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THE HIGH COURT
JUDICIAL REVIEW

2006 No. 90 J.R.

BETWEEN

U.L., S.L., M.L.
AND K.L.

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 28th day of February, 2007

1. The background circumstances of the applicants in these proceedings have already been set out in a judgment between the same parties delivered today. This judgment should be considered with that earlier judgment in proceedings between the same parties with Record No. ----------.

Background facts

2. The application for leave in the 2005 judicial review proceedings came before the court on a previous occasion in January, 2006. One of the issues raised therein (but which was not pursued ultimately) was an alleged defect on the face of the order. A further issue which arose was whether there had been proper consideration given to the psychological condition of the first named applicant.

2. This is the focus of this review.

3. By letters dated 5th and 12th April, 2005 the applicants' solicitor (appointed after the asylum process was completed) had called upon the respondent to consider fresh psychiatric evidence for the purposes of exercising his discretion so as to permit the applicants to remain in the State on humanitarian grounds.

4. For reasons which will appear later in this judgment it is important to note that the issue of refoulement was not raised on behalf of the applicants.

5. On 9th January, 2006 (at the eve of a previous date set for the hearing of the 2005 proceedings) the applicants' legal advisers were served with a memorandum containing the respondents consideration of the psychiatric reports (set out in a letter dated 9th January, 2006) which in turn disclosed a new consideration of the position of the first named applicant pursuant to s. 3 of the Immigration Act, 1999. This decision, now impugned in these proceedings, was dated 20th December, 2005.

6. In the first paragraph of that memorandum there is a consideration of the representations received from the Refugee Legal Service (during the course of the asylum proceedings) requesting that the applicants not be deported until a review of the submissions had been completed.

7. With regard to this, earlier, material it is stated:

> "This representation also included a letter from Dr. Fergus O'Connell in relation to Mr. L. who had received treatment for depression. Dr. O'Connell's letter stated that the deportation orders caused Mr. L. an acute set back in his progression and he would not be likely to receive the support and medical attention he required if deported."

8. The second paragraph of that consideration by the respondent department recites*, inter alia*:

> "The RLS stated that as per his leave to remain application Mr. L. suffered from post-traumatic stress and had been referred for treatment with a psychiatrist."

9. Thereafter there are references in memorandum to the further representations furnished by the applicants' present solicitors, Brian F. Chesser & Co., who were retained after the asylum procedure was completed. In the third paragraph of the memorandum it is stated therefore:

> "In representation received on 6th April, 2005 Brian F. Chesser and Co., Solicitors (now representing the applicants) stated that they were acting on behalf of Mr. L.. The solicitors enclosed a report from Dr. James P. Morrison, Consultant Psychiatrist (tab. 1.) which stated that suicide was a real consideration in Mr. L.'s case and returning him to Croatia would only make matters worse. Brian F. Chesser & Co. requested that the Minister reconsider and revoke the deportation order and undertake not to deport Mr. L. and his family *pro tem*. They further stated that if the deportation order was not revoked within seven days they would consider instituting proceedings to judicially review that decision."

10. The fourth paragraph of the memorandum by the departmental officials refers to the issue of refoulement. It is accepted that this issue was not raised by the applicants' legal advisers. The paragraph contains a recital over a number of lines stating that the issue of refoulement had been considered in accordance with provisions of s. 5 of the Refugee Act, and ultimately concluding that the issue of refoulement did not arise in this case by reason of the designation of Croatia as a safe country of origin.

11. The fifth paragraph of the departmental consideration is of particular relevance. It states:

> "*On examining the psychiatric report it is certainly a matter of serious concern that a person may be at risk of self harm if the law effecting of a deportation order is applied to him but it cannot be held that the law should not apply in such a circumstance. Mr. L.'s mental state is not a matter for an administrative resolution. It is a clinical matter. On examining this case I am of the view that Mr. L. may well be suffering from psychiatric illness and he may well be in need of prescribed medication, however I am not aware that Mr. L. would be unable to be maintained on medication for such a condition in his country of origin*." (emphasis added).

12. The sixth paragraph concludes:

> "Accordingly, I do not consider that refoulement is in issue in this case and recommend that the Minister affirm the deportation order made in respect of U.L. on 11th October, 2004."

13. This material, set out in a memorandum, was signed by Brian Kielty, Executive Officer in the Repatriation Unit, dated 20th December, 2005.

14. It is particularly important, however, to note that beneath this consideration there is set out in handwriting the following:

> "Runaí Aire,
>
> I recommend that the Minister affirms the deportation order in this case for the reasons set out at X above."

15. This written addendum is signed 'N. Dowling', a senior departmental official. It is dated 4th January, 2006. The paragraph marked X is the fifth paragraph, now italicised and cited above, which refers specifically, and only, to Mr. L.'s psychiatric condition. Above Mr. Dowling's addendum there is written in the handwriting of the Minister:

> "5/1/06 Reaffirmed; M McD"

16. Upon this evidential basis counsel on behalf of the applicants seeks to make the case (i) that the respondent in this case had regard *only* to principles relating to non-refoulement (ii) ignored the existence of a discretion which he held (iii) did not consider relevant psychiatric evidence in the context of his discretion under s. 3 of the Act of 1999. It is contended that the respondent had therefore unlawfully fettered his discretion.

17. As has been recently reiterated in the case of *Akujobi & Ors. v. The Minister*, (Unreported, High Court, 11th January, 2007, MacMenamin J.) the test in proceedings wherein a decision sought to be impugned is one under s. 3(11) of the Immigration Act, 1999 is that of "arguability". The applicant also seeks the ancillary relief of an injunction restraining deportation. It is accepted that the test for this second facet of the application is whether the applicants have established a fair question to be tried.

18. In cases of judicial review there is a primary onus upon an applicant for leave to establish a stateable case arguable in law, or one, if facts which would be sufficient if proved, to provide a stateable ground for the form of relief sought by way of judicial review (see the judgments of Finlay C.J. and Denham J. in *G. v. The Director of Public Prosecutions* [1994] 1 I.R. 374 considered most recently in A.

The Issue

19. Did the Minister have regard to the wrong issue, that of refoulement?

20. I am not at all convinced that the applicant, as a matter of evidence has established that this is so. While it is true that the question of refoulement set out in the course of the departmental memorandum, it has not been established that this was the basis of the ultimate determination made by the respondent. While, at first glance, it might be contended that there was an ambiguity derived from the fact that (unaccountably) the issue of refoulement was mentioned in the memorandum, a closer analysis shows this was not at all the basis of the determination.

21. To establish *locus standi* it is necessary to have an evidential foundation. The primary factual finding necessary in this case is the answer to the rhetorical question which starts the last paragraph. The memorandum itself provides that answer. I do not consider there was ambiguity. The answer is contained specifically in the addendum in handwriting signed by Mr. Dowling, the departmental official. It recommends that the Minister affirms the deportation order *for the reasons set out at the paragraph marked X which relates to the psychiatric reports submitted on behalf of the applicant*. No evidence has been adduced to displace the proposition that the evidence, *ex facie* the document impugned, establishes that simple reason for the decision, as set out by Mr. Dowling and affirmed by the Minister. Thus, as a matter of fact, no question of plurality of purpose arises.

22. Counsel for the applicant has referred to *Cassidy v. Minister for Industry and Commerce* [1978], I.R. 297 Henchy J., where that judge had to consider the legal position where, prima facie, there was a plurality of purposes. In such circumstance that judge concluded that one should look to the primary and dominant purpose of the Minister in making the order. Here, even were it to be thought that the document indicated a plurality of purpose, the only reasonable conclusion which can be drawn is that the dominant purpose was that referred to the Minister by Mr. Dowling, which as is clear, relates to the applicant's psychiatric condition, as opposed to that of refoulement.

23. Reference was made to a number of other authorities during the course of submissions *(Re Murray's Application* [1987] 12 N.I.J.B. 2; *The State (Bowles) v. Fitzpatrick* [1989] I.L.R.M. 624; and *The People (Director of Public Prosecutions) v. Howley* where the issue of plurality of purposes arose in the context of criminal procedure. However, by reason of the factual finding I do not consider that these authorities or *Cassidy* are apposite in the present situation.

24. While the departmental memorandum undoubtedly contained extraneous material, it has not been demonstrated upon the evidence that such material was part of the Minister's decision. An analysis of the memorandum as a whole shows that the applicant's psychiatric condition was considered not in one, but in a number of paragraphs, and ultimately the fifth, referred to and emphasised, the attention of the decision maker was drawn to the italicised portion identified; which by any reasonable inference was the basis of the ultimate determination and exercise of the Minister's discretion. It follows that there is no evidential basis to show the Minister only had regard to refoulement, or even had any regard to that issue.

25. It has been suggested that the emphasised paragraph relating to the applicant's psychiatric condition was cryptic or contained factually incorrect material. Particular criticism was made of the last sentence, where the writer stated that he was not aware whether Mr. L. would be unable to be maintained on medication for such a condition in his own country of origin. As a matter of strict interpretation this view, albeit expressed opaquely, is correct in that the author of the memorandum is stating his absence of knowledge as to whether the first named applicant could be maintained on medication for such a condition in his own country of origin. This does not give rise to grounds for leave.

Discretion

26. In *K. v. the Minister for Justice, Equality and Law Reform*, High Court, 9th November, 2005, Clarke J. dealt with the issue of the discretion of the Minister and the respective obligations of the applicants and the respondent.

> "The obligation of the authorities is to afford the person concerned an opportunity to make submissions. Provided those

submissions are in accordance with the Act the obligation of the Minister is to consider them, or if no submissions are made to consider the matters set out in s. 3(6) of the Act of 1999 "insofar as they appear or are known to the Minister". There is no evidence here that the Minister ignored this discretion or fettered it unlawfully.

27. 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 a matter entirely for the Minister. Only in the most exceptional circumstances will a court interfere with the discretion of the Minister in such a weighing process. It has not been demonstrated on the facts that this is a case where an issue such as right to life arises see *C. v. Minister for Justice, Equality and Law Reform*, (Unreported, High Court, 5th November, 2004, Hanna J.). Once it has been established, as I consider it has here, that the Minister has considered the matters which were submitted to him a court should be slow indeed to interfere. It has not been established that such exceptional circumstances arise in the instant case.

28. The test which arises for a grant of leave in these proceedings is a low threshold. However, event having regard to that threshold in the light of the findings made herein the court does not consider that any basis has been established upon which this Court might grant leave to seek judicial review. It follows, therefore, that it is not open to the court to grant an injunction where the higher evidential and legal test of fair issue is applicable. In the circumstances the court therefore will decline each of the applications made by the applicants.