THE HIGH COURT

2003 756 JR

BETWEEN

VASILE LUPASCU

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered the 21st day of December 2004.

1. This is an application under s.5 of the Illegal Immigrants (Trafficking) Act, 2000 ("the 2000 Act") for leave to commence judicial review proceedings for an order of certiorari quashing firstly the deportation order dated 7th August 2003 but notified and deemed to have been received by the applicant on or about the 13th October 2003; and secondly the notification itself pursuant to s. 3(3)(b)(ii) of that Act, which is dated the 9th October 2003.

2. For all practical purposes the relevant date is the 13th October 2003. No extension of time is required, the application for the present relief having been filed on the 21" October 2003.

3. The applicant seeks also reliefs under Order 84 of the Rules of the Superior Courts which I will refer to Sabiya type relief.

4. The history of this case has been long, extending as it does back to the time of the applicant's arrival in this State more than five years ago, on the 12th February 1999. The time which has passed, for various reasons which I will outline, is relevant towhy the applicant seeks leave to apply for the reliefs set forth in his Statement of Grounds, and it is part of his case that during the time which has passed, including between the 14th December 2001 when he was notified of the Minister's proposal to make a deportation order, and the 13th October 2003, the deemed date of that order, his circumstances changed in a number of material and relevant ways, including ways known to the Minister and that the applicant was not afforded any opportunity to make representations to the Minister in relation to these changed circumstances before the Deportation order was made.

5. The Grounds relied upon are, *inter alia*, that by virtue of the lapse of time the Minister has acquiesced in the applicant's presence in the State; that he ought to have been afforded a further opportunity to make updated submissions; that these changed circumstances include having integrated into the State to a very considerable extent during that period of delay, including having entered into a mortgage for the purchase of buying property; that his wife was given a work permit by the Minister for Enterprise, Trade And employment and that certain rights flow to the applicant by virtue of this fact; and that the Minister has failed to give adequate reasons for his decision and has therefore acted unreasonably, and in breach of fair procedures.

6. The application for leave is grounded principally on an affidavit sworn by the applicant on the 21st October 2003, which I shall come to shortly.

The affidavits

7. The applicant says that he arrived here on the 12th February 1999 whereupon he immediately made an asylum application which the RAC decided to transfer to the United Kingdom. A refusal of an appeal against that decision issued on the 10th August 1999. The Minister made a deportation order on the 10th November 1999, whereupon Judicial Review proceedings, as well as Habeas Corpus proceedings were instituted following his arrest on foot of the Deportation Order. Leave was granted to seek Judicial Review, following which the proceedings were compromised. The applicant was permitted to re-enter the asylum process, and was interviewed on the 11th July 2000.

8. He received an adverse decision by letter dated 31st July 2000. He appealed against that decision, and following an oral hearing his appeal was rejected by Decision dated 2nd July 2001, communicated to the applicant by letter dated 7th August 2001.

9. This was followed by a letter dated 14th September 2001 from the Minister wherein the Minister indicated that he intended to make a Deportation Order and invited submissions pursuant to s.3 of the Immigration Act, 1999. Written submissions were made by solicitors acting on the applicant's behalf by letter dated 2nd October 2001.

10. The applicant states that he heard nothing further until he received a letter dated 9th October 2003 (over 2 years later) which enclosed a Deportation Order, and he says that the deportation order "*was triggered by my request to the Tanaiste and Minister for Enterprise, Trade and Employment, Ms. Mary Harney T. D. who is my local T. D. to assist me in obtaining identification from the first named Respondent for the purpose of applying for a driving licence* ".

11. I should just add at this point that in his replying affidavit Mr Gleeson disputes these matters, and avers that in fact the applicant attended at the Department's offices on the 25th March 2003 "*in order to renew his identity card and request the return of such original documents as may have been on his file*". Mr Gleeson exhibits a letter dated the 26th March 2003 from the Department and addressed to "To Whom It May Concern" in which it is stated (a) that his asylum application has been refused, (b) consideration is being given as to whether to grant the leave to remain application or to return him to his country of origin, and (c) the Department is not in a position to issue the applicant with an identification document. Mr Gleeson says that the \Deportation Order was not "triggered" in the manner stated by the applicant.

12. The applicant then goes on to state that in the two years from the date of the Minister's proposal to deport he has put down what he describes as "substantial roots in the State" and that in particular he has taken out a mortgage and bought property in the State where he now resides. He says also that his wife has been granted a work permit which, at the date of his affidavit certainly, is valid and in force.

13. On behalf of the respondents there is an affidavit sworn in reply by Joseph Gleeson sworn on the 19th January 2004. Briefly stated, Mr Gleeson maintains that the applicant has at all times known that he had no right to remain in the State; that he has been in touch with the authorities and had received correspondence from them during the period concerned; that he has known at all times that the Minister was proposing to make a deportation order; that no legitimate expectation that he would be allowed to remain can have arisen, and that the Minister has in no way acquiesced; that his wife's work permit in no way affects the status of the applicant here; and that the reasons for the Minister's decision is clearly set forth in the letter of notification sent (i.e. he is a failed asylum seeker).

14. I have already mentioned what Mr Gleeson says about some of the applicant's averments about having heard nothing from the Minister during the relevant period of delay between the proposal to make the deportation order and the deportation order itself.

Submissions
15. Counsel has stated that the applicant informed the Department that he was going to apply for a mortgage, and also that the applicant paid €7000 in respect of stamp duty. However none of this is contained in any affidavit before this Court. Counsel also referred to the fact that in document which is the "Examination of file under Section 3 of the Immigration Act, 1999" dated 6th May 2003, the Clerical Officer in the

16. Repatriation Unit of the Minister's Department has stated at page 2 thereof that "Mr Lupascu's connection to the State lies in his application for asylum". He goes on to submit that in fact it is clear from this very document that this is incorrect in as much as there is reference in the previous paragraph of the document that the officer had investigated the matter and states a number of family details such as that he is married with one child, that his wife entered the State and obtained a work permit, that her visa was renewed, that their son was granted a visitor's visa valid until I 9th September 2002, that neither his wife nor his son applied for asylum, that his wife claimed child benefit, and so on.

17. But it is submitted that during the following period and before the decision to refuse leave to remain was made, the applicant's circumstances changed, and his links here deepened, and it is submitted that the applicant ought to have been afforded an opportunity to update his circumstances between May 2001 and October 2003.

18. It is submitted that when one looks at the decision in October 2001 and compares it to the decision in October 2003, it is clear that the Minister took matters into account on which the applicant was afforded no opportunity to be heard. In this regard I have been referred to a decision of mine contained in an unreported judgment in Botusha v. Minister for Justice Equality and Law Reform. That was a case in which the Minister was made aware that a medical report was being obtained and would be furnished, but the Minister went ahead and made the order without waiting for the medical report to arrive. In those circumstances I decided that fair procedures required that he ought to have awaited the medical report. The facts are different to the present case, but the applicant points to the importance which I attached to the requirement that procedures be fair.

19. Counsel points to the fact that nowhere has the Minister taken into account the mortgage which the applicant took out in connection with the property purchased in the period concerned, and that this is a connection which is above and beyond the connection referred to as existing solely on the basis of his asylum application. It is also submitted that the decision to make the Deportation Order so suddenly was triggered by the approach made in connection with the seeking of an identity document in March 2003, and that thereafter there was what was described as a rush to get the applicant out of the country. That is a breach of fair procedures in the submission of the applicant.

20. Counsel on behalf of the respondents has submitted that the applicant was afforded the opportunity to make submissions and he did so with the assistance of experienced solicitors, and that he could at any time between that time and the eventual decision have made any further representations he may have wished, in order to take account of any matters which he considered constituted changed circumstances or which would be relevant to the Minister's consideration of his application for leave to remain, but that for whatever reason, the applicant chose not to communicate with the

21. Minister in that regard, although he did have communication in March 2003 when he sought identity documentation, which was refused for the reasons stated. It is pointed out that in the said letter of refusal dated 26th March 2003 which was handed to the applicant it is stated that his application for leave to remain is under consideration, and that this was the perfect opportunity for the applicant to make some updated representations to be taken into account.

22. The respondent submits that the Minister's duty is to consider whatever application is made for leave to remain, and that in this case he did so. It is submitted that the onus is on the applicant to bring to the Minister's attention any matters relevant to that consideration, and that in the absence of any further submission being made, the Minister is entitled to proceed on the basis of whatever material has been placed before him. It is also pointed out that the applicant was not taken by surprise about a decision on his leave to remain application being made, since it is specifically referred to in the letter dated 26th March 2003 handed to the applicant.

23. Counsel has submitted that the applicant cannot regard himself simply as an inactive or passive participant in the asylum/immigration process, and that it is up to him to appraise the Minister of matters relevant to the latter's consideration of his application.

24. I have also been referred to my judgment in *Sofroni v. The Minister for Justice, Equality and Law Reform*, unreported, 9th July 2004. In that judgment I referred to the status in the State of an asylum seeker during the period of time spent here during the asylum process, and that nothing which arose during that time by way of delay could create any legitimate expectation that the applicant's status as an asylum seeker would transform into something else, such as a person who would be allowed to remain. In the present case it is submitted that even the delay which occurred cannot alter the applicant's status or render it more likely or confer any legitimate expectation that his application for leave to remain would be granted. On the other hand Counsel for the applicant has stated that the applicant is not relying on a legitimate expectation, but rather on the delay which has occurred between the making of the proposal to deport and the Deportation order itself, as well as the fact that the applicant was denied an opportunity to make updated submissions or representations prior to the Minister's eventual decision, and seeks support from my judgment in Botusha to which I have referred earlier, rather than Sofroni. Particular reliance is placed on Grounds 1,2, and 3 in the Statement of Grounds, i.e. the delay, the lack of a further opportunity to make updated submissions, and the change in the applicant's circumstances since the original proposal to deport some two years previously.

Conclusion
25. This is firstly an application for leave under s.5 of the 2000 Act, and the task of the applicant in such a case is less arduous than if this were the hearing of the substantive application after leave is granted. Nevertheless, it is beyond doubt that the applicant has to establish substantial grounds, that is grounds which are of substance, arguable, weighty, and not trivial or tenuous. The fact that this is an application required to be made on notice means that an applicant's task is more onerous than is the task of an applicant for leave under Order 84 of the Rules of the Superior Courts, where such an application is made on an ex parte basis. Therefore the Court must, in addition to hearing what is urged by the applicant, have some regard to the arguments and submissions made by the respondents, and yet at the same time do so in a way that is not to the extent or degree that will be done at a substantive hearing. If the level of the bar over which the applicant for leave must pass is at the same height than at the substantive hearing, there seems no purpose served by the requirement for an application for leave on notice, other than to add an unnecessary layer of cost and delay in the process. Where arguments are fulsomely made by Counsel on each side, the task of confining consideration of the

application for leave to the limited way required can be difficult.

26. However, at this stage of the process, there is no doubt that applicant must put forward substantial grounds for contending that he is entitled to apply for relief. The first ground put forward in his Statement of Grounds is that the Minister has been guilty of excessive delay between 14th December 2001 and the 13th October 2003. The first matter to remark is that there is no prescribed time within which the Minister must make the Deportation Order following the notification of his proposal to do so. I do not consider that the applicant has made out substantial grounds, to the necessary extent, that by this delay the Minister could be deemed to have acquiesced to the presence of the applicant here, and this is particularly so in the light of the Minister's letter dated 26th March 2003 which makes the position of the applicant clear at that point in time.

27. It is claimed also that the Minister "*ought to have afforded the applicant a further opportunity to make updated submissions* ". In this regard it is clear that any updated submissions which the applicant wished to make could have been made at any time prior to 14th December 2003, and if he had done so, then almost certainly the Minister would have been obliged to have considered them, and would have done so. That follows in my view from what I stated in Botusha, where the Minister was made aware that a medical opinion was being obtained, but he made the Deportation Order without allowing a reasonable time to receive the promised report. It is another matter completely to say that in all cases where there has been a certain amount of delay, the Minister must communicate with such an applicant and invite a further submission. In this particular case, the applicant himself who is possessed of all relevant knowledge about his own circumstances was aware as of the 26th March 2003 that his application for leave to remain was under consideration and that the Department had stated that it was not in a position at that time to issue him with an identification document. That was a very clear signal which ought to have prompted the applicant to update his situation if he so wished.

28. I do not consider it to be arguable that the Minister is in breach of any obligation, statutory or otherwise as far as fair procedure is concerned, to communicate with the applicant and invite a further submission. The applicant is not simply an inactive or passive participant in this process. He is obliged to act in his own interests, and in this case it is a fact that he sat back and waited for things to happen and he cannot now complain in that regard.

29. In addition, however, this Court has been provided with no evidence as to the mortgage or house purchase which has been made. That is another onus which remains undischarged in the substantiating of this argument even for the purposes of this leave application. This is clearly relevant to the third ground argued, namely that the applicant's circumstances have altered as a result of the delay complained of. In this case the Court has simply a bald assertion about the mortgage. It would not be difficult to exhibit relevant documentation in this regard, and the applicant is under an obligation of candour in an application such as this.

30. It is also not in my view arguable to the required degree in an application of this nature that by granting the applicant's wife a work permit, the Minister was thereafter not entitled to make a Deportation Order in this case once his application for asylum had failed. The Minister was entitled to follow, as he did, the statutory procedure.

31. Ground 5 has not been made out in any fashion whatsoever.

32. The applicant has not put forward arguments in relation to Ground 6, and in relation to ground 7 1 am not satisfied that any substantial ground has been made out for leave regarding the Minister having relied on materials or documents not made available to the applicant. The same applies in relation to Ground 8 regarding adequate reasons for his decision. The reason for the decision is made clear, and he has stated that he has had regard to the representations made on his behalf. The other grounds related to this argument similarly do not cross the required threshold of arguability.

33. I therefore refuse the reliefs sought except in relation to the ground which has been allowed in a number of cases regarding the fact that no destination of deportation is contained in the Deportation Order.

34. I will allow leave in respect of paragraph C4 on the Ground set out at paragraph (e) 9.