

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 384 J.R.]

**IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED),  
IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND IN THE MATTER OF THE CONSTITUTION**

**BETWEEN**

**B.S.**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Barr delivered the 1st day of October, 2014**

**Background**

1. The applicant is a national of Albania born on 4th May, 1981. She arrived in the State on 29th July, 2005, and applied for asylum on 2nd August, 2005. In the questionnaire dated 16th August, 2005, the applicant said that she left Albania for a better life:-

*"I left for a better life. I wanted to be able to avail of regular study, which I could not have in my own country, as there is no peace or order in Albania to achieve this. That is why I am here. I was never arrested or mistreated. I was not questioned. I am humbly asking the Irish State to take care of me. "*

2. At the interview held on 20th October, 2005, the applicant's story changed radically. She stated that she did not have any children and that she had never been married. When asked why she had left Albania, she replied that she had been brought to Italy against her will. She stated that she was being used in that country to work as a prostitute. She said that one lucky day she was able to escape back to Albania. She only stayed a day in Albania and within 24 hours her father had her en route to Ireland. She said that she had been abducted on her way back from the market. She had been stopped by four men. She stated that all four of them grabbed her and dragged her into the car. That evening, all the four men raped her. The next day she was sent to work in Italy. She said that this incident occurred in August 2004. She did not remember the exact date.

3. It was put to the applicant that a EURODAC hit revealed that she had been in Brussels in 2003. The applicant was vague in her answer on this topic. She said that she had been brought there to work as a prostitute. She was asked why she had stated that she had no problems prior to 2004, she said that she could not remember much in the circumstances. When asked to explain what exactly happened in 2003, she stated that she could not say what exactly happened. As far as she could remember, she had been drugged or intoxicated at the time. She did not know what was going on. In the course of her interview, it was put to the applicant that she had said that she had been abducted in 2004. She was asked had she been abducted previously. She answered:-

*"I don't know. I can't remember exactly the dates or events. I remember I may have been in Belgium only for one day. I say Belgium because you say Belgium, but I don't know. My eyes were closed while I was travelling. "*

4. The applicant alleged that someone was looking for her and trying to bring her back to Italy. She never referred to the person as her husband, which became material further on in the application process.

5. By letter dated 22nd November, 2005, the Commissioner recommended that the respondent should not be declared to be a refugee. In the course of the recommendation, the Commissioner made a finding pursuant to s. 13(6)(c) of the Refugee Act 1996 (as amended) that the applicant would not be granted an oral hearing as she had previously applied for asylum in Belgium in 2003.

6. A notice of appeal was lodged by the Refugee Legal Service on 2nd December, 2005. In this document, it was alleged that she had been abducted in 2003 by four men, while on her way home from a shop in Albania. It was alleged that they brought her to Belgium where she was held against her will and forced to work as a prostitute, living with approximately 20 other girls. She alleges she was forced to apply for asylum in Belgium and after some months was moved to Milan in Italy. She gave a broadly similar account of her escape in Italy: managing to leave the house for a very short period, when she immediately met an Italian police man who helped her return to Albania, where she stayed for only 24 hours before travelling to Ireland. She alleged in her application form that since her arrival in Ireland, her father had been visited in Albania by a man who threatened that the applicant and he would be killed if she returned to Albania.

7. With the notice of appeal, the applicant submitted country of origin information from the United States State Department, an Amnesty International report and a medical article by Dr. Juliet Cohen entitled *"Errors of Recall and Credibility: Can omissions and discrepancies in successive statements reasonably be said to undermine the credibility of testimony?"*

8. In a decision dated 4th January, 2006, notified to the applicant under cover of a letter dated 26th January, 2006, the applicant was informed that her appeal was refused. The applicant's personal credibility was specifically rejected. Subsequent to this, the applicant made representations to the Minister pursuant to s. 3 of the Immigration Act 1999, by letter dated 24th February, 2006, in which the applicant again confirmed that she was not married and had no children. Under the heading of refolement, the Minister was referred to her asylum application.

9. The applicant's version changed again when she updated her submissions pursuant to s. 3 by letter dated 29th August, 2006. In

this, for the first time, she stated that she was forced to marry one of the men who had taken her to Belgium in 2003. It was stated that her husband had discovered where she lived in Cork, and that she had to report him to the police.

10. It appears that on 9th September, 2006, the applicant attempted to commit suicide by taking an overdose of her medication. She was taken to hospital after this episode. In further submissions lodged on 7th December, 2006, the Minister was provided with a declaration made by a solicitor in Albania, giving the applicant's circumstances as disclosed to him by the father of the applicant.

11. By letter dated 9th March, 2007, the applicant was informed that the Minister had made a deportation order in respect of her. Attached to this letter were copies of the deportation order which had been issued on 28th August, 2006, together with a copy of the "Examination of File". A country report relating to the concrete efforts by the Albanian police to combat the tide of human trafficking was relied upon to find that effective State protection would be available. The letter of 9th March, 2007, also invited the applicant to apply for subsidiary protection and stated that the Minister was prepared to give an undertaking not to implement the deportation order before a decision had been made on this aspect.

12. An application seeking subsidiary protection was made on 12th March, 2007. Submissions in support of the application were made by letter dated 23rd March, 2007; this letter seems to have been resent on 21st September, 2007.

13. The application for subsidiary protection was refused on 14th October, 2008. As with the deportation decision, a country report relating to the concrete efforts by the Albanian police to combat the tide of human trafficking was relied upon to find that effective state protection would be available. The credibility findings made by the Tribunal were completely relied upon. The applicant was again informed by letter dated 21st October, 2008, that the Minister had made a deportation order in respect of her and she was instructed to attend with the GNIB on 11th November, 2008, to make arrangements for her removal from the State.

14. There does not seem to have been much activity on the file for approximately a year after that date. Towards the end of 2009, the applicant sought the advices of her present solicitor and thereafter medical reports were sought.

15. By letter dated 11th June, 2010, the applicant sought revocation of the deportation order. This application was made primarily based on the applicant's mental health and also based on changed country conditions in Albania. A number of documents were submitted. While some of these documents related to matters already submitted to the Minister, or capable of having been submitted in the leave to remain or subsidiary protection applications, three matters were clearly new and merited the Minister's consideration. The first of these was a report by Dr. Giller, who interviewed the applicant on 11th November, 2009. In the opinion section of that report, she stated as follows:-

*"Ms. S. is suffering from a generalised anxiety disorder as defined in the Diagnostic and Statistical Manual of Mental Disorder of the American Psychiatric Association, 4th Ed. (DSN IV). The symptoms which she has are: constant anxious thoughts and fears, sleep disturbance with frequent nightmares, inability to relax, poor concentration, poor appetite and a history of significant weight loss, irritability and muscle tension. It severely effects her daily functioning. In my opinion, this is highly consistent with her history of being discovered in Ireland by a man she fears and whom she thinks may return again.*

*Her psychological distress is of such a degree that she has attempted suicide on one occasion and currently expresses suicidal ideation. In my opinion were she to be returned to Albania or threatened with return, her risk of suicide would be high. "*

16. The second new document was a report of Dr. O'Donovan, the applicant's G.P. In the report, dated 19th November, 2009, the doctor states that the applicant suffered from Post Traumatic Stress Disorder with depressive features. He noted that on 19th September, 2006, the applicant was taken by ambulance from Kinsale Road Accommodation Centre following an overdose of her anti-depressant medication.

The doctor came to the following conclusion:-

*"Ms. S. continues to suffer from anxiety and depression and is currently being prescribed the anti-depressant medication, Lustral 50mg tablets one daily, as well as medication to relieve her anxiety and help to reduce the frequency of nightmares of her sexual assaults, called zypreza, 2.5mg at night. It is important for Ms. S.'s mental well being that she has continued access to medication such as these. I understand that Ms. S. would not have access to these medications in her own country, if deported, as she would have to purchase them and she could not afford to buy the medications. "*

17. The third document submitted was a New York Times article which stated that a ban introduced three years previously barring all Albanian citizens from using speed boats and which had reduced trafficking by over 50% had been reversed the previous May, leaving law enforcement and human rights officials concerned that as a result human trafficking may explode again.

18. By letter dated 16th June, 2010, the Repatriation Unit stated that the applicant had not presented with GNIB on 16th June, 2010, and was classified as an evader; that the revocation application "should be made from outside the State and such an application must rely on new and changed circumstances", and when the applicant either removes herself from the State or presents with GNIB in Burgh Quay, Dublin, within five days, the Minister will proceed to consider the revocation application.

19. By letter dated 22nd June, 2010, the applicant's solicitor wrote to the GNIB and INIS seeking to allow the applicant to sign on with immigration in Cork because she had been living in Cork since her deportation order and had been residing at the Kinsale Road accommodation. By further letter dated 7th August, 2010, the applicant's solicitor wrote to INIS stating that no reply had been received to the request to make arrangements for the applicant to sign on with immigration in Cork and that the request was being repeated and also asking that the applicant's file be reviewed as she had arrived in Ireland in August, 2005 and had been living in direct provision accommodation since then.

20. On 3rd May, 2011, the applicant signed on with immigration in Cork. She was detained and informed that she would be deported on the following day. There are two letters on the file coming from the applicant's solicitor on 3rd May, 2011. It is not clear if the first letter was ever actually sent. The second letter was in the following terms:-

*"Our client was told to sign on today in Cork and was detained and has been told that she is being deported tomorrow. We made an application to revoke the deportation order and we were informed that if she complied with signing on that the application would be considered. We would ask you therefore to defer the deportation until her application to revoke*

the deportation order has been considered. She has been informed that she will be deported on 4/5/2011. Our client is not fit to be deported considering her state of mind and we also enclose a psychiatric report in her application to revoke the deportation order. We would ask you therefore to defer the deportation order until her application to revoke the deportation order has been determined. Please also find enclosed:

*(i) Medical report from her GP*

*We would also like you to consider the new medical report. In the light of the new medical report, I would ask you to defer her deportation order until her application to revoke is considered, also in the light of her medical condition she should not be allowed to travel. We await hearing from you."*

21. The new medical report referred to in the said correspondence was a report from Dr. O'Donovan dated 21st April, 2011. It is in the following terms:-

*"I have known Ms. S. as a patient of my practice since December 2006. Ms. S. suffers from Post Traumatic Stress Disorder with depressive features as a result of physical and sexual assault over a three year period prior to her seeking asylum in 2005.*

*Ms. S. continues to suffer from severe anxiety as well as depression. She takes prescribed anti-depressant medication, lustral as well as a medication to help relieve her anxiety and help to reduce the frequency of nightmares of her sexual assaults, called zyprexa.*

*Ms. S.'s recovery from her Post Traumatic Stress Disorder, anxiety and depression is delayed due to the uncertainty about her future. Until such a time that she is granted permission to live in Ireland, she will not recover. I urge you, therefore, to please grant Ms. S. permission to remain in Ireland so that she can put the traumatic experiences of her past behind her and build a new life for herself"*

22. An examination of the applicant's file was carried out by Caitriona Kirwan, Executive Officer with the Repatriation Unit on 3rd May, 2011. The report was signed off by Phelim Cassidy, HEO, and by Chris Carroll, APO on 3rd May, 2011. A note affirming the deportation order was made by M. Hynes, Principal Officer on behalf of the Minister on 4th May, 2011. It will be necessary to refer to this examination of the file in more detail later in this judgment.

23. The applicant was deported from the State at 8am on 4th May, 2011.

24. The applicant's solicitor received a fax in the afternoon of 4th May, 2011, from the Arrangements Unit, with a letter attached stating "please find enclosed a copy of correspondence for the attention of your client". Attached was a letter dated 4th May, 2011, addressed to the applicant and stating "the outcome of the consideration is that the Minister's earlier decision to make a deportation order in respect of you remains unchanged Enclosed is a copy of the latest consideration for your information. Please be advised that there is no undertaking in place in relation to your removal". The enclosed, "latest consideration" was a fifteen page examination of the file as carried out by Ms. Kirwan. There was no consideration of the medical report submitted by Dr. O'Donovan and faxed to the respondents at 18.00hrs on 3rd May, 2011.

**Report on the Examination of the File**

25. Ms. Kirwan set out the documents which had been submitted on behalf of the applicant: a medical legal report by Dr. Joan Giller, a medical report from Dr. Donal O'Donovan, a copy of the applicant's letter to the Minister dated 2nd January, 2007, a copy of the garda report dated 23rd August, 2006, a copy of the applicant's admission notes to the Mercy Hospital, copies of two SPIRASI appointment letters, *New York Times* article on "Speedboats, Albanian sex trade could flair", 16th July, 2009; an international fund for agricultural development Albania gender profile, 29th December, 2009; and the applicant's letter of authority. Ms. Kirwan referred to the country of origin information which had been submitted on behalf of the applicant and then set out a significant amount of country information which had been obtained in relation to human trafficking in Albania. Although trafficking continued to be a problem in Albania, the government had taken significant steps to address the issue.

26. The report noted that the applicant claimed that her parents were being threatened in Albania and that she fears that, if she is returned to Albania, her life and her parents would be endangered. It is stated that her ex-husband followed her to the accommodation centre and a garda report stating that Ms. S. reported being followed and threatened by her husband was submitted. The report states that Ms. S. did not wish to make a statement on the incident as she was unaware of her ex-husband's address, telephone number or any known associates, but was informed that if she came upon the details to contact the gardaí.

27. The examiner referred to a 2011 country information report on Albania by the United Kingdom Border Agency, which states that there is a functioning police force in Albania from whom the applicant could seek protection were she in fear of coming to harm. The report states further that there are avenues of complaint open to those who are dissatisfied with the police service they receive. The examiner then referred to country information concerning the operation of the police force in Albania.

28. The examiner also looked at country information concerning treatment of women in Albania. The United Kingdom Border Agency 2011 report stated that while there was room for improvement, the government had demonstrated its determination to meet international standards as set out in the *Convention on the Elimination of All Forms of Discrimination against Women*.

29. In relation to the situation of returned former asylum seekers in Albania, the country of origin information (project country sheet on Albania 2008) states that there was no reported negative impact for failed former asylum seekers returning to Albania. It was noted that according to Albanian law, illegal exit from the country is an offence but in practice those cases have been ignored and penalties have never been applied by the judicial system.

30. The examiner had regard to the evidence concerning the applicant's medical condition as set out in a medical report from Dr. Giller and Dr. O'Donovan. The examiner looked at country information on the health system in Albania. This involved an examination of the availability of medical treatment and drugs and an examination of the mental health system in Albania. The examiner came to the following conclusion:-

*"The above excerpts make it clear that Article 3 of the European Convention on Human Rights does not impose any obligation to provide medical care on contracting states. Having considered all of the above factors, it is not accepted that there are any exceptional circumstances in this case such that there is a sufficiently real risk that deporting B. S. to Albania would be a breach of Article 3. The fact that the circumstances of the applicant in Albania may be less*

*favourable than those enjoyed by the applicant in Ireland does not in itself exist as exceptional circumstances. "*

### **Consideration under Article 8 of the European Convention on Human Rights**

31. The examiner then considered the matter pursuant to Article 8 of the European Convention on Human Rights. She noted the questions which had been identified by the House of Lords decision in *R. (Razgar) v. Homes Secretary* [2004] 2 A.C. 368. This decision set out five questions which are likely to arise when considering Article 8 rights in the context of a proposal to remove an individual. Those questions are as follows:-

*"(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*

*(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*

*(3) If so, is such interference in accordance with the law?*

*(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*

*(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

32. The examiner acknowledged in the report on the file dated 3rd May, 2011, that if the Minister decided to deport the applicant, this had the potential to be an interference with her right to respect for private life within the meaning of Article 8(1) of the European Convention on Human Rights. This related to her educational and other social ties that she had formed in the State as well as matters relating to her personal development since her arrival in the State. It was noted that the applicant had completed a certificate in Political Issues as delivered by the Department of Government in University College Cork.

33. It was noted that the applicant was suffering from depression and anxiety and was on anti-depressant medication. The report went on to look at country information which described the health system and in particular the mental health system in Albania. The examiner cited the relevant principles from the High Court decision in *Agbonahor v. Minister for Justice, Equality and Law Reform* [2006] IEHC 56. In the course of his judgment in that case, Feeney J. stated as follows:-

*"On the basis of the above authorities this Court is satisfied that a correct interpretation of the Strasbourg authorities imposes an obligation on States not to interfere with the private life of individuals by their own actions. The authorities identify that there is an extension of that principle in relation to extradition type cases but that that extension is extremely limited and exceptional and only arises where there is a genuine and true risk that the authorities in the receiving State would commit acts upon an individual which would breach that person's rights under the Convention in the event that he is removed to that country ...*

*On the basis of the facts established herein the consequences arising from the applicants ' removal from the State will at most be an indirect consequence of that removal and where such removal is in pursuance of the lawful immigration policy there cannot be said to be a lack of respect by the State authorities. The facts demonstrate that the alleged risk or danger to the applicants, and in particular the second named applicant, are not as a result of State action nor is this a case in which such alleged risks arise out of the actions of the public authorities in a receiving State. On the basis of the foregoing this Court is satisfied that none of the applicants has established a breach of Article 8. "*

34. In the report, the examiner came to the following conclusion:-

*"In addressing the second question and having weighed and considered the facts of this case as set out above, it is not however accepted that any such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8. As a result, a decision in *Alketa Mucaj* (sic) does not constitute a breach of the right to respect for private life under Article 8 of the ECHR."*

35. It is noted that the wrong name is used in the concluding paragraph. This may indicate that the report may have been concluded in some haste. However, I do not think that this error renders the entire section invalid.

36. The State's obligations under Article 8 are engaged where it directly harms a proposed deportee, or where such proposed deportee is likely to be harmed by the authorities in the receiving State. The obligations of the State are not engaged for the likely harm to the applicant arises as a result of the individual's own actions. In the circumstances, the Minister was right to conclude that there was no breach of the rights under Article 8.

37. The threat of suicide has been considered by the High Court and to an extent by the Supreme Court in *L.C. v. Minister for Justice* [2011] 2 I.R. 133. In the High Court, it was held that in order to succeed, an applicant had to establish three matters on the balance of probabilities:-

*"(i) When the respondent decided to refuse to rescind the deportation order, that there then existed to the respondent's knowledge, a real and substantial threat to the applicant's life by suicide as a direct consequence of his decision;*

*(ii) the applicant's threatened act of suicide could only be forestalled by him acceding to the applicant's request and stopping the process of deportation and not by any other means such as medical intervention;*

*(iii) the respondent either missed or disregarded, to the point of irrationality, compelling medical and other material evidence of the foregoing. "*

38. The question for determination is as to whether the medical evidence disclosed a real and substantial risk to the life of the applicant as of the date of the decision not to revoke the deportation order, which could not be avoided by other means. In this regard, the evidence before the Minister was a report from Dr. Giller based on an interview with the applicant on 11th November, 2009. This medical report was not submitted until 11th June, 2010, and it was almost eighteen months out of date at the time of the Minister's actual decision.

39. The report states that were the applicant to be returned to Albania, the risk of suicide would be high. The opinion Dr. Giller appears to have been expressed on the basis of the applicant's claimed history as relevant to her psychological condition. It would appear from the report that the statement that the applicant would be at risk on return to Albania, was predicated on the alleged fear of the applicant's husband. It is notable that the history of the applicant, stated to be "*relevant*" by Dr. Giller, differs in some material particulars from the narrative given at various points to the asylum authorities in the State. It is also notable that Dr. Giller is not herself a psychologist or psychiatrist, and her experience appears to lie in the medical conditions of asylum seekers.

40. The only other report before the Minister was a report of the applicant's G.P, Dr. O'Donovan of 19th November, 2009. This set out that the applicant suffered from anxiety and depression and was being prescribed anti-depressant medication as well as the medication to help relieve her anxiety and to reduce the frequency of her nightmares. The G.P. did not state that deportation in and of itself would give rise to a risk of suicide, though the report does document an apparent attempt at suicide on 19th September, 2006. There appear to have been no further attempts since that date and the general practitioner was of the view that the applicant should not be deported because she would not have access, for financial reasons, to the relevant anti depressant medication in her own country.

41. It was open to the respondents to reach the conclusion that the medical reports did not establish a real and substantial risk to the applicant's life by reason of the deportation which could not be avoided other than by revoking the deportation order. I am satisfied that the reason that the Minister did not consider the second report of Dr. O'Donovan was because it was submitted too late by the applicant's solicitor. There had been a constant drip-feeding of information as the case progressed. It was not the fault of the respondents that the reports before it in 2011 were old reports having been drawn up in November 2009. The Minister had due regard to the reports which were actually before him at the time of the decision which was made by the examiner of the file on 3rd May, 2011, and was signed off on behalf of the Minister on 4th May, 2011. The fact that the second report from Dr. O'Donovan was submitted by fax at 6pm on 3rd May, 2011, meant that it was simply too late for consideration as part of the file. On the medical evidence that was actually on the file, it was open to the Minister to reach the conclusion that there was not a "*real and substantial*" risk of suicide. Accordingly, the Minister was entitled to form the opinion that the deportation order should not be revoked on this ground.

42. In the circumstances, I refuse to make any order quashing the decision of the Minister dated 4th May, 2011, affirming the deportation order made herein on 28th August, 2006.