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THE HIGH COURT
JUDICIAL REVIEW

[2005] No. 642 JR

A.F.AK.

APPLICANT

AND

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

RESPONDENT

AND

[2005] No. 600 JR

A.F.AY.

APPLICANT

AND

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

RESPONDENT

Judgment delivered by Mr. Justice Feeney on 24th May, 2007

1. The above two judicial review applications have similar and overlapping issues. The two Applicants are the mother and father of an infant child, K. Ak. who is the Applicant in separate judicial review proceedings [2006 No. 329 JR.]. In those proceedings leave has been granted to seek judicial review and the Respondents in these cases have acknowledged that no steps will be taken to either of the Applicants pending the determination of their child's judicial review application.

2. Mr. Ak., who is the Applicant in judicial review proceedings [2005 No. 642 JR], arrived in Ireland on the 24th August, 2003. He was an unaccompanied minor having been born on the 6th May, 1986. The affidavit evidence herein indicates that he was arrested at Cork Airport and held in prison for a period of approximately one month being ultimately released on the 24th September, 2003. That detention is alleged to have been unlawful and is the subject matter of a number of grounds upon which he has sought judicial review.

3. After his release Mr. Ak. pursued an application for refugee status. The Refugee Applications Commissioner concluded in a report of the 10th May, 2004, that the Applicant had not suffered persecution for any of the Convention grounds nor was he likely to face persecution if he was to return to his country of origin namely Nigeria and duly recommended that the Applicant had failed to establish a well founded fear of persecution as defined under section 2 of the Refugee Act 1996 as amended. That report was considered for the Refugee Applications Commissioner and on the 11th May, 2004 and it was recommended that Mr. Ak. should not be declared a refugee. No reference was made to any claim based upon unlawful detention even though there was a reference in the questionnaire to the arrest. During the interview the Applicant indicated that he travelled to Ireland without any travel documents and that he had not sought asylum as soon as he arrived in Ireland as "he did not know about that".

4. Mr. Ak. appealed to the Refugee Appeals Tribunal. A written notice of appeal was submitted with the assistance of legal representation. Ten grounds of appeal were identified and no claim was made or pursued on the basis of any alleged false detention or imprisonment. A full oral hearing took place before the Refugee Appeals Tribunal and the Applicant was represented by counsel. Details of the Applicant's arrest and detention were provided during the interview before the Refugee Appeals Tribunal and those details are recorded in the report of the Tribunal member. No claim was identified in relation to any alleged unlawful detention or imprisonment at the hearing. The Tribunal member decided that the Applicant was not a refugee and accordingly affirmed the recommendation of the Refugee Applications Commissioner in a report dated the 15th September, 2004.

5. The Applicant sought legal advice from the Refugee Legal Service as to whether or not there were grounds for bringing judicial review proceedings and was advised that there were no grounds for bringing such proceedings.

6. The Applicant was informed by letter dated the 10th February, 2005, of the Minister's intention to make a deportation order under section 3 of the Immigration Act 1999 as amended and informing the Applicant of the options open to him, including an entitlement to make representations to remain temporarily in the State.

7. Representations were duly made on the Applicant's behalf by a letter dated the 24th February, 2005. Those representations were considered. A deportation order was made dated the 11th May, 2005. The Applicant was informed of the making of such a deportation order and the reasons therefore and a copy of the order was sent to him by letter dated the 27th May, 2005. It is that deportation order which the Applicant seeks to have judicially reviewed.

8. The Applicant in the other judicial review proceedings is Ms. Ay. She was born on the 3rd May, 1986, in Nigeria and arrived in Ireland as an unaccompanied minor on the 6th January, 2004. She pursued an application for refugee status, completing the standard questionnaire. She was duly interviewed on the 9th March, 2004, and a report and recommendation of the Refugee Applications Commissioner was duly prepared dated the 19th March, 2004. The authorised officer indicated that he was satisfied that the Applicant had failed to establish a well founded fear of persecution and on the 22nd March, 2004, the report was considered and it was recommended on behalf of the Refugee Applications Commissioner that the Applicant should not be declared a refugee. She duly appealed that matter to the Refugee Appeals Tribunal. A full oral hearing took place before the Appeals Tribunal and the Applicant was represented by counsel. The Tribunal member duly determined that having considered the matter that he was satisfied that the Applicant had not established a well founded fear of persecution and that the Applicant lacked credibility and that she left Nigeria for other than a convention reason. The member of the Refugee Appeals Tribunal duly affirmed the recommendation of the Refugee Applications Commissioner and did so in a report dated the 2nd September, 2004.

9. What is known as a section 3 letter, that is a letter indicating the intention of the Minister to make a deportation order, was duly sent to the Applicant on the 18th January, 2005. In response thereto the Applicant made representations to remain temporarily in the State. She did so by letter dated the 3rd February, 2005, from her solicitors. The application to remain was duly considered, including the representations received, and the Minister decided to make a deportation order. A deportation order was made on the 13th May, 2005, and the Applicant was informed of the making of such a deportation order and the reasons therefore by letter dated the 31st May, 2005.

10. It is in respect of that deportation order that this Applicant pursues the application for judicial review.

11. The basis upon which judicial review is being sought is identical in both cases other than that in relation to Mr. Ak., two additional grounds are identified.

12. Those additional grounds relate firstly to a claim based upon the alleged unlawful detention or imprisonment of that Applicant on his arrival in the State and secondly, that the Minister acted in breach of fair procedures and took into account irrelevant considerations in relation to Mr. Ak. when considering whether or not to make a deportation order in relation to a matter identified in a report under section 3(6)(g) of the Immigration Act 1999, wherein it was stated:

> "Upon arrival in the State Mr. Ak. was arrested and detained for a period of approximately one month. He was released from St. Patrick's Institution when he claimed asylum."

13. It is claimed that the reference to the arrest and detention therein under that section, which relates to character and conduct, was unfair and that reliance on the matter therein identified as relating to character resulted in an irrelevant consideration being taken into account by the Minister. As herein before identified, all other grounds in Mr. Ak.'s application are identical to Ms. Ay's.

14. The approach to be taken by this court to these applications is dictated by the fact that what is in issue is an application to challenge a decision of the Minister to make deportation orders. Such applications are made in circumstances where each of the Applicants has been refused asylum following an appeal to the Refugee Appeals Tribunal. The approach to be taken to such applications was considered by Clarke J. *In Kouyape v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 9th November, 2005). Clarke J. stated at para 4.16 of his judgment, having reviewed the authorities, as follows:-

> "It is clear from the above authorities that the only obligation that arises in those circumstances (an application under section 3(6) of the 1999 Act) 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 section 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 submissions, it does not seem to me that that aspect of the Minister's decision is reviewable by the courts."

15. Even though irrationality was not argued in that case Mr. Justice Clarke indicated that if a challenge were made to the Minister based upon that ground that such application would "be fraught with difficulty". Mr. Justice Clarke concluded:

> "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 could be shown that:
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> (a) The Minister did not consider whether the provisions of section 5 applied where the Minister says that he did so consider and in the absence of any evidence on the contrary this will be established.
>
> (b) That the Minister could not reasonably have come to the view which he did...
>
> (c) That the Minister did not afford the Applicant a statutory entitlement to make representations on the so called humanitarian grounds or
>
> (d) That the Minister did not consider any such representations made within the terms of the statute or the factors set out in section 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."

16. It is clear from that authority that Mr. Justice Clarke proceeded on the basis that a very narrow view had to be 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. This Court is in full agreement with that approach. The Court is satisfied that for either of the Applicants to be granted leave to seek judicial review that they would have to establish very special circumstances. This Court adopts the approach identified by Mr. Justice Clarke at para. 4.12 of that judgment to the effect that:-

> "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 section 5 in corning to his opinion, it seems to me that it is not open to the court to go behind the Minister's reasoning."

17. It is clear from the decision of Clarke J., and from the approach identified by the Supreme Court in *Baby 0. v. The Minister for Justice Equality and Law Reform* [2002] 2 I.R. 169, that the obligations upon the Minister when considering making a deportation order are significantly and fundamentally different from those which arise in the case of statutory bodies charged with the task of determining whether to recommend a person be granted refugee status. The limited nature of the obligations upon the Minister results in the scope of review available in respect of a decision by the Minister being narrow.

18. A second matter which guides this Court in its decision is the necessity that the Applicants establish substantial grounds to enable them to succeed in their applications. The Supreme Court in the *Illegal Immigrants (Trafficking,) Bill 1999* decision [2000] 2 I.R. 360 held that the need for an Applicant to show

> "substantial grounds" before being granted leave to challenge the validity of a decision was one which fell within the discretion of the legislature and was not so onerous as to infringe the constitutional right of access to the courts or the right to fair procedures. At p. 394 and 395 of the judgment the Supreme Court recognised that the interpretation of the phrase substantial grounds in the case of *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 by Carroll J. as being equivalent to reasonable, arguable and weighty and that such grounds must not be trivial or tenuous was an appropriate interpretation for the phrase substantial grounds in the 1999 Bill. It is clear that the substantial grounds test envisages a greater degree of scrutiny than the test of arguability. This is all the more so in circumstances where the scope for review by the Court is a decision to deport which in the words of Clarke J. quoted above in the *Kouyape* decision must show "unusual, special or changed circumstances"."

19. The final matter which guides the Court in its approach to the applications, and in particular the application of Mr. Ak., is the statement of Peart J. in the case of *Mamyko v. The Minister for Justice* (Unreported judgment of 6th November, 2003) where he stated at p. 404:

> "While the Minister has under section 17(6) of the Refugee Act 1996 been given power, at his or her discretion, to grant

permission in writing to remain in the State, to any person who has either withdrawn his or her application or to whom the Minister has refused a declaration, that does not mean that an Applicant should be permitted to 'drip feed' grounds from time to time for any such application to remain. If grounds are to be put forward in relation to asking the Minister to exercise his discretion under section 17(6) of the Refugee Act, 1996, those grounds must be made promptly, or at least within what is reasonable in all the circumstances, and all the available grounds must be included at that time, rather than put forward in a piecemeal way. Otherwise the entire fabric and integrity of the asylum process would be thrown into chaos."

20. This Court adopts that statement as an appropriate approach to take to the claim herein made by Mr. Ak. in relation to his imprisonment on his arrival in the State and his claim that such imprisonment was in breach of the provisions of the European Convention on Human Rights Act 2003 and in violation of the Childcare Act 1991 and/or the 1989 UN Convention on the Rights of the Child. All of those matters could have been raised or pursued either in separate and timely proceedings or within the asylum process. The Court is satisfied that in relation to Mr. Ak., that any claim which he desires to take in relation to his initial imprisonment on arrival within the State should be prosecuted in separate and stand alone proceedings. The use of that claim as a basis for reviewing the Minister's deportation order, in circumstances where the matter was never raised prior to the application herein, would be to permit a misuse of the asylum process.

21. A common ground relied upon on behalf of both Applicants is a claim that there was a failure to comply with the *Separated Children in Europe Programme Statement of Good Practice* (3rd Edition) of 2004. That document amounts to no more than a statement of good practice and the nature and scope of that statement is identified in the introduction thereto. Reliance was placed upon para. 13.3.2 thereof, which indicated "that separate children who arrived as minors and who were allowed to remain for humanitarian or compassionate reasons, or who received any other kind of temporary status expiring at the age of 18 should be treated in a generous manner when they reach the age of majority and full regard should be had to their vulnerable status. They should be allowed to remain in the host country". This court is satisfied that that statement has no applicability to the facts of this case. The two Applicants were both minors when they arrived in this jurisdiction but within months had attained their majority. They were allowed as minors to remain within the jurisdiction to enable their applications for refugee status to be processed. They were provided with legal assistance and in the case of Mr. Ak. during his minority he was provided with a designated social worker. However their applications for refugee status were fully and comprehensively dealt with at the time that they were adults and further insofar as any reliance could be placed upon a recommendation that "aged out" persons be treated in a generous fashion such contention was expressly made in the written submission on behalf of Mr. Ak. and formed part of the representations and matters received and considered by the Minister. No such representation was made on behalf of Ms. Ay.

22. It was open to either of the Applicants to raise all or any matters relating to the Statement of Good Practice and the only matter raised in relation to one Applicant was a request for the application to be treated in a generous manner, and that representation was considered by the Minister. This Court is satisfied that there is no basis for the claim for judicial review based upon the suggestion that the State failed in its obligations under various Conventions, protocols or other intentional documents. No basis has been shown or established that the Minister's decision in relation to either of the Applicants was incompatible with the State's obligations under the Convention and there is no basis for contending that the Minister's decisions would be unlawful pursuant to section 2 of the Human Rights Act of 2003.

23. Another matter raised before this court related solely to Mr. Ak. and concerned the examination of his file under section 3 of the Immigration Act, 1999, as carried out by a clerical officer within the Minister's repatriation unit. In a document dated 13th April, 2005, under the paragraph dealing with section 3(6)(g) of the 1999 Act, in relation to character and conduct, there was a statement that "upon arrival in the State Mr. Ak. was arrested and detained for a period of approximately one month. He was released from St. Patrick's Institution when he claimed asylum". It is claimed that this statement was incorrectly and improperly included under the heading of character and conduct of the person. This Court is satisfied that the statement in issue is a factually correct statement and is consistent with a proper overview of the documentation available to the repatriation unit. It does not and cannot amount to a denial of fair procedures, nor can it be deemed the taking into account of an irrelevant consideration. It is apparent from the documents which were available to the Minister that Mr. Ak. was arrested on arrival within this State as he had no travel documents and that he did not immediately apply for asylum as he was unaware of such process. In those circumstances the factually correct statement concerning his arrest and detention cannot be properly characterised as a misstatement in relation to his character or conduct and it is clear that the full context of his arrest and detention is apparent from the documentation which was available. The Court is satisfied that there is no basis to the claim under this heading.

24. The claim that the Minister gave no consideration to the fact that the two Applicants were both minors on entering the State and on starting the asylum process is based upon an assertion that there is no express reference thereto in the reasons stated by the Minister in his letters of notification. It is clear and apparent from the papers that both of the Applicant's were unaccompanied minors and that that was at all times part of the information available to the Minister and insofar as any representation was sought to be made arising therefrom such representation was made on behalf of Mr. Ak. and considered by the Minister. The Court is satisfied that there is no basis for this claim.

25. A final issue which was raised on behalf of the Applicants was the standard of review. This Court is satisfied, after careful scrutiny and review, that there is no basis in either of the Applicant's claims for judicial review, either under the established standards relating to unreasonableness or even if a more exacting or higher standard was considered. In the premise this Court refuses the Applicant's leave to seek judicial review on any of the grounds identified in the notices of motion herein.