Neutral Citation Number: [2007] IEHC 415

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 261 JR]

BETWEEN

V.P. AND S.P.

APPLICANTS

AND
REFUGEE APPEALS TRIBUNAL AND
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment delivered by Mr. Justice Feeney on the 7th day of December 2007

1. The applicants seek to bring these proceedings for the purposes of quashing a decision of the Refugee Appeals Tribunal which was made on 15th December, 2005. That decision followed an oral hearing on the 17th October, 2005 at which the applicants were represented by their solicitor. The appeal before the Refugee Appeals Tribunal was brought by the applicants against the recommendation of the Refugee Applications Commissioner refusing an application for a declaration that the applicants should be given refugee status. As it is required by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000, the applicants have sought leave to bring judicial review proceedings on notice to the respondents and are required to establish substantial grounds.

2. The two applicants are both Moldovan nationals who applied for asylum in early June 2005. The application of each of the applicants was based on a stated fear of persecution in Moldova for reasons of political opinion. The Refugee Applications Commissioner determined that the applicants were not refugees on the 15th August, 2005. The applicants appealed to the Refugee Appeals Tribunal and on 17th October, 2005 an oral hearing took place before the Tribunal. The applicants had set out their grounds of appeal in a detailed notice of appeal together with the accompanying documentation. The Tribunal conducted a complete re-hearing and heard the oral evidence of both applicants and submissions on behalf of the applicants and the presenting officer. Having considered the evidence, documentation and submissions a Member of the Refugee Appeals Tribunal determined that he was not satisfied that the applicants had demonstrated a well founded fear of persecution for any of the reason contemplated by s. 2 of the Refugees Act, 1996 (as amended) and found that the applicants were not refugees within the meaning of s. 2 of the Refugee Act, 1996 (as amended) and accordingly affirmed the recommendation of the Refugee Applications Commissioner and dismissed the applicants appeal. That decision was contained in a written decision dated the 15th December, 2005.

3. The applicants seek to challenge the decision of the Refugee Appeals Tribunal on two grounds firstly that the Tribunal made a material error of fact going to jurisdiction and secondly that the Tribunal erred in relation to the assessment of credibility in that it was contended that there was no evidence before the Tribunal which would have allowed the Tribunal Member to reach the conclusion he did in respect of the applicants credibility.

4. The Refugee Appeals Tribunal Member in his decision of 15th December, 2005 concluded that there was no reasonable degree of likelihood that either of the applicants would be subjected to persecution in the future. The applicants claim in relation to the risk of persecution in the future, was based on the fact that the first named applicant had become a member of the Popular Christian Democratic Party in Moldova in or about 2002. That party was opposed to the then communist government. It was claimed that it was the first named applicant's involvement with this political party which gave rise to the persecution of himself and his wife. There were elections in Moldova in March 2005, in which Moldova's governing communist party obtained approximately 46% of the vote but lost ground to the opposition democratic Moldova block and the Popular Christian Democratic Party. As a result of that election the Popular Christian Democratic Party had a number of representatives elected and became part of the government and one of the party's members became Vice-President. In arriving at his decision the Member of the Refugee Appeals Tribunal stated:

> "The convention requires that a forward looking test should be applied in respect of each of the applicants and I do not see any reasonable degree of likelihood that the applicants or either of them would be persecuted by reasons of the difficulties claimed. There apparently was elections in March 2005, and considered by the international community to be free and fair and taking into account that members of the Party the applicants say they were associated with are, in fact, part of the Government, I do not see any reasonable degree of likelihood that they would be subjected to the persecution claimed for this reason."

5. The decision of the Refugee Appeals Tribunal stated:

> "The convention requires that a forward looking test should be applied in respect of each of the applicants."

There is no doubt that given the definition of a refugee contained in the Refugee Act, 1996 which defines a refugee as meaning, a person, who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion …is unable, or owing to such fear is unwilling to return to it, i.e. (the country of his or her nationality). A forward looking test must be applied. It was in applying such forward looking test that the Refugee Appeals Tribunal Member determined that in the light of the prevailing political circumstances in Moldova and the involvement of the political party, who the first named applicant supported, as part of the government there was no reasonable degree of likelihood that the applicants or either of them would be persecuted. Membership or involvement in a political party which had been part of the government since the election in March 2005 could not be viewed as a risk. That was the central finding, based upon the forward looking test, which resulted in the determination of the Refugee Appeals Tribunal.

6. The applicants have raised the two issues identified above as being the grounds upon which relief should be granted. The first relates to an alleged material error or fact going to jurisdiction. The suggested error of fact is the finding by the Tribunal that the criminal summons which the first named applicant faced in Moldova related to the offence of an insult to a co-worker. This issue was dealt with in the decision of the Refugee Appeals Tribunal in the following terms, namely:

> "The applicant was then asked as to whether or not he was told what charges were against him and he said … he was charged with distributing propaganda. The presenting officer then referring to the document produced by the applicant dated 15th March, 2005, in which Article 174/6 of the Criminal Code for the Republic of Moldova was referred to, it was pointed out to the applicant that Article 174 refers to sexual intercourse with a person who has not reached the age of fourteen years and goes on to set out other matters. The applicant replied that that was the document that he was given.

> Two weeks was then provided to the solicitor for the applicant to see whether or not a reply would be made to this issue. A copy of the Criminal Code for the Republic of Moldova in English was provided at the hearing.
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> Subsequent to the hearing, he provided documentation by letter dated 18th October, 2005 and further by letter of 21st October, indicating that Article 174/6 of the Moldovan Penal Code referred to an insult to a police co-worker. It means a premeditated insulted (sic) to the honour and dignity. The insult of any worker within the organisation of internal affairs or person, being in the exercise of duty or maintaining the public order and controlling the criminal activity; expressed in the form of action, verbal or written, attracts a penalty of up to ten times the minimum monthly wage or administrative arrest for up to fifteen days. This appears to refer to a police co-worker implying a fellow police office and the applicant is clearly not a police officer."

Later in the decision the member under the heading of "Conclusion in Decision" stated:

> "While I have the gravest reservations in respect of the document purporting to be a summons, it would appear from the documentation supplied that the Article refers to a fellow police officer."

7. The Tribunal Member considered the issue of the criminal charge pending against the first named applicant in Moldova on the basis of the information which was available to him as of the date that he completed and signed his written decision. As of that date it is clear that the Tribunal Member acted on the basis that he had been provided with a correct translation by the solicitors for the applicants. After the decision of the Refugee Appeals Tribunal the applicants changed legal advisors. The first named applicant then requested a further translation on the advice of counsel. That translation is exhibited in para. 8 of the grounding affidavit of the first named applicant. It differs from the previous translation in that it identifies Article 174/6 as dealing with the harassment of a police informer rather than an insult to a police co-worker. If one is to proceed on the basis that the later translation, obtained on 28th February, 2006 is the correct translation it would mean that the first named applicant did not have to be a co-worker of a police officer to commit an offence under Article 174/6.

8. The applicants claim that there is as a result of mistranslation an error of fact going to jurisdiction. The suggested error of fact relates to the conclusion in the Report that Article 174/6 of the Moldovan Penal Code could have no application to the first named applicant as that Article dealt with an insult to a police co-worker and therefore could not apply to the first named applicant who was not a police officer.

9. It was contended on behalf of the applicants placing reliance on the decision of this Court in *Doran v. Minister for Finance* [2001] 2 I.R. 452 that the court should not permit an error of fact going to jurisdiction. In that case the High Court allowed an appeal and remitted the matter back to the Labour Court having determined that the conclusion of the Labour Court was based on a misunderstanding for which there was no evidential basis and that accordingly the Labour Court had erred in law in reaching its decision. Murphy J. in *Doran v The Minister for Finance* expressly referred to the earlier decision of *Brides v. Minister for Agriculture* [1998] 4 I.R. 250 which had held that the High Court was concerned with the question of whether or not the Labour Court had erred in law in reaching its decision. On p. 462 in the *Doran* case, Murphy J. expressly held that:

> "If there was no evidential basis for the misunderstanding then, in that sense, the Labour Court would have appeared to have erred in law in reaching its decision."

It was in those circumstances that the matter was remitted to the Labour Court for rehearing.

10. This court is satisfied that the facts of this case are distinguishable from those in *Doran v. The Minister for Finance.* The Tribunal acted on the basis of the evidence variable to it and therefore acted within jurisdiction. As pointed out by Kearns J. in the High Court decision of *Ryanair Limited v. Flynn* [2000] 3. I.R. 240 (p. 264):

> "It seems clear that the cases where the court can intervene by way of judicial review to correct errors of fact must be extremely rare. The court can only intervene to quash the decision of an administrative body or Tribunal of grounds of unreasonableness or irrationality if it exhibits the characteristics identified by Henchey J. in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642."

Kearns went on to state (at p. 265):

> "There is no body of jurisprudence in this jurisdiction which suggests that it would be desirable for the courts to interfere where errors within jurisdiction are made."

It is apparent from the decision of Kearns J. that it is a basic rule of administrative law that bodies entrusted with executive tasks are entitled to err within jurisdiction without the High Court acting as a court of appeal and as stated at (p. 256):

> "In relation to 'mistake of fact', while generally it is accepted there is no jurisdiction to quash a decision because of an alleged factual error, it is nonetheless the case that where factual errors occur such as to render the decision irrational, then judicial review will lie."

To intervene the court would be required to be satisfied that there was both a factual error and that error rendered the decision irrational.

11. In this instance even if this court was to accept that the second translation is a correct translation then it is clear that such translation was not before the Tribunal as it had not been obtained as of the date of the decision. The Tribunal therefore acted on the basis of the evidence available to it and if there was an error it was an error within jurisdiction and this court cannot act as a court of appeal. It is also the case that a full and proper reading of the decision of the Tribunal makes it clear that the conclusion and finding in relation to the consequences and effect of Article 174/6 of the Code of Administrative Penalties of Moldova was an incidental finding and not a finding central to the ultimate conclusion. The finding made in the paragraph following the paragraph dealing with Article 174/6 contains a finding that the applicants have adduced manifestly false evidence in support of their application to the Tribunal. That finding is not based upon a consideration of article 174/6 but rather on a series of separate findings made in the following paragraphs. Also the central basis for the Tribunal's decision was based on a conclusion that a party member was highly unlikely to be at risk if that political party was part of the Government.

12. This court is satisfied that in relation to the claim based upon an error of fact going to jurisdiction that even if an error of fact has been established such error was neither material or outside jurisdiction. It is not an error which has the consequence of requiring this

court to make an order to the effect that the Tribunal made an irrational decision or that its decision is wholly grounded on an erroneous view of the law.

13. As was pointed out by Morris P. in *Bailey v. Flood* (Unreported, High Court, Morris P. 6th March 2000) at p. 27: (quoted at p 265 of the *Ryanair* judgment)

> "The function of the High Court on an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful. Consideration of the alternative position can only confirm this view. The effective administration of a tribunal of inquiry would be impossible if it were compelled at every turn to justify its actions to the High Court."

14. The second issue raised by the applicants relates to the adverse credibility findings made in the decision of the Refugee Appeals Tribunal. Those findings are to be found on pp. 6 and 7 of the decision. The most significant finding in relation to credibility was that the Tribunal Member did not find it plausible or credible that a person, such as the first named applicant, who was a simple ordinary member of the Popular Christian Democratic Party, would be subject to the threats alleged by the first named applicant. The decision identified that the first named applicant gave evidence to the effect that he did not seek assistance from senior party members, notwithstanding his contention that he was being persecuted because of his membership of the party. The member went on to conclude that the first named applicant's evidence in relation to suggested persecution linked to party membership was not credible and such finding was reinforced by the evidence that such party was now a minor party in Government. There was also in adverse conclusions drawn in relation to the first named applicant's evidence concerning his employment history.

15. It is well established that a court in reviewing the decision of an administrative body does not engage in an appeal process. As the Supreme Court stated in *O'Keeffe v. An Bórd Pleanala* [1993] 1 I.R. 39, the court will only interfere with these decisions if fair procedures and constitutional justice were deficient during the investigation and appeal procedures. This court must not fall into the trap identified by Peart J. in *Imafu v. Refugee Appeals Tribunal* (Unreported, 9th December, 2005) of substituting its own view and credibility for that of the Tribunal Member.

16. This is not a case in which the adverse findings in relation to credibility are based upon bald statements or findings which could be identified as having been arrived at following a process by which the assessment of credibility has been made in a legally flawed manner. In this instance the court is satisfied that the assessment of credibility has been made on a rational basis. The decision made on credibility cannot be identified as coming within the type of finding where a court should intervene. This is not a case where the decision in relation to credibility has been made in the absence of any evidence or where it could be concluded that the decision was irrational or flies in the face of reason.

17. This court has adopted the practice of careful review of process based upon the principles of constitutional justice. On that basis this court is satisfied that the decision of the Refugee Appeals Tribunal was consistent with evidence available to the Tribunal and the decision made by the Tribunal can neither be categorised as either irrational or flying in the face of reason. This court has so concluded following a detailed review of not only the decision of the tribunal, in its entirety, but also on the basis of the documentation which was available to the Tribunal.

18. In particular this court is satisfied that the key finding that the applicants did not have a well founded fear of persecution if they were to return to Moldova based upon a forward looking test, was consistent with the evidence available to the Tribunal. The conclusion that the two applicants were at no risk of future persecution if they were returned to Moldova was both rational and based upon evidence.

19. In the light of the above findings this court is satisfied that the applicants have failed to establish any 'substantial grounds' and the reliefs sought in the notice of motion are refused.