Neutral Citation Number: [2011] IEHC 371

THE HIGH COURT

2010 1178 JR

BETWEEN

S. K.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 15th September, 2011

1. The applicant is a 45 year old Kenyan national, who arrived in the State on the 24th February, 2005. Although the applicant states that he has four children it appears that that her father is deceased but that the rest of her family – including her four children – reside in Kenya.

2. Upon arrival in the State the applicant applied for asylum. It appeared that the gist of her claim was her erstwhile partner was a member of what is described as the Wakorino religious sect, and that she was persuaded to join it in June, 2002. She contends that at one meeting she was raped and that her partner instructed her not to tell anyone about the incident. At another meeting of the group she contends that she witnessed a man being murdered. She contends that she reported the murder to the police and that some members of the group were arrested following the exhumation of the body. She says, however, that these individuals were ultimately released as the police stated that they could find no positive evidence to connect the arrested person with the murder. Some months later she says that unknown assailants entered the compound and killed her brother in law. She contends that the individuals had intended to kill her but killed her brother in law by mistake. While she reported the matter to the police and some arrests followed, but again individuals were released after a relatively short time.

3. While her asylum claim was rejected by the Refugee Appeals Tribunal, Ms. K. then made an application for subsidiary protection in December, 2006. The applicant's application for subsidiary protection was rejected in December, 2009. It is clear from the examination of file memorandum by the Minister's official that they were not satisfied that:-

> "The applicant has demonstrated that she is without protection in Kenya and [they] do not find that there are any substantial grounds for believing that the applicant would be at risk of serious harm by torture or inhuman or degrading treatment or by reason of indiscriminate violence in Kenya if she is returned there."

4. The Minister also made a deportation order in December, 2009 but this order was set aside on foot of High Court judicial review proceedings brought by the applicant. She was then given the opportunity to make further representations as to why the deportation order should not be made. A fresh deportation order was made on the 27th July, 2010, and this was notified to the applicant by letter dated the 9th August, 2010. It is this deportation order which has given rise to the present proceedings.

5. In the letter of the 9th August, 2010, the Minister stated that:-

> "Having regard to the factors set out in s. 3(6) of the Immigration Act 1999 (as amended) including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features in your case as might tend to support you being granted leave to remain in the State."

6. The Minister enclosed a copy of the examination of file consideration pursuant to s. 3 of the Immigration Act 1999. This is a rather detailed document. It seeks to engage with the various issues advanced on the applicant. The Minister concluded that Ms. K had avenues of protection open to her in Kenya and the grounds advanced here were, in essence, the same as had failed both before the office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. For those reasons he concluded that her deportation would not infringe the prohibition on *refoulement* contained in s. 5 of the Refugee Act 1996.

7. At the heart of the applicant's case is the contention that the representations made on behalf of the applicant were inadequately considered by the Minister. Let us then examine each of these substantive complaints in turn.

The job offer

8. There is no doubt but that Ms. K. presents from the documents before me as an engaging person who has sought in the six years she has been in Ireland to contribute to Irish society herself by extensive volunteering work for a variety of charities and other worthy causes, a fact which the file memorandum properly acknowledges. The Minister was also aware of the fact that she had a firm offer of employment looking after the elderly parents of a prospective employer. Section 3(6)(f) of the 1999 Act requires the Minister to consider the employment prospects of any person whom he is considering deporting. This is clearly happened in the present case, where the Minister referred to the fact that she was a qualified nurse:

> "[SK] is not permitted by law to work in the State. The applicant has submitted an offer of employment conditional on her being allowed to work in the State. In the course of examining the applicant's submission, the Minister has to consider the economic climate and the rights of those persons who are legally allowed to work and reside in the State."

9. Given the regrettably high levels of employment now prevailing in the State, there are no grounds for impeaching the Minister's conclusions on this point. This case is thus very different from my own judgment in *Efe v Minister for Justice, Equality and Law Reform* (Unreported, High Court, 25th February, 2011), a case where the Minister had failed to acknowledge that the applicant did, in

fact, have two firm letters offering employment. In any event, this was only one of three factors (and by far the least important) identified by me as the basis of a substantial ground for questioning the adequacy of the Minister's assessment of the representation as "full and fair".

The applicant's mental health
10. The medical evidence suggests that the applicant presented as an individual suffering from post-traumatic stress disorder and that she was treated for this condition after her arrival here in 2005. The evidence does not, however, suggest that the applicant is suffering from a psychiatric condition.

11. Even if she were, the respondent does not infringe either Article 40.3.2 of the Constitution or Article 3 ECHR by deporting a foreign national illegally here *simply* because the level of health care in that national's country of origin is inferior to that prevailing here: see, *e.g., Bensaid v. United Kingdom* [2001] ECHR 82, (2001) 33 EHRR 10. In that case the applicant, an Algerian national, was a schizophrenic who had been treated for this illness for some years in the United Kingdom. The Court unanimously rejected the complaint that the applicant's removal to Algeria would infringe his rights under Article 3 ECHR and held as follows (at paras. 36-40):-

> "In the present case, the applicant is suffering from a long-term mental illness, schizophrenia. He is currently receiving medication, olanzapine, which assists him in managing his symptoms. If he returns to Algeria, this drug will no longer be available to him free as an outpatient. He does not subscribe to any social insurance fund and cannot claim any reimbursement. It is, however, the case that the drug would be available to him if he was admitted as an inpatient and that it would be potentially available on payment as an outpatient. It is also the case that other medication, used in the management of mental illness, is likely to be available. The nearest hospital for providing treatment is at Blida, some 75 to 80 km from the village where his family live.
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> The difficulties in obtaining medication and the stress inherent in returning to that part of Algeria, where there is violence and active terrorism, would, according to the applicant, seriously endanger his health. Deterioration in his already existing mental illness could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (such as withdrawal and lack of motivation). The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3.
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> The Court observes, however, that the applicant faces the risk of relapse even if he stays in the United Kingdom as his illness is long term and requires constant management. Removal will arguably increase the risk, as will the differences in available personal support and accessibility of treatment. The applicant has argued, in particular, that other drugs are less likely to be of benefit to his condition, and also that the option of becoming an inpatient should be a last resort. Nonetheless, medical treatment is available to the applicant in Algeria. The fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3 of the Convention.
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> The Court finds that the risk that the applicant would suffer a deterioration in his condition if he were returned to Algeria and that, if he did, he would not receive adequate support or care is to a large extent speculative. The arguments concerning the attitude of his family as devout Muslims, the difficulty of travelling to Blida and the effects on his health of these factors are also speculative. The information provided by the parties does not indicate that travel to the hospital is effectively prevented by the situation in the region. The applicant is not himself a likely target of terrorist activity. Even if his family does not have a car, this does not exclude the possibility of other arrangements being made.
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> The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not disclose the exceptional circumstances of *D. v. the United Kingdom*…..where the applicant was in the final stages of a terminal illness, Aids, and had no prospect of medical care or family support on expulsion to St Kitts."

12. As Ms. K's case would not seem to approach the level of the illness suffered by the applicant in *Bensaid*, there are no grounds for impugning the decision on this account.

The reference to Nigeria
13. The examination of file contains (at internal page 13) an isolated reference to the wrong country, in that the official who prepared the draft referred mistakenly to Nigeria rather than Kenya. This reference was admittedly in the context of the s. 5 prohibition.

14. But it is perfectly clear in the context of an examination of the documentation as a whole that this was just a slip. The entirety of the rest of the document is devoted to a discussion of Kenya. No serious case can be advanced that the decision maker had any country but Kenya in mind. In view of this, this erroneous reference must be regarded as a form of harmless error which does not go to jurisdiction.

15. Nor can this slip realistically be regarded as an error on the face of the record. While it is true that an expansive view is taken of the record in contemporary administrative law (see, e.g., the comments of Costello P. in *Ryan v. Compensation Tribunal* [1997] 1 I.L.R.M. 194 at 200), an isolated misdescription contained in an elaborate document setting out reasons can scarcely fit the description of error of law on the face of the record.

16. This was the view taken by Cooke J. in *L. v. Refugee Appeal Tribunal* [2010] IEHC 362, a case where the decision-maker had confused the neighbouring states of the Republic of Congo and the Democratic Republic of Congo. Cooke J. concluded that while the applicant had given an incorrect title to the applicant's country of origin, he had not made any mistake "in understanding the identity of the particular state to which the facts, events and alleged persecution related". The judge continued:-

> "It must be borne in mind that the common law concept of "error on the face of the record" applies to some omission, misdescription or mistake in a document essential to the power being exercised which has the effect of depriving the exercise of jurisdiction. (See for example: *State (Cunningham) v. O'Floinn* [1960] I.R. 198 – omission of a precise statement of the offence in an order of conviction: or *Simple Imports v. Revenue Commissioners* [2000] 1 I.R. 243) – mistaken statement in a search warrant of the grounds for its issue.) In the judgment of the Court, the misnaming of the country of origin or nationality in a narrative appeal decision of this kind does not fall

into that category. So far as the validity of the exercise of the jurisdiction to make or refuse a recommendation in relation to refugee status is concerned, it is the fact that the applicant is "outside the country of his or her nationality" which is essential to the definition of "refugee" in s. 2 of the Act of 1996 rather than the particular identity of the country.

For these reasons the Court considers that no actual mistake of fact material to the validity of the contested decision has been made and that insofar as the misnaming could be characterised as an error on the face of the decision it is not an "error on the face of the record" in the legal sense of that term which goes to the valid exercise of the Tribunal's jurisdiction."

17. I consider that the principles adumbrated by Cooke J. apply a *fortiori* to the present case which, after all, is much weaker than L. Even if I were wrong on this, I would nonetheless consider that the error at issue here is so technical and insubstantial - certainly when taken in the context of the decision as a whole - that *certiorari* should be refused on discretionary grounds in view of this inconsequential error.

The refoulement issue
18. At the heart of the applicant's case is the claim that she is likely to suffer persecution were she to be returned to Kenya in view of her past experiences with the Wakinoro sect. There are, I think, two principal reasons why this claim could not possibly succeed.

19. First, the applicant has not challenged the decision of the Refugee Appeal Tribunal which found against her claim. Indeed, she has not even challenged the validity of the subsidiary protection decision. Against that background where no such challenge has been made it is clear from the judgment of Clarke J. in *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380 that the role of the courts in reviewing the analysis of the Minister in respect of such decisions is necessarily "more limited than the role of the court in considering the determination of the statutory bodies in respect of the refugee process itself", at least absent "unusual, special or changed circumstances" or in the absence of evidence that the Minister did not consider the matters specified by s.5 of the 1996 Act in coming to his opinion.

20. Second, it cannot be said that the Minister did not endeavour to consider the *refoulement* issue. On the contrary, in the face of (apparently) improbable claims which were not buttressed by any independent evidence or country of origin information, the Minister went to some considerable lengths to ascertain whether her account might be true. In any event, while the country of origin information shows that the system of human rights protection in Kenya is far from perfect, there is a functioning police and legal system which, even on her own account, did investigate her complaints.

The generalised nature of the reasons
21. Finally, objection is taken to what is described as the generalised nature of the reasons. But it is has been clear, certainly since the Supreme Court's decision in *P. v. Minister for Justice, Equality and Law Reform* [2001] IESC 107, [2002] 1 I.R. 164 that the reason given by Minister - namely, that as a failed asylum seeker it was in the interests of the common good that Ms. K. be deported - is perfectly acceptable. Ms. K. cannot be in any real doubt as to the reason why the deportation order was made. As Hardiman J. observed in *P.*:-

"In the circumstances of this case, the Minister was bound to have regard to the matters set out in s. 3(6) of the [Immigration Act 1999]. In my view he was also clearly entitled to take into account the reason for the proposal to make a deportation order, i.e., that the applicants were in each case failed asylum seekers. If the reason for the proposal had been a different one, he would have been entitled to take that into account as well. He was obliged specifically to consider the common good and considerations of public policy. In my view he was entitled to identify, as an aspect of these things, the maintenance of the integrity of the asylum and immigration systems. The applicants had been entitled, in each case, to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that they were not entitled to asylum their position in the State naturally falls to be considered afresh, at the Minister's discretion. There was no other legal basis on which they could the be entitled to remain in the State other than as a result of a consideration of s. 3(6). In my view, having regard to the nature of the matters set out at sub-paragraphs (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the Minister. These factors must be considered in the context of the requirements of common good, public policy, and where it arises, national security.

To put this another way, each of the Applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of application for entry into the country, made from outside. There is no reason of policy why they should be enabled to bypass this system simply on the basis that they had made an application for asylum which had failed, or might even have been found "*manifestly unfounded*". ….[T]he invocation of the "*the common good*" in subsection (6) does not require or imply any opinion derogatory of the individual whose case is being considered. It simply entitles the Minister to have regard to the State's policy in relation to the control of aliens who are not, on the facts of their individual cases, entitled to asylum. ……The reference to the necessity to maintain the integrity of the asylum and immigration system in my view refers to a legitimate aspect of public policy and the common good, and one which has been clearly expounded in the judgment of the Court on the Article 26 reference cited. It follows from these findings that I consider that adequate reasons have been stated in the letter which has been quoted and that these are sufficiently understandable.

Where an administrative decision must address only a single issue, its formulation will often be succinct. Where a large number of persons apply, on individual facts, for the same relief, the nature of the authorities consideration and the form of grant or refusal may be similar or identical. An adequate Statement of Reasons in one case may thus be equally adequate in others. This does not diminish the statements essential validity or convert it into a mere administrative formula."

22. This passage plainly applies to the facts of the present case as well.

Conclusions
23. In the event, therefore, I can find no grounds on which I could grant leave for the purposes of s. 5(2) of the Illegal Immigrants

(Trafficking) Act 2000. I arrive at this conclusion with some personal sympathy for Ms. K. since she has done her best to make a new life in Ireland over the last six years or so. There is, however, no legal basis by which I could properly interfere with the Minister's decision.