THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 928 J.R.]

BETWEEN

A.W.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2016

1. The applicant was born in the Democratic Republic of Congo in 1963. Prior to coming to Ireland, she lived in Kinshasa.

2. On 23rd October, 2007, she applied for a UK visa in a false name. This visa was issued, valid for a six month period from that date, expiring on 23rd April, 2008. This visa application was not disclosed in her original asylum application, and came to light from information furnished by the UK Border Agency to the respondent.

3. On either 20th or 23rd April, 2008 (depending on which version of the applicant's story is to be accepted), she says she left the D.R.C. with the assistance of a people-trafficker. She says she arrived in Ireland on 24th April, 2008. She then made a claim for asylum, which was rejected by the Refugee Applications Commissioner of 6th September, 2008.

4. This refusal was appealed to the Refugee Appeals Tribunal which rejected the appeal in a decision dated 20th October, 2009. The rejection was based primarily on a finding of a lack of credibility on the part of the applicant, the tribunal member referring in particular to having had the opportunity of seeing the applicant give evidence and of her failing to deal with inconsistencies in that evidence.

5. On 29th January, 2010, the applicant sought subsidiary protection and simultaneously made representations for leave to remain under s. 3 of the Immigration Act 1999.

6. The subsidiary protection application was rejected by the Minister on 8th June, 2011. She made further submissions seeking a review of the subsidiary protection refusal and leave to remain, by letter dated 16th June, 2011. She then applied for judicial review of the refusal of subsidiary protection. An order giving leave in that behalf was made by Birmingham J. on 4th July, 2011.

7. In *A.W. v. Minister for Justice and Equality (No. 1)* (Unreported, High Court, 30th March, 2012), Cooke J. dismissed the first judicial review proceedings.

8. Following that decision, the applicant made further submissions under s. 3 of the 1999 Act by letter dated 12th April, 2012.

9. Following consideration of the applicant's submissions, the Minister made a first deportation order on 19th February, 2013. This prompted a second judicial review application by the applicant seeking to quash that deportation order. Those proceedings were settled before the hearing of the leave application, on the basis that the Minister would revoke the deportation order and consider further submissions.

10. The first deportation order was revoked by order dated 28th May, 2013. Following that, the applicant made further submissions under s. 3 of the 1999 Act and also in relation to subsidiary protection although that application had already been finally determined at that point.

11. The Minister then made a second deportation order, dated 5th November, 2013. This was transmitted to the applicant by letter dated 14th November, 2013, which she says she received on 18th November, 2013. The present proceedings, the third judicial review proceedings brought by the applicant, were instituted on 10th December, 2013, slightly out of time. By consent of the parties, I will make an order extending time.

12. As can be seen from the foregoing, the applicant was found not to be credible by the tribunal. The Minister placed reliance on this credibility finding. The Minister was satisfied that there was no sufficient risk of refoulement under s. 5 of the Refugee Act 1996. There are therefore, in essence, two elements to the present challenge:

> (i) Was the Minister's approach to credibility unlawful?
>
> (ii) If not, was the approach to the risk of refoulement based on factors other than credibility (i.e., her status as a failed asylum seeker being returned to D.R.C.) unlawful?

13. Before addressing those questions it is necessary to examine the nature of an assessment under s. 5 of the Refugee Act 1996.

The approach to s. 5 of the 1996 Act

14. The question of compliance with s. 5 will arise in every deportation case. Given that there must be a workable deportation system, the bar to be set by the court for challenges on the grounds of non-compliance with s. 5 cannot be unreasonably high. Leaving aside a case where there is an allegation of a failure to consider s. 5 at all, which is highly unlikely to be capable of being

established seeing as it is routine for the deportation order and considerations to refer to it, Clarke J. in *Kouaype v. Minister for Justice* [2005] IEHC 380, held "*it would require very special circumstances"* to challenge a s. 5 determination unless "*the Minister could not reasonably have come to the view which he did"* and that "*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 of the Act of 1996 does not arise"*. Clarke J. also referred specifically to an obligation on the Minister to consider any change in circumstances since such earlier decision.

15. In *Meadows v. Minister for Justice* [2010] 2 I.R. 701, Murray C.J. stated at para. 78 that if there is no "*claim or factual material*" put forward supporting a s. 5 risk, then the s. 5 decision "*is a mere formality and the rationale of the decision will be self-evident*". He went on to say at para. 80 that "*if such material has been presented to him by or on behalf of the proposed deportee… the first respondent must specifically address that issue and form an opinion*". Given that the Minister is likely to "*address*" the issue of s. 5 in more or less every case, I infer from what is said by Murray C.J. at para. 80 that some form of narrative discussion of the issue is required above and beyond mere consideration of s. 5. At para. 87, he went on to say that "*at the very least the rationale underlying the decision must be discernible expressly or inferentially*".

16. The ratio of the decision is set out at paras. 93 to 98 where Murray C.J. finds that "*the decision of the Minister in the terms couched was so vague and opaque that its underlying rationale could not be properly or reasonably deduced"*. A statement that *refoulement* was found not to be an issue did not clearly identify whether the Minister was of the view that it was not an issue at all, or that there was some risk but a remote one or that there was some evidence of supporting it but that evidence could be rejected.

17. In *F.N. v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88 at para. 45, p. 116, Charleton J. emphasised that in considering a s. 5 claim, the Minister must first consider if "*the claim made is the same in substance"* as that which has failed in the asylum process. If not, he stated that the Minister must "*consider it fairly*". It appears to follow from this approach that if a claim is a repeat of the asylum claim, the Minister would be entitled to reject it on the grounds that the asylum claim had been rejected.

18. In *T.K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99, Hogan J. considered at para. 26 that in this context it was "*irrelevant that both the Commissioner and the Tribunal rejected the applicant's account on credibility grounds, since this was also true of the applicant in* Meadows". On the other hand, *Kouaype* would suggest that the Minister was entitled to rely on any decision of the commissioner or tribunal, even one in relation to credibility. In that case, the tribunal decision rejecting the applicant's appeal was based on credibility grounds.

19. A similar approach to Hogan J.'s decision in *T.K.* was taken in *H.M. v. Minister for Justice and Equality* [2015] IEHC 799 (Faherty J.); cases which illustrate the need for a greater degree of specificity in a s. 5 determination where unusual features exist, in particular where there is a distinct basis for a s. 5 issue separate and apart from any issues rejected at the asylum stage.

20. I am inclined to the view that simply because the applicant's credibility was rejected during the asylum process in *Meadows* does not mean that such findings are not relevant. Meadows requires reasons to be given by the Minister. It does not mean that the decisions in the asylum process are "*irrelevant*". To that extent, I would prefer the approach of Clarke J. in *Kouaype* and Charleton J. in F.N. to what could be an interpretation to the contrary of the *obiter* comment of Hogan J. at para. 26 of *T.K.*

The degree of threat to trigger s. 5

21. Section 5 of the Refugee Act 1996, is based on art. 33 of the Refugee Convention and follows a similar wording. However, crucially, art. 33 only prevents the refoulement of "*a refugee*", whereas s. 5 expands this protection massively to prevent the return of anyone, refugee or otherwise, whose life or freedom is threatened by reason of a Convention nexus.

22. Article 33 only applies to asylum seekers as such during the initial period of the examination of their claim, but not to persons who have been determined not to have a well-founded fear of persecution (see discussion in Guy Goodwin Gill, *The Refugee in International Law* (2nd ed., Oxford 1996), pp. 137-139.

23. Article 33, therefore, embodies the notion of "persecution" implicitly, which in turn involves the settings of a threshold above and beyond difficulties or discrimination not amounting to persecution.

24. Non-refoulement is also reflected in art. 3 of the 1984 UN Convention Against Torture (C.A.T.), which prohibits the refoulement of a "*person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*". A determination of whether substantial grounds exist must take into account all relevant circumstances including, if it be the case, "*the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights*" (art. 3(2)).

25. Furthermore, the return of an individual may contravene the ECHR if "*the risk of serious treatment and the severity of that treatment fall within the scope of Article 3*" of the Convention (*Kirkwood v. UK* (Application No. 10479/83) 37 D&R 158).

26. What art. 33 of the Refugee Convention, art. 3 of the C.A.T. and art. 3 of the ECHR have in common is the setting, expressly or by implication, of a threshold for the severity of treatment likely to be visited upon the person returned.

27. In *Mutombo v. Switzerland* (27th April, 1994, UN Doc. CAT/C/12/D/13/1993), (1995) 7 I.J.R.L. 322, the UN Committee Against Torture said that "*the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk"*. (See Goodwin Gill, pp. 153 to 154). The reverse is also the case.

28. Putting s. 5 of the 1996 Act in the context of the international instruments on the protection of human rights, as I must do, I consider that it was not the intention of the Oireachtas to provide that *any* detention however short, likely to be visited upon a deportee, would constitute a bar to return pursuant to the section. Some minimum level of gravity is implied by the term "threatened", when read in the context I have set out.

29. There is strong support in the country of origin information for the proposition that only certain categories of deportees to the D.R.C. would be likely to have been subjected to treatment of the appropriate severity, for example, dissidents or convicted criminals. It was open to the Minister to hold that refoulement did not arise if this applicant did not personally come within those categories, and that even if a routine practice of relatively short detention of most or all deportees was in place, this practice did not reach the appropriate threshold of severity in order to engage s. 5.

Should the decision be quashed because the Minister failed to reconsider the credibility conclusions of the tribunal?
30. In the submissions dated 17th July, 2013, the applicant sought to persuade the Minister to revisit the credibility conclusions of the tribunal. In the considerations underlying the decision (at p. 5 of 23), the Minister took note of the submission, but considered that the tribunal was the best place to assess credibility. It is also noted that the tribunal decision was unchallenged by way of judicial review.

31. In the subsidiary protection context, it is well established that the Minister is required to form a fresh view of credibility rather than simply to consider herself bound by the tribunal's findings: see *H.N. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 16 (Hogan J.); *Barua v. Minister for Justice and Equality* [2012] IEHC 456 (Mac Eochaidh J.); and *M.M. v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 370 (Hogan J.).

32. However given that leave to remain is part of the executive power of the State in controlling immigration, and not a specific international protection process governed by EU law, as subsidiary protection is, it does not follow that the Minister is under an obligation to reconsider findings in the asylum process at the stage of making a deportation order. In any event, the Minister did not blindly follow the finding but gave a reason for doing so – the tribunal was best placed to assess the applicant's evidence. This is a reasonable conclusion. In this case, the tribunal specifically assessed the demeanour and responses of the applicant and this is reflected in its decision. One might note in passing that the comment that the tribunal decision was unchallenged does not take things very far however, because by definition a tribunal decision would be negative (and therefore unchallenged or unsuccessfully challenged) for deportation to arise.

Did the Minister fail to consider the applicant's submissions regarding gender-based violence and a medical report?
33. Mr. Colm O'Dwyer, S.C., who appears (with Mr. Colin Smith, B.L.) for the applicant, submits that the Minister failed to consider submissions made by the applicant in relation to the risk of gender based violence in D.R.C. and as to submissions made by the applicant in relation to the risk of gender based violence in D.R.C. and as to a medical report from SPIRASI testifying to mental trauma and scarring she has suffered.

34. The risk of gender-based violence is addressed at p. 6 of 23 in the considerations underlying the decision. While the discussion is not as specific in relation to Kinshasa as the applicant would probably wish, I do not think that the analysis and reasons offered as so unreasonable as to warrant being quashed. The Minister's rejection of this submission is within the decision-maker's discretion in this case.

35. Likewise, the SPIRASI report is considered under the heading of humanitarian considerations (at pp. 2 to 3 of the considerations underlying the decision). Again, I would consider that this constitutes adequate consideration in the circumstances.

Did the Minister err in the consideration of the UK Country Policy Bulletin?
36. The primary issue at the hearing before me was the adequacy of the Minister's consideration of the principle of non-refoulement under s. 5 of the Refugee Act 1996, which reflects art. 33(1) of the 1951 Refugee Convention. Sub-s. (1) prohibits the return of a person whose "*life or freedom*" may be threatened by virtue of their membership of a group based on a Convention ground. Sub-s. (2) defines "*freedom*" in sub-s. (1) as "*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)*". The section significantly expands the parameters of art. 33(1) of the Refugee Convention, in that the latter applies only to *refoulement* of refugees, whereas the section applies to *refoulement* of any person on a Convention ground. In the applicant's case, the social group to which she belongs for these purposes is that of a returned failed asylum seeker.

37. There is considerable discussion in country of origin information material as to the risks to returned failed asylum seekers in D.R.C., which I will discuss further below. However, in the Minister's consideration in the present case, a particular document has loomed large, namely a UK Home Office report entitled *Country Policy Bulletin* relating to D.R.C., dated November, 2012.

38. This document is akin to a species of document described in the UK case law as an operational guidance note. The Country Policy Bulletin of 2012 relies heavily on, (and as Mr. Nick Reilly, B.L., for the respondent points out, states at para. 1.2 that it should be in conjunction with) a report of a fact finding mission, 18th – 28th June, 2012, which is a separate factual document consisting of country of origin information in the conventional sense.

39. It is essential for the purposes of understanding the argument made by Mr. O'Dwyer under this heading to bear in mind the distinction between country of origin information and government policy statements such as the Country Policy Bulletin. That distinction was discussed in *M.D. (Ivory Coast) v. Secretary of State for the Home Department* [2010] UKUT 215 (IAC) at paras. 265 to 266, in which it made clear that a policy statement does not have the same objectivity and independence as country of origin information. Policy statements in the context of U.K. tribunal proceedings should be read as essentially a government submission, rather than as factual country of origin material. It does not follow however that an Irish tribunal is obliged to treat such a report simply as a submission.

40. However, in *P.R. (D.R.C.) v. Secretary of State for the Home Department* [2013] EWHC 3879 (Admin), reliance is placed on the UK policy bulletin insofar as it summarises the fact finding mission report of June 2012.

41. It is not for the courts to be prescriptive as to the sort of material the Minister can have regard to, as long as it is reasonable to do so. While on one view the UK document relied on was not "pure" country of origin information but included analysis by the UK Home Office, that does not mean that it is unlawful for the Minister to rely on it. Such reliance has not been shown to be unreasonable. To start dictating to the Minister what she can and cannot have regard to, unless she strays outside the bounds of reasonableness, would be to engage in a melancholy tendency that has occasionally occurred in caselaw whereby the shaping of the decision is shifted from the executive to the courts. Such a tendency must be resisted.

Was there a failure to consider country of origin information proper?
42. As mentioned above, a considerable amount of material has been generated in respect of the plight of returned failed asylum seekers following their repatriation to D.R.C. This has given rise to a number of important decisions in this country and in the UK.

43. Reference had been made to a report entitled "Unsafe Return" dated 24th November, 2011, by Ms. Catherine Ramos, who is a researcher with the "Justice First" NGO. This report raised serious concerns about the treatment of returned failed asylum seekers in D.R.C. It was relied on behalf of the applicant in submissions to the Minister.

44. The Minister's conclusion was that the UK Border Agency report, already referred to, and repatriation of asylum seekers by the UNHCR serve to "*undermine the credibility and reliability of*" the unsafe return report. On this basis, the Minister concluded that the

applicant's fears regarding return were "*unfounded*" (p. 20).

45. It seems to me given the fact that there is country of origin information supporting a range of possible conclusions in relation to this issue, that it was open to the Minister to hold that there was no sufficient risk for the purposes of s. 5 of the 1996 Act.

46. Having said that, the language in which this finding is couched is unsatisfactory. In particular, the word "credibility" is something of a term of art in the international protection context, and generally implies that the person is making things up. This would be an improper term to apply to the Justice First report. Its reliability may be called into question; its credibility should not be, without a great deal more than the Minister had to go on. But this infirmity of wording does not take away from the fundamental thrust of the decision, which was that the Minister preferred the UKBA analysis to that of Justice First.

47. In *P.B.N. v. Minister for Justice and Equality (No. 1)* [2013] IEHC 435, Clark J. commented at para. 13 that the unsafe return report was compiled by "*activists*" and at para. 40 that it could not compare with objective reports by the UN or NGOs with a record of objectivity. She refused an injunction restraining the deportation of the applicant in that case to the D.R.C. That refusal, however, was overturned on appeal to the Supreme Court *(P.B.N. v. Minister for Justice and Equality (No. 1)* [2014] IESC 9), Laffoy J. holding that there was a sufficiently arguable basis to enjoin deportation. The proceedings then continued to the leave stage, Barr J. granting leave in *P.B.N. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 124. At paras. 86 to 87, of his judgment, he relied in particular on *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, and on the need for clarity and reasons in decisions of this kind. The substantive decision has not yet been handed down as of the date of this judgment.

48. Separately, in *S.S.L. v. Minister for Justice and Equality* [2013] IEHC 421, McDermott J. quashed a subsidiary protection decision and a deportation order regarding a Congolese applicant, primarily on the basis that it was unreasonable to hold that there was no risk of serious harm due to indiscriminate violence in Kinshasa (that being the test for subsidiary protection in the circumstances).

49. In *P.R. (D.R.C.),* Phillips J. held that as regards Ms. Ramos, the author of "Unsafe Return", there was "*no reason to doubt her integrity or the sincerity of her motives*" (para. 35). It was also held, as noted above, that the UK Border Agency policy statement was not irrational in summarising the factual conclusions of the fact finding mission that the "*consensus*" was that there was no relevant risk to failed asylum seekers generally, although there could be particular categories of asylum seeker who faced risks on return.

50. The thrust of the Minister's conclusion was within her jurisdiction. I would not quash the decision merely because it could have been better worded.

The claim that all D.R.C. returnees are arrested and detained for a short period

51. The country of origin information would support the proposition that many or even all D.R.C. returnees who are failed asylum seekers are detained for a short period on arrival. The Minister does not make a specific finding on this. Does this evidence render the Minister's decision unlawful?

52. It is important to go back to the principle of *Meadows*. The Supreme Court required that the reasons for a decision should be sufficiently apparent. It did not require full narrative discussion of every element of an applicant's claim. Reading the decision overall, one can infer that the Minister was not persuaded by such elements of the information as were supportive of the applicant that s. 5 was engaged in this case.

53. Again, the wording of the decision could have been more rigorous. But the thrust of it is clear. I would not quash the decision merely because the narrative discussion did not also address the question of the short period of detention that might ensue administratively, immediately following return.

54. As discussed above, relatively brief routine detention on arrival would fall outside the type of threat to freedom envisaged by s. 5 of the 1996 Act and art. 33(1) of the Refugee Convention. It is simply not the kind of threat to human rights that international refugee law was designed to protect against.

Conclusion

55. The most recent consideration of this matter in the U.K., *B.M. and Others (returnees - criminal and non-criminal) (CG)* [2015] UKUT 293 (IAC) (2nd June 2015) (McCloskey J.), provides strong support for the conclusion of the Minister in this case. In that decision, it was held that a returned failed asylum seeker to D.R.C. is not, without more, likely to be subject to refoulement. Certain categories of Congolese criminals or political activists were in a separate category. The decision considers a vast body of country of origin information dated between 2005 and 2015, listed in an annex to the judgment, which includes, but goes far beyond, the material relied on by the present applicant.

56. Such a view reinforces the conclusion I have independently arrived at in the present case, namely that despite a number of possible shortcomings in the wording of the decision, the central thrust of that decision was that the applicant did not face a risk coming within the level of gravity that would engage s. 5. This decision was within the range of reasonable conclusions she could have drawn on the material before her.

Order

57. For the foregoing reasons, I will order as follows:-

(i) that time be extended for the bringing of the application up to the date on which it was made;

(ii) that leave be granted in accordance with the statement of grounds for the reliefs at para. (d) on the grounds at para. (e) but that the substantive reliefs be refused;

(iii) that the proceedings be adjourned to enable any consequential applications, and that any party intending to make such application give the other party advance written particulars.