 15th day of February 2008.

1. The applicant in these proceedings is a Romanian national who upon her arrival in Ireland in February, 2005 presented at Dublin Airport with a false Lithuanian passport. When challenged she was advised that she was being refused entry to the State whereupon she immediately sought asylum. She did actually have on her person a valid Romanian passport and an identity card. She was then admitted to the State, arrested, and detained on charges relating to her possession, and use, of a false passport, contrary respectively to s.29(2) and s.26 of the Criminal Justice (Theft and Fraud Offences) Act 2001. A charge under section 29(2) is punishable on conviction on indictment by a fine or imprisonment for up to five years or both and under s.26 on conviction on indictment by a fine and/or imprisonment for up to ten years. The applicant spent five days in detention before being conditionally released.

2. Subsequently, the applicant failed to turn up for an interview within the asylum process and her application was deemed to have been withdrawn. She has subsequently been served with a deportation order. In the background the prosecution against her proceeded in the District Court. The applicant sought a number of adjournments and wrote a number of letters to the Director of Public Prosecutions, being the respondent herein, relying on Article 31(1) of the 1951 Geneva Convention under the heading "Refugees Unlawfully in the Country of Refuge."

3. Article 31(1) of the 1951 Geneva Convention states:-

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

4. The relevant letters requesting the respondent to give consideration to withdrawing the charges against the applicant are dated respectively the 15th day of November, 2005, and the 9th day of January, 2006.

5. No reply was received to these letters and the District Court hearing that the prosecuting member of An Garda Síochána had no power to withdraw the charges, fixed a hearing date for the 10th February, 2006.

6. An application for leave to apply for judicial review was granted by this Court (Peart J.) on the 6th day of March, 2006, but the only ground that is being pursued before this Court is that at paragraph D seeking;

"(D) In the alternative an order of mandamus by way of application for judicial review directing the respondent to consider the request of the applicant, that the said prosecution be withdrawn on the grounds that the applicant is entitled to the benefit of Article 31 of the United Nations Convention Relating to the Status of Refugees 1951."

7. The case is made on the applicant's behalf that she is a person who, in good faith, claimed asylum notwithstanding that by reason of her failure to turn up for interview her application for asylum was deemed to be withdrawn. It is submitted that she presented herself to the Irish authorities without delay and sought asylum in this jurisdiction in good faith.

8. As is set out by the applicant the core issue in this application is whether or not the respondent has a duty to consider requests by persons, in the position of the applicant, that a prosecution brought in the name of the respondent be withdrawn on the ground that it is inconsistent with the State's international obligations pursuant to Article 31(1) of the 1951 Convention. Further, it is alleged on the applicant's behalf that the applicant has a legitimate expectation that the respondent consider her request.

9. For the purpose of these proceedings the applicant accepts that the 1951 Convention does not form part of Irish law.

10. Counsel for the applicant, Mr. Dillion Malone, emphasises that the case being made is that the respondent has, at a minimum, an obligation to consider a request that a prosecution be withdrawn because it is in breach of Ireland's international obligations pursuant to Article 31(1) of the 1951 Convention. This, in effect, is the crux of the case and he accepts that he cannot actually either seek to, or, stop the respondent proceeding ahead with the prosecution. Counsel for the applicant refers to the fact that no reply was received to the letters forwarded on the behalf of the applicant and that the applicant has a legitimate expectation to, at least, having her application considered by the respondent.

11. Counsel for the respondent, Mr. O'Malley, submits that the issues raised in this application have already been considered by this Court on at least two previous occasions, in the case of *Sofineti v. Judge Anderson and D.P.P.* (Unreported, High Court, O'Higgins J., November 18th, 2004) and that of *Siritanu v. D.P.P.* [2006] IEHC 26 (Dunne J.).

12. The central thrust of counsel's submission, on the respondent's behalf, is that by virtue of the terms of Article 30 of the Constitution of Ireland and the Prosecution of Offences Act 1974, the powers and the duties of the respondent cannot be affected by any claimed legitimate expectation based on an international treaty.

13. Further, it is submitted on the respondent's behalf that there was no precedent for this application to the extent that no court has previously given a direction to the respondent on the basis of legitimate expectation.

14. Counsel for the respondent submits that legitimate expectation must be founded on either an express promise by a public officer to the applicant, or a consistent course of practice where people have been treated in a particular manner and the applicant could reasonably be expected to be treated in the same way.

15. Mr. Dillon-Malone, on the applicant's behalf, submits that the 'correct approach' to adopt when a court must decide if entering

into an international treaty may give rise to legitimate expectations is that as stated in *Re Khairandish* [2003] ScotCS 116, 23rd April 2003, at paras.10 – 12, per Lord Drummond;

"I accept that, when the United Kingdom enters into an international treaty, that may give rise to a legitimate expectation on the part of individuals that the executive will act in accordance with the terms of the treaty. The reasons for that conclusion are set out by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, a case in which it was claimed that the United Nations Convention on the Rights of the Child gave rise to legitimate expectations. In that case, Mason C.J. and Deane J. stated, at p.291:

'Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act ... particularly when the instrument evidences internationally accepted standards to be applied by the courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the convention ... and treat the best interests of the children as 'a primary consideration.' It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it ... The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into out municipal law by the back door.' ...

Nevertheless, the ability of an international treaty to give rise to a legitimate expectation is subject to three major qualifications. The first of these is described in the second paragraph of the passage quoted above from *Minister for Immigration and Ethnic Affairs v. Teoh*: even when a legitimate expectation exists, the decision maker is not compelled to act in accordance with it; if there are valid reasons to the contrary, he may decline to do so. That is because a legitimate expectation is not a binding rule of law. The second qualification is also mentioned in *Minister for Immigration and Ethnic Affairs v. Teoh*: even if a legitimate expectation might otherwise emerge from the fact that the executive has concluded a treaty, it may be negated either by statute or by a contrary indication issued by the executive. The notion that a legitimate expectation may be negated by statute requires no comment. The possibility that a legitimate expectation may be negated by a declaration by the executive arises out of the fact that it is not a rule of law. The underlying basis for the recognition of legitimate expectations is the principle that government and public administration should be carried on in a reasonable manner, and that that involves consistency of decision-making. If the executive makes a public statement that it will act in a particular way in a particular category of cases, the principle of consistency requires that it should act in that way unless there are valid reasons to the contrary. That is what creates a legitimate expectation. If, however, the executive makes a statement that in future it will act in a different way, the principle of consistency is not infringed; the executive has simply exercised its right to alter the basis on which it acts, in a situation where it is not bound by legislation or the common law. The treaty itself, of course, is not binding in domestic law unless it is incorporated into legislation.

The third qualification on the principle that entering into an international treaty may give rise to legitimate expectations is this: not every treaty will have that effect, and the particular treaty relied upon must be examined to discover whether its nature is such that it can reasonably be supposed to give rise to legitimate expectations on the part of individuals or other legal persons. International treaties and conventions cover a vast range of subject matter. Some are clearly intended to affect the rights or status of individuals; the Geneva Convention relating to the Status of Refugees is a good example. In such cases it will usually, although perhaps not invariably, be appropriate to draw the conclusion that the treaty gives rise to a legitimate expectation that the government, and its ministers, officials and agencies, will act according to its terms. Other treaties are clearly not intended to affect the rights of individuals, but rather to regulate the relations of states or governments among themselves; military, naval and defensive treaties are obvious examples of this category. Treaties of the latter sort will not give rise to legitimate expectations on the part of individuals, because they are concerned with acts of the state or government acting as such at an international level, and acts of that nature are beyond the scope of the domestic law. In yet other cases, a treaty may have some bearing on the rights or status of individuals, but its subject matter or objectives or terms may be such as to negative any implication that it gives rise to legitimate expectations on the part of those individuals. In every case, the terms and objectives of the treaty in question must be examined, and the court must decide the category into which it falls."

16. Based on the above rationale, counsel for the applicant submits that the circumstances of the instant case constitutes as one of the 'limited exceptions' where the functions of the respondent may be subject to judicial review. As Keane C.J. stated in *Eviston v. D.P.P.* [2002] 3 I.R. 260, at p. 290;

"In contrast to the systems in many civil law jurisdictions, the courts play no role in the prosecution of offences and both the decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned (with limited exceptions) to the respondent under the Constitution and the relevant statutory provisions."

17. The primary ground submitted by the applicant for the reliefs sought in these judicial review proceedings is based on the doctrine of legitimate expectations. This Court held in *Fahih v. Minister for Justice* [1993] 2 I.R. 406, at p. 420 (per O'Hanlon J.) quoting Lord Fraser in the Privy Council case of *The Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629, at p. 638, that when a legitimate expectation arises that requires a public body to honour a procedural commitment:-

"The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty."

18. The issue, therefore, before the Court is whether there is a certain established procedure which requires that the respondent consider the request of the applicant that her prosecution poses objections to Article 31(1) of the Geneva Convention 1951 providing that this action does not come into conflict with his statutory functions and duties.

19. Article 29(6) of the Constitution states:-

"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

20. The relevance of this Constitutional provision in relation to legitimate expectations has been addressed comprehensively in *Kavanagh v. Mountjoy Prison* [2002] 3 I.R. 97 (per Fennelly J.), at p.124, and in *Sofinetti v. Anderson & D.P.P.* (Unreported, High Court, O'Higgins J., 18th November, 2004). This Court notes the following passage of O'Higgins J. in *Sofinetti*:-

"The Constitution establishes an unmistakable distinction between domestic and international law. The Government has the exclusive prerogative of entering into agreements with other States. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies. I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to effect either the provision of a statute or the judgment of a court without coming into conflict with the Constitution."

21. For this Court to accept, however, that Article 31(1) of the Geneva Convention 1951 creates a legitimate expectation brings the Constitution and statutory law into conflict with these provisions of international law as it fetters the wide discretion granted to the respondent in the exercise of his prosecutorial discretion. This fulfils the second qualification of the test, as referred to above, by Lord Drummond in *Re Khairandish* at para.11, which states:

"Even if a legitimate expectation might otherwise emerge from the fact that the executive has concluded a treaty, it may be negated either by statute or by a contrary indication issued by the executive."

Lord Drummond followed this by stating that even "[t]he notion that a legitimate expectation may be negated by statute requires no comment."

22. In this case, the legitimate expectation in contention conflicts with not only statute but also with Article 30 of the Constitution.

Article 30(3) of the Constitution states:-

"All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

23. The Prosecution of Offences Act 1974 established the office of the Director of Public Prosecutions and effected an unqualified transfer, as noted by Finlay P., as he then was, in *State (O'Callaghan) v. Ó hUdaigh* [1977] I.R. 42, at p. 47, of the prosecutorial powers vested in the Attorney General to the respondent.

24. Section 3(1) of the Act provides that the respondent will perform

"... all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General immediately before the commencement of this section and references to the Attorney General in any statute or statutory instrument in force immediately before such commencement shall be construed accordingly."

25. Section 2(5) of the Act also provides that the respondent will be "independent in the performance of his functions."

26. The wide discretion of the respondent is subject only to judicial review in limited circumstances. In *State (McCormack) v. Curran* [1987] I.L.R.M. 225, at p.237, Finlay C.J. held that the discretion of the respondent could only be reviewed if "it can be demonstrated that he reaches a decision *mala fide* or is influenced by an improper motive or improper policy then his decision would be reviewable by a court."

27. Further, in the exercise of his exclusive right to prosecute on indictment the respondent is under no duty to give reasons as such a duty, as held by the Supreme Court in *H v. D.P.P.* [1994] 2 I.R. 589, at p.603, (*per* O'Flaherty J.), "stems from a need to facilitate full judicial review, the limited intervention available in the context of the decisions of the Director obviates the necessity to disclose reasons."

28. The extent to which the courts can review a decision of the respondent not to prosecute in a particular case was the subject of further consideration by the Supreme Court in *Eviston v. D.P.P.* [2002] 3 I.R. 260. The Supreme Court found against the respondent in *Eviston*, at p. 299, (*per* Keane C.J.), on the limited ground that due to the particular exceptional circumstances of the manner in which the applicant was communicated with by the respondent fair procedures had not been observed.

29. The instant case is distinguished by the applicant from the previous case of *Siritanu* dealt with by this Court (Dunne J.) by the fact that the applicant received no letter of response from the respondent to the request of the applicant that the prosecution be withdrawn having regard to Article 31(1) of the 1951 Convention.

30. It may be that the respondent has considered the submission by the applicant to have regard to Article 31(1). The fact that no letter was sent by the respondent in response to the applicant's query on this matter does not mean that the respondent did not exercise his discretion in giving consideration to the matter and there is the fact that the case is proceeding. Further, the respondent has previously considered this very matter in *Sofinetti* and *Siritanu*, two cases which are almost identical in circumstances to that of the instant case.

31. It is not the role of this Court to unreasonably fetter the discretion of the respondent by requiring that he respond to every item of correspondence sent to his office. This Court would approve the following passage of O'Higgins J., in *Sofinetti*, as endorsed in *Siritanu*, at p.11, (*per* Dunne J.);

"In the light of Article 29.6 of the Constitution taken in conjunction with the duties imposed on the Director of Public Prosecutions by the Constitution and the Prosecutions of Offences Act 1974, there can be no legitimate expectation in the applicant's submission that Article 31 of the Convention could be successfully invoked by her so as to prevent the

Director of Public Prosecutions prosecuting her and maintaining such a prosecution.”

32. As noted above, the reviewability of the respondent’s decision-making function is limited to particular circumstances where he reaches a decision *mala fide* or is influenced by an improper motive or improper policy, none of which have been established in the instant case.

33. In conclusion, the core issue of these proceedings, the applicant’s claim that she has a legitimate expectation that her request be considered by the respondent, has been dealt with by this Court in the two previous cases of *Sofinetti* and *Siritanu*, both of which had very similar circumstances to those of the instant case. The Court held, in both cases, that no such legitimate expectation arose requiring the respondent to fulfil such a procedural commitment. This Court finds that no principled distinction has been identified between the instant case and the two similar cases previously dealt with by this Court. Further, as held by O’Higgins J. in *Sofinetti*, for this Court to recognise a legitimate expectation regarding the discretion of the respondent in his consideration of the submission of the applicant concerning Article 31(1) of the Geneva Convention 1951 would “clearly amount to incorporating the provisions of the unincorporated convention into our municipal law by the back door.”

34. For the reasons as set out herein I refuse the relief sought by the applicant.