THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 928 J.R.]

BETWEEN

A.W.

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of June, 2016

1. Following the substantive judgment in this case (*A.W. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 111 (Unreported, High Court, 15th February, 2016)) Mr. Colm O'Dwyer S.C. (with Mr. Colin Smith B.L.) for the applicant has applied for leave to appeal to the Court of Appeal. In support of that application he has identified two proposed questions of law which he submits are of exceptional public importance such that it is in the public interest that an appeal should be brought.

2. I have had regard to the caselaw on the issue of leave to appeal, including *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, MacMenamin J., 13th July, 2006) and *Arklow Holidays Limited v. An Bord Pleanála* [2007] 4 I.R. 112 (Clarke J.). In particular in *Arklow Holidays* at para. 4(ii), Clarke J. emphasised *that "the importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case*", citing *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704 (McKechnie J.). It was also emphasised that the point must be one in respect of which some uncertainty arises making it appropriate for resolution on appeal.

The first proposed question

3. The applicant's first proposed question of law is *"whether the Minister, in considering the issue of refoulement and deciding whether to make a deportation order in respect of a person, is obliged to consider and assess submissions made by the person as to why adverse credibility findings made by asylum decision-makers ought not to be adopted".*

4. Mr. O'Dwyer submits that this question affects virtually every applicant. But that does not seem to me to be the case. It is only of potential relevance where the person has firstly been through the asylum process and secondly where an applicant's credibility has been found wanting during that process. In any event, as I noted in the substantive judgment, the Minister did not blindly follow the finding of the Tribunal, but gave a reason for doing so, namely that the Tribunal had heard the applicant and was in a better position to assess her credibility than the Minister, who was conducting a paper exercise. There is, it seems to me, a certain lack of reality in suggesting that a Minister can meaningfully reassess a credibility finding previously made by someone who had actually heard the applicant.

5. The substantive judgment in this case held that there was no general obligation to reconsider adverse credibility findings, made earlier in the process, at the deportation order stage. Even assuming that that is a point of public importance, no uncertainty has been demonstrated in relation to it.

6. Hypothetically it may be argued that if some future applicant comes forward in exceptional circumstances with some very compelling new feature supportive of credibility that is introduced at the deportation stage, it might be argued that there be a greater onus on the Minister to consider this. But even assuming in favour of the applicant that such a contention could be made, that is very much a fact-specific situation that would only arise in very limited cases. On the facts this particular applicant does not seem to me to have brought forward such compelling evidence and her submission in this regard lacks a degree of factual foundation.

7. Even the decision in *Barua v. Minister for Justice and Equality* [2012] IEHC 456 (Unreported, High Court, Mac Eochaidh J., 9th November, 2012), which is the high watermark of the applicant's case under this heading, acknowledges, at para. 39, that the Minister is entitled to adopt adverse findings of the Tribunal when considering subsidiary protection (albeit as part of a fresh consideration). Mr. O'Dwyer relies on the right to due process but the applicant has already received due process in the Tribunal.

8. In relation to this point it has not been established that there is any uncertainty in the law which requires to be clarified by the Court of Appeal. Nor does it seem to me that on the facts, the applicant can properly advance the point, because of the lack of any really compelling material militating in favour of a re-consideration of the adverse credibility findings.

The second proposed question

9. Mr O'Dwyer's second proposed question is *"whether detention of failed asylum seekers for a 'short period' cannot be the kind of threat to human rights to which s. 5 of the Refugee Act and/or international refugee law applies or which engages s. 5".*

10. Mr. Nick Reilly B.L. for the respondent submits that much of the applicant's argument, particularly under this heading, is an attempt to contend that my original decision was incorrect, as opposed to showing that it is appropriate for appeal (contrary to the approach set out by Laffoy J. in *Gritto v. Minister for Justice, Equality and Law Reform* [2005] IEHC 75 (Unreported, High Court, 16th March, 2005). In particular, the applicant has advanced a range of authorities, not all of which were opened at the hearing, to demonstrate that the severity of a particular period of detention, in terms of its impact under art. 3 of the ECHR, depends on all of the circumstances rather than just its duration (*Arutyunyan v. Russia* (Application no. 48977/09, European Court of Human Rights, 10th January, 2012) at para. 68; *Price v. United Kingdom* (Application no. 33394/96, European Court of Human Rights, 10th July,

2001) at para. 24; *Mouisel v. France* (Application no. 67263/01) (2002) E.C.H.R. 740, para. 37; *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783; *Minister for Justice, Equality and Law Reform v. Machaczka* [2012] IEHC 434 (Unreported, High Court, Edwards J., 12th October, 2012); and *E.T. v. Clinical Director of the Central Mental Hospital* [2010] 4 I.R. 403 per Charleton J. at 412).

11. It is hard to banish the spectre of exceptional circumstances from many areas of the law, and again hypothetically it may be that a particular applicant is so physically or psychiatrically vulnerable that even a short detention could give rise to a risk of ill-treatment contrary to art. 3 of the ECHR. However, I consider that such a situation would only arise in truly exceptional circumstances and certainly the present applicant is nowhere near establishing that she falls into such an exceptional category. The general rule must be that brief, routine, administrative border detention is not the sort of threat to liberty that engages the U.N. Convention against Torture (U.N.C.A.T.) or the prohibition on *refoulement*.

12. Mr. O'Dwyer relies on the applicant's gender and her mental health. Even accepting that the applicant has suffered mental health issues, there is nothing to show that brief routine detention at the frontier of the Democratic Republic of Congo (D.R.C.) prior to admission to that country would cause the level of severe psychiatric injury that would trigger the prohibition on *refoulement* or the strictures of the U.N.C.A.T. There must be some reality to the points that an applicant can advance.

13. Mr. O'Dwyer relies on a concession made in the decision in *B.M. v. Secretary of State for the Home Department* [2015] UKUT 293 *per* McCloskey J. at para. 13, that detention in the D.R.C. for more than one day would breach art. 3 of the ECHR. But I do not think a concession made in a case in another jurisdiction takes this applicant very far.

14. Mr. O'Dwyer also relies on the applicant's gender, and in particular a comment by one doctor referred to in the *Unsafe Return* report, to the effect that the chances of returnees being raped might be as high as 70%. However, an examination of the report shows that this discussion was in the context of detainees in custody for periods measured in months and not in the context of the routine detention at the border on return. There is simply no evidence that returnees, still less those outside categories of special interest, of which on the facts the applicant is not included, are being abused in this manner in the course of the brief period of detention that may apply at the border. In any event, the *Unsafe Return* report has not been favoured as an entirely objective and comprehensive analysis of the situation in the D.R.C. by either the U.K. authorities (as upheld in *B.M.*), which surveyed much more comprehensive material, or by the Minister, or by Clark J. in *P.B.N. v. Minister for Justice and Equality (No. 1)* [2013] IEHC 435 (Unreported, High Court, 16th September, 2013) at paras. 13 and 40. Furthermore, the Unsafe Return report was considered in the recent judgment of Faherty J. in *P.B.N. v. Minister for Justice and Equality (No. 3)* (Unreported, High Court, 2nd June, 2016) (delivered after the substantive judgment in the present case). At para. 172, Faherty J. notes that the Minister was entitled to prefer the U.K. Border Agency material over the *Unsafe Return* report. The upshot is that the Minister was entitled to conclude that an unremarkable returnee such as the applicant is simply not at real risk of ill-treatment. There is simply a lack of evidence in the present case that a brief detention would create a real risk to the applicant such as would ground the point she now wishes to bring to the Court of Appeal.

15. Mr. O'Dwyer submits that flights back to the D.R.C. are organised by Frontex, the EU's border control agency, and that the Congolese authorities could therefore infer that persons on such flights are failed asylum-seekers. But this alone does not bring the applicant within the category of persons at special risk, as set out in, for example, *B.M.*

16. Having regard to the foregoing, it does not appear to me that there is any contradiction or uncertainty in the law that requires to be resolved by the Court of Appeal. Furthermore, the applicant has not established the necessary evidential basis for the point she wishes to advance in that court.

Costs
17. The applicant submitted that the normal rule as to costs should be departed from if leave to appeal was granted, but no compelling reason has been put forward not to follow the general rule if such leave is refused in this case.

Order
18. For the foregoing reasons, I will order:-

(i) that leave to appeal to the Court of Appeal be refused; and

(ii) that the respondent be awarded the costs of the proceedings as against the applicant.