Neutral Citation Number: [2011] IEHC 290

THE HIGH COURT

2011 151 JR

BETWEEN

G. K. N.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

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

1. In these judicial review proceedings the applicant, Mr. N., seeks leave to quash a deportation order of the Minister for Justice, Equality and Law Reform pursuant to s. 3 of the Immigration Act 1999 ("the 1999 Act") dated 26th January, 2011. The applicant also seeks leave to challenge the constitutionality of s. 3(1) of the 1999 Act on the ground that it does not provide an effective remedy in respect of the making of a deportation order.

2. The applicant is a Cameroonian national who arrived in Ireland in November 2008 and who then made a claim for asylum. He contended that he had worked with a human rights group entitled Global Conscience Initiative which worked with prisoners and political detainees in Kumba, a city in the south west of Cameroon. Mr. N. maintains was persecuted as a result by agents of the Cameroonian state. I will return presently to the details of this claim.

Challenge to the constitutionality of s. 3 of the 1999 Act

3. While counsel for the applicant, Mr. Monahan, indicated that he was not pressing this point, for completeness I will nonetheless deal with it. So far as the challenge to the constitutionality of s. 3 of the 1999 Act is concerned, the first thing to note is that neither the statement of grounds nor the affidavit set out any possible basis on which the applicant might be said to be affected by the (alleged) absence of an effective remedy. The claim, therefore, has "the insubstantiality of a pure hypothesis": see, e.g., the comments of Henchy J. in *Cahill v. Sutton* [1980] I.R. 269 at 286. The applicant, therefore, lacks the basic standing such as would be necessary to enable to advance such a claim.

4. This, in itself, would be sufficient to dispose of the constitutional claim. As it happens, I dealt with the question of an effective remedy in both a constitutional and ECHR context in my judgment in *Efe v. Minister for Justice, Equality and Law Reform (No.2)* [2011] IEHC 214. At the conclusion of my judgment I summarized my findings thus:-

> "A. Article 40.3.1 and Article 40.3.2 of the Constitution require the State to vindicate constitutional rights. This of necessity requires the State to provide a mechanism where such rights are adequately vindicated by means of an adequate remedy and, where appropriate, the courts will take on the task of fashioning such a remedy.
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> B. Any rule of law which purported to constrain this Court from protecting constitutional rights in circumstances where it could only interfere where there was "no evidence" to justify a factual conclusion reached by a decision-maker would simply be at odds with these constitutional obligations. A test of this nature in the sphere of constitutional rights would thus fall to be condemned as unconstitutional in the light of the obligations imposed on the State by Article 40.3.1 and Article 40.3.2 to vindicate these constitutional rights.
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> C. In the wake of the Supreme Court's decision in *Meadows* it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a Meadows-style proportionality analysis.
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> D. In the light of the decision in *Meadows*, it is clear that constitutional rights - including the family rights protected by Article 41 at issue here - are adequately vindicated by the common law rules of judicial review.
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> E. In judicial review proceedings it is not permissible for this Court to receive and act on new evidence, since to do so would be to cross a border between appeal and review. If there were no mechanism whereby material new facts which impacted significantly on constitutional rights emerged after the relevant administrative decision could be reviewed, then such a lacuna would amount to a failure to vindicate constitutional rights for the purposes of Article 40.3 and the Court might have to give a declaration to this effect.
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> F. As it happens, however, there is such a mechanism, in that s. 3(11) of the 1999 Act allows the Minister to revoke a deportation order. In these circumstances, there is no basis for granting a *Carmody*-style declaration in respect of any legal lacuna and still less is there any basis declaring the common law rules of judicial review to be unconstitutional on this account.
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> G. It is clear from the decision of the ECHR in *Kay v. United Kingdom* that *Meadows*-style judicial review satisfies the requirements of Article 13 ECHR. So far as the receipt of new evidence is concerned, is likewise clear from *Maslov v. Austria* that all that is necessary that there is a mechanism whereby new material evidence can be evaluated by administrative decision-makers. As we have noted, there is such a procedure provided by s. 3(11) of the 1999 Act.
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> H. For these reasons, there is no basis for granting a declaration of incompatibility pursuant to s. 5(2) of the 2003 Act."

5. If I may respectfully say so, these conclusions are sufficient to dispose of any challenge to the constitutionality of s. 3 of the 1999 Act. It is equally plain that there is no basis for granting any declaration of incompatibility in this regard pursuant to s. 5(2) of the European Convention of Human Rights Act 2003.

6. It follows, therefore, that I must refuse leave in respect of these grounds.

Alleged error on the face of the record
7. The applicant originally contended that the s. 3 file analysis was defective in that it was first signed by an official, Ms. Maria Grove, on 31st August, 2010, for onward transmission to a higher executive officer, Ms. Claire Sperin, but Ms. Sperin did not subsequently deal with the file. While Mr. Monahan again indicated that he was not pressing the point, I will nonetheless canvass this issue.

8. The evidence demonstrates, however, that the examination was read and approved by Ms. Maire Ni Fheinneadha, a higher executive officer on 16th December ,2010, in accordance with the Department's own internal procedures, albeit not by Ms. Sperin. It was subsequently read and approved by Mr. Michael P.Flynn, an Assistant Principal Officer on 23rd December, 2010. Mr. Flynn transmitted the file to the then Minister for Justice, Equality and Law Reform (Mr. Brendan Smith TD) and the deportation order was signed personally by the Minister on 26th January, 2011.

9. This contention is wholly without substance. It is elementary that by virtue of the Minister's status as a corporation sole (cf. s. 2 of the Ministers and Secretaries Act 1924) all decisions taken by individual civil servants are taken in the name of the Minister: see, e.g., the decisions of the Supreme Court in *Tang v. Minister for Justice* [1996] 2 I.L.R.M. 46 and *Devanney v. Shields* [1998] 1 I.L.R.M. 81. In that respect, the identity of the individual civil servants who did (or, as the case may, did not) participate in the decision-making process it is quite irrelevant in law, since the law regards the ultimate decision as being that of the Minister. Accordingly, each of the civil servants who took part in the decision are themselves acting at all times in the name of the Minister. It follows in turn that the internal arrangements in the decision making process are wholly a matter for the Minister and are of no concern to the person affected by the decision.

10. Given that the suggestion that there is an error on the face of the record is entirely unfounded, I would accordingly decline to grant leave in respect of this contention.

Challenge to the reasoning of the Minister
11. By a decision of 5th August, 2009, the Refugee Appeal Tribunal found against the applicant on general credibility grounds. This decision clearly influenced the Minister's subsidiary protection decision and the parallel s. 3 file analysis. Indeed, the file analysis prepared for the Minister noted that the applicant had "failed the asylum process due to major credibility issues and has not substantiated any aspect of his asylum claim by way of documents".

12. Passing over the fact that the applicant never challenged the decision of the Tribunal, the negative credibility analysis which features in the Minister's s. 3 file analysis could only be set aside if it were shown to have been infected by a material error of fact or if the conclusions did not rationally or reasonably flow from the factual premises: see, e.g., decisions such as *Hill v. Criminal Injuries Compensation Tribunal* [1990] I.L.R.M. 36; *A.B.-M. v. Minister for Justice, Equality and Law Reform,* High Court, 23 July 2001; *AMT v. Refugee Appeal Tribunal* [2004] 2 I.R. 607; *L. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 362; *ML v. Refugee Appeal Tribunal,* High Court, 21st January 2011 and *HR v. Refugee Appeal* Tribunal [2011] IEHC 151.

13. Has there been any such error of fact or unreasonable inference? It may be convenient here to summarise briefly the gist of the applicant's case. The applicant contended that he worked for a human rights organisation, Global Conscience Initiative ("GCI"), which specialized in work with prisoners. He contends that he was harassed by the police by reason of this work and that he was detained in Kumba central police station on several occasions in 2008. He further maintained that he was beaten on a number of occasions while in detention. He then says that the principal of the organisation, a Mr. Samba Churchill, arranged for his escape from prison.

14. The Tribunal found against the applicant on a range of credibility grounds. It suffices perhaps to mention two such grounds. The first was that the GCI newsletter made no mention of any of its members being detained or imprisoned in Kumba, even though one of its stated functions of the newsletter was to provide an outlet for such prisoners. One might reasonably have expected that this would have been highlighted by the newsletter had such occurred, not least given that, on Mr. N.'s account, Mr. Churchill was intimately involved in securing his release. Second, the applicant claimed that he had visited the central police station in Kumba on many occasions and that the officers there knew him well by name. Mr. N. was nonetheless unable to name any of these officers.

15. None of these findings have been challenged. While the country of origin information demonstrates that the level of human rights protection in Cameroon leaves a good deal to be desired, a critical factor in the present case is that the only basis on which Mr. N. could claim that he had well founded fear of persecution (for the purposes of the Refugee Act 1996) or "serious harm" (for the purposes of the European Communities (Eligibility for Protection) Regulations 2006 (SI No. 518 of 2006) is by reason of his alleged involvement in GCI. Yet that account has been thoroughly disbelieved by the relevant Tribunal member charged with investigating the matter.

16. Mr. Monahan argued that these findings had not been expressly adopted in the case of the deportation decision. While this might have been correct so far as the original typed version of the decision is concerned, the handwritten additions of Mr. Flynn expressly referred to these "major credibility issues" as found by the Tribunal.

17. Against that background, therefore, other complaints advanced by the applicant directed towards the Minister's reasoning recede in importance. Thus, for example, the deportation decision argued that if Mr. N. felt at risk of persecution, he could bring a complaint to the National Commission on Human Rights and Freedoms ("NCHRF") which acts as an umbrella organisation for human rights groups in Cameroon. Mr. Monahan argued - quite possibly with some justice - that the NCHRF was hampered by a lack of funds and that as it could only make recommendations, it did not provide an effective remedy. But if Mr. N. cannot otherwise advance any credible claim that he is at risk of persecution or serious harm, then the relevance of this argument is not obvious.

18. Mr. Monahan also complained that Mr. Flynn's hand-written note had stated that Mr. N. had not substantiated his asylum claim without any documentary evidence, whereas Mr. N. had produced a GCI membership card. That may be so, but the probative value of this document must be regarded as slight, not least where the remainder of the asylum claim was comprehensively disbelieved. At best, therefore, this statement may be regarded as a form of harmless error which had no real bearing on the validity of the decision.

Conclusions
19. For the reasons stated, I would therefore hold that the applicant has not presented substantial grounds for challenging the

decision of the Minister within the meaning of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, and I would therefore refuse leave to apply for judicial review.