[Neutral Citation Number: 2006 IEHC 26]

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 668 J.R.]

BETWEEN

TUDOR SIRITANU

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS AND JUDGE COUGHLAN

RESPONDENTS

Judgment of Ms. Justice Dunne delivered on the 2nd day of February, 2006

1. This is an unusual application for judicial review. Originally the matter came before the court by way of two notices of motion dated the 18th July, 2005. The first of those was an application for an interlocutory injunction restraining the respondent his servants or agents from taking any further step in the prosecution of the applicant in the proceedings entitled "The People (at the suit of the Director of Public Prosecutions) v. Tudor Siritanu" bearing the charge sheet number 369913 pending the determination of the proceedings. The second notice of motion was for leave to apply for *(i)* an order of prohibition by way of application for judicial review seeking to restrain the respondent, his servants or agents from prosecuting the applicant in the said proceedings, *(ii)* a declaration by way of application for judicial review that the applicant is entitled to the benefit of article 31 of the United Nations Convention Relating to the Status of Refugees, 1951, *(iii)* a declaration that the continued prosecution of the applicant is an abuse of the process of the Court and *(iv)* an order of mandamus by way of application for judicial review directing the respondent to consider the request of the applicant that the said prosecution be withdrawn on the ground that the applicant is entitled to the benefit of article 31 of the United Nations Convention Relating to the Status of Refugees, 1951.

2. It would appear from the papers before me that the application for the interlocutory injunction restraining the District Court proceedings together with the application for leave to apply for judicial review came before the court on the 21st of June, 2005. It appears that it was on that date that the applicant was directed to serve notice of the application for an interlocutory injunction and the notice of motion for leave to apply for judicial review on the respondent. Thereafter, the notices of motion came before the court on the 18th of July, 2005, and appear to have been adjourned until the matter came on for hearing before me on the 30th day of January, 2006. I have set out the history in order to explain how this matter came before me as an application for leave to apply for judicial review on notice. At the outset of the hearing before me it was agreed by both parties that the applicant herein had to establish substantial grounds in order to succeed in his application for leave to apply for judicial review.

3. When the matter came on for hearing before me counsel for the applicant, Mr. Dillon Malone, made it clear to me that he no longer sought the reliefs set out at paragraphs (a) and (b) of his 2nd notice of motion and relied simply on paragraphs (c) and (d) thereof. In effect therefore, his claim was limited to seeking an order of mandamus directing the respondent to consider the request of the applicant that the prosecution be withdrawn on the grounds that the applicant is entitled to the benefit of article 31 of the United Nations Convention Relating to the Status of Refugees, 1951. Further Mr. Dillon Malone accepted that there was nothing in the papers before me of any kind to indicate or to demonstrate that any relief was sought against the second named respondent and on that basis I directed that the second named respondent should not be a party to the proceedings. The second named respondent was as is usual in such circumstances, not represented before the court. I should add that counsel for the applicant came into this matter after these proceedings were initiated.

4. The background to this matter is set out in the affidavit of the applicant sworn herein on the 21st day of June, 2005. He states that he is a national of Moldova. He arrived at Dublin Airport on the 7th of March, 2005. He had in his possession false travel and identity papers. He stated that his purpose in coming here was to seek asylum. He left Moldova on the 4th of March, 2005, and travelled overland by minibus via Romania, Hungry and Austria to Italy. He arrived in Venice on the 6th of March, 2005, at 2am. That day having paid a sum of €100 to a man and furnished a passport sized photograph to the same man at the main train station in Venice he then purchased from the said man a false Lithuanian passport. He also stated that he gave his own passport to a friend of his who resided in Venice, for safe keeping. On the 7th of March he took a flight from Venice to Dublin and arrived in Dublin Airport at approximately 9pm.

5. On arrival the applicant herein was arrested and charged in respect of certain alleged offences. Subsequently on the 9th of March, 2005, the applicant was interviewed by Detective Garda Breandan O'Somachain, a member of An Garda Síochána attached to the Garda National Emigration Bureau. It appears that the applicant made an application for asylum on the 9th of March, 2005, as he was about to be removed back to Venice.

6. Originally the applicant was charged with certain offences under the Refugee Acts relating to the destruction of papers and his failure to establish his identity. Ultimately these charges were withdrawn as his true passport was obtained by him from his friend in Italy. He was, however, subsequently rearrested and charged with the offence which is now the subject of District Court proceedings. When the matter was before the District Court on foot of the said charge it was indicated to the District Court that an application was being made to the respondent seeking to have the proceedings withdrawn on the grounds that his prosecution would be in breach of Article 31 of the United Nations Convention Relating to the Status of Refugees, 1951. A letter dated the 16th of May, 2005, was sent by solicitors on behalf of the applicant to the respondent requesting that the prosecution be withdrawn.

7. The letter dated the 16th of May, 2005, from the applicant's solicitor to the respondent herein set out brief details of the background and then went on as follows:

> "In view of this current [prosecution] against our client we rely upon Article 31 of the Refugee Convention, 1951 that prohibits convention countries from [prosecuting] asylum seekers for travelling on false documents.
>
> We therefore rely upon an English case of R. v. Uxbridge Magistrates Court, ex parte Adimi [2001] Q.B. 67 to support our claim."

(The solicitor's letter inadvertently used the word persecution as opposed to prosecution in the passage quoted above).

8. The respondent herein has not furnished any replying affidavit but it was agreed by both sides that a letter dated the 8th of September, 2005, from the office of the respondent to the solicitors for the applicant should be before the court although the same was not formally exhibited in any affidavit. The letter was considered by me on that basis. As that letter to a large extent encapsulated matters that were advanced in legal argument before me I think it would be helpful to set out that letter in full.

"Dear Sirs,

> We refer to your letter of 16th May, 2005, in which you call upon the Director of Public Prosecutions to withdraw the charge preferred against your client namely charge contrary to s. 26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
>
> You give as a basis for that demand the contention that your client relies upon Article 31 of the Refugee Convention, 1951 and you cite the case *of R. v. Uxbridge Magistrates Court, ex parte Adimi* [2001] Q.B. 667 in support of that claim.
>
> The prosecution of offences is provided for in Article 30.3 of the Constitution and the Director of Public Prosecutions is charged with the function of prosecuting crime in this jurisdiction by the provision of the Prosecution of Offences Act, 1974. In exercise of his independent functions under that Act, the director has directed that your client knew or believed to be, a false instrument with the intention of inducing another person to accept it as genuine and by reason of so accepting the said instrument to do some act or to make some omission or to provide some service to the prejudice of that person or any other person, contrary to s. 26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
>
> No basis has been established for withdrawing that charge and your client's demand that it be withdrawn is hereby rejected.
>
> In support of your client's claim you cite the *Adimi* case. However, the portion of the judgment of Simon Browne L.J. in that case favourable to your client has been reconsidered by the Judge himself, in *R (European Roma Rights) v. Prague Immigration Offices* (C.A.) [2004] 2 W.L.R. 147.
>
> More significantly, your client's situation is governed by the judgment of O'Higgins J. in the High Court in this jurisdiction in *Sofineti v. District Judge Anderson and Ors.* (Unreported, High Court, 18th March, 2004).
>
> In *Sofineti* the High Court rejected the suggestion that Article 31 of the Refugee Convention Act, 1951 has been incorporated into Irish Law and it rejected the suggestion that the applicant in that case was immune from criminal prosecution by reason of the convention. The court also rejected the contention that the applicant in that case had a legitimate expectation that she would be afforded the protection of Article 31. The court also found that there could be no legitimate expectation that Article 31 could be invoked so as to preclude the director from prosecuting that applicant for an offence under s. 26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, which is the very offence your client is charged with.

In the circumstances, the Director does not propose to withdraw the said charge against your client."

9. The letter signed by Claire Loftus, the Chief Prosecution Solicitor.

10. In considering that letter, Mr. Dillon Malone sought to distinguish the position in his case from that which applied in the *Sofineti* decision. He made the point that the applicant is not making a claim for immunity from prosecution unlike the applicant in *Sofineti*. All that he seeks to do, he argues, is to request the Director to consider the provisions of Article 31. He argued that the letter from the office of the respondent makes it clear that the respondent is refusing to consider the position under Article 31. All that Mr. Dillon Malone seeks on behalf of his client is that the Director gives consideration to withdrawing the prosecution having regard to the provisions of Article 31. He considered the judgment of O'Higgins J. in the case of *Sofineti* referred to above in which it was argued that the 1951 Convention forms part of Irish law. In that case O'Higgins J. firmly rejected the submission that the 1951 Convention forms part of Irish Law and Mr. Dillon Malone on behalf of the applicant accepts that the decision is binding on his client to that extent. He went on to consider the issue of legitimate expectation as dealt with in that decision and in particular he referred to the passage of O'Higgins J. at p. 14 as follows:

> "The respondents submit that a legitimate expectation of a particular course of action cannot arise where legislation clearly provides for a different course of action. They maintain that the Director of Public Prosecutions is charged by law with certain functions and that there can be no reliance on the doctrine of legitimate expectation to prevent him from discharging those functions. They also maintain that the doctrine of legitimate expectation cannot be used to import the provisions of Article 31 of the Geneva Convention, 1951 into Irish Law in the absence of legislation because of the provisions of Article 29.6 of the Constitution."

11. Mr. Dillon Malone went on to consider at some length the passage of the judgment of O'Higgins J. dealing with the arguments in that case in respect of legitimate expectation. In particular Mr. Dillon Malone referred to a passage cited by O'Higgins J. from the case of *Kavanagh v. Governor of Mountjoy Prison & Ors*. [2002] 3 I.R. 97 in which Fennelly J., referred to a decision of the Australian Courts to the following effect:

> "The judgment contains the following at p. 291:
>
> > 'Ratification of a Convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the Convention and to treat the best interests of children as 'a primary consideration'."

12. Having quoted the passages from the judgement of Fennelly J. in the case of *Kavanagh*, O'Higgins J. at p. 18 of the judgment went on to say as follows:

> "The constitution establishes an unmistakable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the government wishes the terms of international agreements to have effect in domestic law it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies. I am prepared to assume that the State may, by entering into an international

agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to effect either the provisions of a statute or the judgment of the court without coming into conflict with the constitution."

13. Mr. Dillon Malone relies heavily on this passage of the judgment in *Sofineti*. He argues that the respondent in his capacity as the person who decides on whether someone should or should not be prosecuted is an administrative decision maker. He identifies the power exercised by the D.P.P. as an administrative power and consequently he argues that he has a legitimate expectation that the D.P.P. will respect the terms of Article 31 of the 1951 Convention. In that context he says that he is entitled to have the request made to the respondent considered by the respondent. He argues for no more than that. In considering the overall functions of the D.P.P. he considered the case of *Eviston v. D.P.P.* [2002] 3 I.R. 260. He relies on that decision to show that it is established that there is a procedure in existence in the office of the respondent to consider a request for a review of the decision to initiate, or not to initiate as the case may be, a prosecution. Finally Mr. Dillon Malone urged on the court that the court has a jurisdiction to say that the respondent should consider Article 31 and that this application was not seeking to interfere with his discretion either to prosecute or not to prosecute as the case may be. All that he is asking is for that Article 31 be taken into consideration.

14. Mr. Michael P. O'Higgins appeared on behalf of the respondent. He referred to the basis upon which the application has now been brought. As the applicant has now limited the argument in this case to saying that he is entitled to make a request of the respondent and that the respondent is under a duty to consider such request and whether Article 31 applies to the circumstances of the case such that the prosecution be withdrawn, Mr. O'Higgins argues that in fact the respondent has considered the point raised by the applicant herein. He referred in that regard to the letter referred to above dated 8th of September, 2005. He stated that the letter can be construed as showing that the D.P.P. had in fact considered the Article 31 point. If he was wrong in that submission he then argued that there is no right on the part of someone in this applicant's situation to demand that the D.P.P. consider the provisions of Article 31 in deciding whether or not to prosecute.

15. Mr. O'Higgins then looked at the nature of the application before the court. He said that it was an application to stay a prosecution pending an event i.e. the consideration of the applicant's request by the respondent having regard to the provisions of Article 31. Accordingly the prohibition jurisdiction of the court was triggered. Although the case as originally constituted is not now being made and the applicant has confined himself to the relief by way of declaration that the continued prosecution is an abuse of the process of the court and that an order of mandamus be granted directing the respondent to consider the request, he states that in effect this amounts to seeking prohibition although that is not how the application is now characterised. In those circumstances he contends that what is sought is in effect prohibition and therefore the applicant must show that there is a real risk that he cannot get a fair trial.

16. In considering the decision of O'Higgins J. in the *Sofineti* case, he noted that Mr. Dillon Malone has not sought to argue that the case was incorrectly decided. The height of the argument based on that decision is the obiter dictum of O'Higgins J. at p. 18 of that judgment where it was stated by O'Higgins J. as follows:

> "I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to effect either the provisions of a statute or the judgment of a court without coming into conflict with the constitution."

17. Mr. O'Higgins pointed out that the power of the D.P.P. is regulated by and arises under statute namely, the Prosecution of Offenders Act, 1974. As a result of the decision of O'Higgins J. in the *Sofineti* case, it was clear that there was no right capable of being enforced under Article 31, a point effectively accepted by and on behalf of the applicant. In that context he argued that the applicant was not entitled to go on to say notwithstanding that there is no right capable of being enforced under Article 31 that he is entitled to issue a request to have Article 31 considered. There is no such right. Mr. O'Higgins then referred to the letter from the respondent herein. In that letter the respondent set out a number of matters namely the relevant case law and he referred to the convention. On that basis it is clear that the D.P.P. at the time of dealing with this matter was aware of the convention and thus Mr. O'Higgins said that he was entitled to say that the respondent dealt with the inquiry from the applicant's solicitor, dealt with the issues of law arising from the matters set out in the applicant's solicitor's letter and rejected the inquiry. Finally Mr. O'Higgins stated that there can not be an enforceable right to entertain a request to withdraw a prosecution that cannot be prohibited.

18. By way of reply Mr. Dillon Malone disagreed with the contention that the applicant did not have a right to stop the trial before the request was considered. Insofar as he was challenging the judgement of O'Higgins J. in the case of *Sofineti*, he argued that his point was that it was not a usurpation of the legislative function of the Oireachtas to say that the D.P.P. can consider the provisions of Article 31 of the 1951 Convention. He pointed out that the respondent has an obligation in carrying out his statutory function to filter the cases to be prosecuted. Finally he referred to a passage from the judgment of Fennelly J. in *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 107 at p. 127:

> "I turn finally to the argument based on legitimate expectation. It is unnecessary to pronounce any view on the impressive array of authorities cited by counsel for the applicant for the proposition that decision makers should take international human right's instruments into account when making decisions in areas potentially affected by those instruments. It can be accepted without deciding that such a decision maker should pay due regard to such instruments. It is, however, the particular form of legitimate expectation claimed by the applicant which has to be considered.
>
> The principle of respect for a legitimate expectation, though novel and as yet not fully explored, can be confidently defined as a rule applicable, *ratione materiae*, to the decision making process. Where the State is involved, it should be assumed for present purposes that all makers of administrative decisions may come within a scope once the State itself has adopted a relevant position in the international fear. On that hypothesis, decision makers should not be allowed to disappoint expectations which they have themselves created and which are reasonably entertained by those within the purview of the powers they exercise. Why, one asks? The simple almost naïve answer is that it would be unfair. I discussed this in my judgment in *Daly v. Minister for the Marine* [2001] 2 I.R. 513. Moreover the doctrine of legitimate expectation does not, in the normal course of events, guarantee anything more than procedural fairness."

Fennelly J. then goes on to refer to the Australian decision in the case referred to in the judgment of O'Higgins J. in *Sofineti* and quoted above.

Conclusions

19. This is an application brought on notice to the other side. It is agreed that the threshold to be satisfied by the applicant is that he must show there are substantial grounds for giving leave to apply for judicial review. In essence the application herein seeks to compel the respondent to consider the provisions of Article 31 of the 1951 Convention on foot of the request made in the letter of

16th May, 2005, by the solicitors for the applicant. That letter called upon the respondent to withdraw the charge against the applicant by virtue of the provisions of Article 31. Although the applicant has narrowed down the scope of reliefs sought in these proceedings, it is still the case that the applicant seeks to stop the proceedings continuing until such time as such request is complied with. Thus it seems to me that the argument made by Mr. O'Higgins to the effect that the applicant has continued to seek prohibition notwithstanding his express withdrawal of that relief has force given that the applicant seeks to stay the prosecution until the respondent considers the Article 31 request. Since the proceedings commenced, the D.P.P. has not pursued the prosecution pending the resolution of the judicial review proceedings and I cannot see what other effect there would be on the prosecution of the proceedings if the relief sought was granted in this case other than to stop the proceedings until such time as a decision was made either rejecting or accepting the applicant's request. That being so it seems to me that Mr. O'Higgins is correct in his argument that the applicant must show that there is a serious risk of an unfair trial. This is perhaps a somewhat difficult conclusion to reach because in the circumstances of this case the applicant has not sought to demonstrate that there is a serious risk of an unfair trial if the relief sought is not granted. On the contrary the argument has been that he simply wants the respondent to make a decision one way or another having regard to the provisions of Article 31 and if having made such decision, the decision is one to prosecute then the only reliance that could be placed by the applicant on Article 31 in court would be in mitigation of any sentence on the basis that he was convicted. Clearly the provisions of Article 31 do not afford a defence to the prosecution. The form in which these proceedings have come on for hearing before me makes it somewhat difficult to apply the case law that is relevant to prohibition to the circumstances of this case in the light of the form of relief now sought. Nevertheless having regard to the nature of the relief now sought, the effect of such relief if granted being to delay any prosecution pending a decision being made, therefore as the applicant has not shown a serious risk of an unfair trial it seems to me that his application must fail.

20. If I am wrong on that conclusion, it seems to me that I should consider the question as to whether or not the applicant herein has crossed the threshold necessary to apply for leave in this case. In doing so, the first aspect to be considered seems to me to be the letter dated the 8th of September, 2005, from the office of the respondent to the solicitors for the applicant. That letter was, of course, sent after these proceedings had commenced. Nonetheless it is abundantly clear from the letter that the respondent is fully aware of the provisions of Article 31 of the 1951 Convention. It is also clear that the respondent has considered the fact that Article 31 does not form part of Irish Law. I think it is clear from the letter that the respondent was of the view that Article 31 could not be invoked by the applicant so as to preclude the respondent from prosecuting the applicant for an offence under s. 26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. He reached that conclusion on the basis of the decision of the High Court in the *Sofineti* case. I think that on any reasonable interpretation of the letter it is clear that the respondent did not in fact consider whether to withdraw the prosecution or not having regard to the provisions of Article 31 of the 1951 Convention. Rather, he concluded that Article 31 had no application to the circumstances of the case. I should note however that the Director also stated in that letter as follows:

> "No basis has been established for withdrawing that charge, and your clients demand that it be withdrawn is hereby rejected."

21. I think that passage can only be interpreted as meaning that no other basis apart from Article 31 was put forward in the letter and accordingly as the respondent took the view that Article 31 was not something that could be relied upon it was in those circumstances that the request of the applicant's solicitor was rejected. That being so the question then arises as to whether the respondent was correct in his interpretation of the decision of O'Higgins J. in the *Sofineti* case. In the course of his judgment in the *Sofineti* case having very carefully considered all of the arguments raised as to whether Article 31 was part of Irish law and further the issue as to whether an applicant had a legitimate expectation that the provisions of Article 31 could be invoked by an applicant in relation to prosecution undertaken by the Director of Public Prosecutions. O'Higgins J. came to a very clear conclusion. He stated at p. 22 as follows:

> "In the light of Article 29.6 of the Constitution taken in conjunction with the duties imposed on the Director of Public Prosecutions by the Constitution and the Prosecution of Offences Act, 1974 there can be no legitimate expectations in the applicant that Article 31 of the Convention could be successfully invoked by her so as to prevent the Director of Public Prosecutions prosecuting her and maintaining such prosecution."

22. I see no basis for disagreeing with that conclusion nor do I see any basis for distinguishing the conclusion reached by O'Higgins J. in that case on the issue of legitimate expectation from the circumstances of this case. It seems to me that the respondent correctly had regard to the decision in that case and applied it appropriately. That being so I ask myself the question is there any purpose in compelling the respondent to consider a request from an applicant in circumstances where there is no legitimate expectation that Article 31 of the Convention can be successfully invoked so as to prevent the Director of Public Prosecutions from prosecuting and maintaining a prosecution such as that in the present circumstances. What right enforceable by mandamus could there be to compel a consideration by the respondent under Article 31 in circumstances where Article 31 cannot be invoked? I cannot see that any such right could exist. What the applicant seeks to do is to delay his prosecution to have a request considered that will afford no benefit to the applicant in circumstances where the respondent has made his position abundantly clear.

23. In the circumstances I am satisfied that the applicant has not satisfied the requirement to show that there are substantial grounds demonstrated which could give rise to leave to apply for judicial review herein.