

## THE HIGH COURT

[2010 No. 390 J.R.]

BETWEEN

N.T.P (VIETNAM)

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, THE ATTORNEY  
GENERAL AND IRELAND

RESPONDENTS

**JUDGMENT of Mr. Justice Eagar delivered on the 15th day of April 2015**

1. This is a telescoped application to quash the decision of the first named respondent issued on the 23rd February, 2010 in respect of the applicant's application for refugee status.
2. The notice of motion in this case was issued on the 30th March, 2010 and the reliefs sought were as follows:-
  - 1) An order of *certiorari* quashing the decision of the first named respondent issued on the 23rd February, 2010 in respect of the applicant's application for refugee status;
  - 2) a declaration that the first named respondent erred in law and/or acted in breach of fair procedures in its determination of the applicant's application for refugee status;
  - 3) a declaration that s. 13(5) (a) of the Refugee Act 1996 (as amended), fails to comply with the minimum standards prescribed by Directive 2005/85/EC of the 1st December, 2005 by depriving the applicant of an effective remedy against the finding that the applicant should be denied an oral hearing;
  - 4) a declaration that s.13(5) (a) of the Refugee Act 1996 (as amended) imposes an unwarranted violation of the applicant's right to constitutional and natural justice such that it is unconstitutional and is in breach of Directives 2004/83/EC and 2005/85/EC;
  - 5) a declaration that the procedure for the determination of asylum application provided for in the Refugee Act 1996 (as amended) and the European Communities (Eligibility for Protection) Regulations 2006 failed to comply with the minimum standards prescribed by Directive 2005/85/EC of the 1st December, 2005 by depriving the applicant of an effective remedy against the first instance determination of the application as required by Article 39 of the Directive;
  - 6) the other relief sought was for an extension of time.
3. The statement of grounds which accompanied the notice of motion sought relief on the following grounds:-
  - 1) The respondent erred in law in holding that s. 13(6) (c) of the Refugee Act 1996 (as amended) applied to the applicant's case without making any finding that the applicants delay in applying for refugee status was without reasonable cause;
  - 2) in the alternative to (1) the respondent acted in breach of the applicant's right to fair procedures in failing to give any reasons as to how it could have found that the applicant's delay in applying for refugee status was without reasonable cause;
  - 3) the respondent failed to give any or any adequate reasons for its decision to apply s. 13(6);
  - 4) the first named respondent failed to act in accordance with Directive 2004/83/EC and Directive 2005/85/EC and the European Communities (Eligibility for Protection) Regulations 2006;
  - 5) an application of 13(5) (a) of the Refugee Act 1996 (as amended) to the applicant's case denied the applicant an oral appeal hearing. The applicant has no right of appeal against this decision to deny him an oral appeal. This lies in breach of the provisions of Directive 2005/85/EC;
  - 6) further to (5) the reasons for denying the applicant an oral appeal as applied to the facts of the applicant's case does not constitute a sufficient reason for the restriction of the applicant's right to constitutional and natural justice and fair procedures. It deprives the applicant of the opportunity of giving oral evidence and in calling oral evidence from witnesses in respect of his case including an issue as to why he did not apply for refugee status earlier in Ireland. It is unconstitutional and in contravention of Directives 2004/83/EC and 2005/85/EC;
  - 7) the applicant's claim for a declaration of refugee status under s. 17(1) of the Refugee Act 1996 (as amended) has not been lawfully determined by means of a procedure which complies with the minimum standards required to be met by Council Directive 2005/85/EC of the 1st December, 2005 and that the procedure by which the applicant's claim has been processed deprives the applicant of an effective remedy in the first instance determination of its application for asylum before a court or tribunal and so fails to comply with the requirements of chapter 5 of the said Directive.
4. At the commencement of the proceedings this Court indicated that it would not consider the issues relating to the constitutionality of the section and any alleged breaches of the European Convention on Human Rights until a determination was made on the basic issues arising from the case in question.
5. The notice of motion was grounded also on the application of the affidavit of the applicant. He said that he is a national of Vietnam, he is a Catholic and travelled to and entered Ireland lawfully on the 2nd December, 2009 with a Vietnamese priest who was invited by Father M. of a North Dublin city parish. He accompanied the priest and they obtained visas prior to their departure and thus

entered the State lawfully.

6. On the 5th January, 2010 the priest returned to Vietnam and the applicant applied for refugee status in Ireland because he feared persecution if he returned to Vietnam on the 11th January, 2010. An ASY1 Form was completed on the 14th January and his questionnaire was completed on the 23rd January, 2010. He attended the first named respondent for an interview on the 5th February, 2010 and on the 23rd February, 2010 the first named respondent issued its report in which it recommended that he be refused refugee status and determined that he be denied an oral appeal hearing and instead be restricted to a written appeal. He said that this deals with issues arising out of his section 11 interview which this Court will deal with further on in this judgment. Further he says that he was advised that there would be no appeal against this decision to deny him an oral appeal hearing. He also said that a number of credibility findings were made that he wanted to challenge not least because the answers he gave to questions during the interview may have been lost in translation and that he could only challenge these findings effectively if he was allowed an oral hearing. He then deals with the delay in issuing these proceedings as they stem from fundamental human rights.

7. In relation to the application for the extension of time, counsel on behalf of the respondent indicated that because the applicant stated in a letter dated the 8th March, 2010 that counsel had been retained to give an opinion on possible grounds to judicially review the recommendation it appeared that the applicant had formed an intention to judicially review the finding within the fourteen days time limit and in these circumstances the respondents did not raise any issue in respect of the delay in the present case.

#### **Section 11 interview**

8. The section 11 interview took place on the 5th February, 2010 and the interview was conducted in Vietnamese with an interpreter present. The relevant portions of the section 11 interview were contained in the report pursuant to s. 13 (1) of the Refugee Act 1996 (as amended) prepared by the first named respondent.

9. The report of the Refugee Applications Commissioner was dated the 17th February, 2010 although the interviewing officer of the Commissioner who interviewed the applicant made her recommendation on the 16th February, 2010.

#### **(a) Persecution**

The first named respondent outlined the applicant's case. The applicant stated that he had problems in Vietnam going back to the Vietnam War when he was working for the Americans. His land and house were taken by the government and he was sent to re-education camps from 1977 to 1982. He tried to escape from Vietnam in 1982, 1984 and 1986. In 1986 he was caught by the police and imprisoned from December 1986 until August 1987. The applicant had no problems from August 1987 until 2007 when he then became more involved with the Catholic Church. From the 20th November, 2008 to the 25th November, 2008, he had to attend the police station every day where he was questioned and then released in the evening. He stated that from November 2008 until December 2009 he went into hiding and he had no further problems from the authorities in Vietnam (save that he was in hiding). He then had the opportunity to leave Vietnam and come to Ireland.

The first named respondent said that the claim may be considered to constitute a severe violation of basic human rights and therefore may be considered as being of a persecutory nature and as such would satisfy the prosecution element of the refugee definition. This however is without prejudice to an examination of the well-foundedness of the fear of being persecuted in accordance with s. 2 of the Refugee Act 1996 (as amended).

#### **(b) Well-foundedness of the fear**

The first named respondent indicated that it was difficult to substantiate in any real or meaningful way if the events the applicant described actually occurred given the inherently subjective nature of much of his claim. However in situations such as this the first named respondent stated that the UNHCR is clear that it is often necessary to apply the benefit of the doubt to those elements of a claim which are not susceptible to proof. It was thus necessary to examine the applicant's account, avail of country of origin information and assess the overall credibility of his testimony.

10. The first named respondent indicated that the applicant's fear of persecution being the main reason for him leaving Vietnam in 2009 is based on his involvement with the Catholic Church and therefore this fear of persecution will be examined in the report. The first named respondent indicated that the country of origin information suggested that following a number of attacks, arrests, and destruction of property by the government against Catholics in 2008 this amounted to the harshest crackdown on Catholics in Vietnam in decades. Vietnam had not seen such a large number of Catholics participating in mass public protest since the 1950's nor has the government responded to Catholics so violently in recent decades

#### **Issues of credibility**

11. The first named respondent noted that the applicant had indicated that his problems in 2007 arose as a result of his involvement with the Catholic Church and he stated that he has always been a Catholic. He became more involved with the Church in 2007 when he was in the forest one day he walked out and saw a cross and got talking to the priest who was there and made friends with him. He stated that his work in the Church included building a house and planting flowers. He did some accounting and preaching for the Church. He stated that he didn't have any problems in Vietnam because of his religion before he became involved with the Catholic Church in 2007. All of these statements of the first named respondent were based on the section 11 interview.

#### **The first finding of credibility**

12. The first named respondent said that as the applicant stated his problems in 2007 were as a result of his work with the Catholic Church, it was necessary to examine his knowledge of the Catholic religion. The first named respondent said:-

- "1. He did not know the name of the Bishop in his diocese.*
- 2. His knowledge regarding the number of disciples and their names was vague.*
- 3. He did not know the importance of Easter Sunday to the Catholic faith.*
- 4. He did know why Good Friday was so important to Catholics.*
- 5. He did not know any of the Ten Commandments."*

13. The first named respondent accepted that the applicant had some knowledge regarding the Catholic religion but his lack of knowledge to the above questions undermined his claim that he was a preacher for the Catholic Church (which raised an issue of credibility).

### **The second issue of credibility**

14. The next issue that was raised by the first named respondent were inconsistencies between his visa application and his application for asylum. At his section 11 interview the applicant stated his wife died in 1974. However in his visa application the applicant had included a "family household book" dated the 23rd November, 2005 which referred to the applicant and stated his relationship with the householder as "husband". According to the country of origin information the "household registry" was the major form of proof that a person had an established address and officially listed by blood or marital relationship the family members listed on the registry in demonstrating identity and residence for the purposes of obtaining any benefits or official documents such as passports etc. The applicant had confirmed that the household document is an important document but mistakes are sometimes made.

15. The first named respondent said that it was difficult to accept that errors regarding the marital status of a person could be made in view of the importance of the document and that if errors were made it would be reasonable to expect that the owner of the document would seek to rectify the error.

### **The third issue of credibility**

16. At the section 11 interview the applicant stated that he worked in the forest on a coffee plantation however in his visa application he stated he was self-employed and the owner of a company. When asked to explain this discrepancy the applicant replied *"I said anything just to get a visa"*. The applicant was then asked if he had lied to get the visa to come to Ireland and to which he replied "Yes". He was then asked if he had lied to get the visa was he was not lying in his interview to get asylum and it was concluded that the discrepancies and inconsistencies as outlined above raise serious concerns regarding the credibility of the applicant.

### **The fourth issue of credibility**

17. The first named respondent noted that the applicant had flown from Vietnam to France on the 1st December, 2009 and arrived in Ireland on the 2nd December, 2009. He applied for asylum on the 11th January, 2010. He was asked to explain why he waited until the 11th January, 2011 before he applied for asylum and he replied:- *"Because a priest was here and I had to wait until he returned to Vietnam before I could seek asylum. I did a lot of thinking before I made an application"*. The applicant also stated that he told the priest with whom he had travelled to Ireland that he wanted to stay in Ireland and apply for asylum. The priest returned to Vietnam on the 5th January, 2010. The first named respondent considered that the applicant had failed to provide a reasonable explanation for his delay of over five weeks in applying for asylum after he arrived in Ireland, therefore the credibility of applicant's claim is undermined.

### **The fifth issue of credibility**

18. The applicant was asked to explain how he was able to obtain a Vietnamese passport if the government were looking for him and he replied *"When I went to the office there I asked the man if he wanted money, how much I would have to pay to get a passport and I gave him \$400"*.

19. It is considered that as the applicant was able to obtain a passport and exit through immigration at a Vietnamese airport, his passport contained an immigration stamp to confirm this and that his well-foundedness of fear was further underlined. It was also considered that s. 11(B) (c) of the Refugee Act 1996 (as amended) is particularly relevant in this case *"whether the Applicant had provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she had arrived since departing from his or her country of origin or habitual residence"*.

### **The sixth issue of credibility**

20. The applicant stated he travelled from Vietnam to France and then onto Ireland. He did not apply for asylum in France. He said he was with the priest and he wanted to come to Ireland accordingly he followed him to Ireland.

### **The seventh issue of credibility**

21. The applicant stated that the police came to his house and took him to the police station on the 20th November, 2008 where he was questioned about saying negative things about the Vietnamese government. He stated that he had to go to the police station every morning and he was released in the evening during the period from the 20th November, 2008 until the 25th November, 2008. He states that he was due to go back to the police station after the 25th November but when they asked him to go back he knew they would arrest him. The first named respondent said that as the applicant had been attending the police station for five days it was difficult to understand why he was not arrested during this time and further as the applicant had no further problems from the police after the 25th November it was considered that the well-foundedness of his fear was further undermined.

22. The first named respondent said that the applicant's testimony at interview was not credible or plausible and therefore the benefit of the doubt could not be afforded to the applicant and it concluded that the applicant had failed to establish a well-founded fear of persecution.

### **State protection**

23. The first named respondent said that as the applicant's claim was based on a stated fear of persecution by the government and police in Vietnam if it considered that his claim was credible, state protection in Vietnam may not be a viable option for the applicant. This however, the first named respondent said, was without prejudice to the credibility concerns raised earlier in the report.

### **Internal relocation**

24. The first named respondent said that with regard to the possibility of the option of internal relocation within Vietnam following his visits to the police station in November 2008 the applicant continued to live in Vietnam until he came to Ireland in December 2009 and he did not have any problems with the authorities. Therefore it was considered the applicant could have remained in Vietnam and lived there safely.

### **Nexus to section 2 grounds**

25. The applicant's claims may be regarded as satisfying the nexus to the s. 2 grounds in respect of religion. However this is without prejudice to an examination of the well-foundedness of the fear of being persecuted in accordance with s. 2 of the Refugee Act 1996 (as amended).

### **The section 13 (6)(c) finding**

26. The interviewer in her report stated that she found that s. 13(6) (c) applied to the application given that the applicant did not claim asylum upon arrival in the State and there was a delay of over five years before the applicant claimed asylum. She also concluded that the applicant had not established a well-founded fear of persecution (presumably as a result of the credibility findings) as required by s. 2 of the Act of 1996. The superior officer of the Refugee Applications Commissioner recommended that the applicant should not be declared a refugee and he also recommended that s. 13(6) (c) is applicable to the application.

27. The first named respondent concluded the recommendation as follows:-

*"Section 2 of the Refugee Act 1996 (as amended) requires that for a person to be considered a refugee they must have 'a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. The Applicant's claims may be regarded as satisfying the nexus to section 2 grounds with respect to religion but this is without prejudice to an examination of the well-foundedness of the fear and the recommendation was that section 13(6)(c) applies to this application given that the Applicant did not claim asylum upon arrival in the State and there was a delay of over five years before the Applicant claimed asylum. The conclusion is that the Applicant has not established a well-founded fear of persecution as required by section 2 and this recommendation was confirmed by the Refugee Applications Commissioner on the 17th February, 2010 and the recommendation that section 13(6)(c) is appropriate to the application."*

#### **Submissions by counsel for the applicant**

28. Counsel on behalf of the applicant went through in detail the recommendation of the first named respondent and made a number of criticisms:-

- 1) The first named respondent chose to focus only on the applicant's claim for refugee status based on his Catholic faith and did not deal with the other aspects of his claim;
- 2) the first named respondent acknowledged that the Applicant had some knowledge of the Catholic faith but that his lack of knowledge in certain areas undermined his claim that he was a preacher for the Catholic Church;
- 3) further the first named respondent held that there were a number of discrepancies and inconsistencies between the applicant's visa application and his application for asylum;
- 4) the first named respondent had made adverse credibility findings about the alleged delay by the applicant in applying for asylum;
- 5) various other adverse credibility findings were made and the first named respondent relied on its findings and inferences to reach the extreme conclusion that none of the applicant's testimony was credible.

29. Objection was raised by counsel for the respondent in relation to the grounds which were stated in the statement of grounds and the Court indicated that it would hear counsel for the applicant and would take into account the grounds listed in the statement of grounds.

#### **Submissions of the respondents**

30. Counsel for the respondent queried the submissions made on behalf of the applicant which were not encompassed by the pleadings of the case. Counsel for the respondent emphasised the facts found by the first named respondent in relation to issues of credibility including the issues relating to his lack of knowledge of the Catholic Church, his ability to get a passport and leave Vietnam and in relation to the failure to give reasons and quotes the mandatory provision of s. 11(B) of the Refugee Act 1996 (as amended) which requires the Commissioner to take certain matters into account when assessing credibility (this Court's emphasis).

31. Counsel for the respondent, in relation to the finding contrary to s. 13(6)(c), submitted that this is a matter to be assessed by the Refugee Applications Commissioner and his decision is to be subject to judicial review but not appeal. Counsel submitted that before the recommendation could be interfered with it must be shown that this decision was irrational. Counsel pointed to what it characterised as very serious and grave misrepresentations to the Department of Foreign Affairs in obtaining a visa and also the serious and grave misrepresentations in the course of the applicant's asylum claim. Counsel said that this justified the finding contrary to s. 13(6)(c).

#### **Discussion**

32. Section 13 of the Refugee Act 1996 as amended by s.11 (1) of the Immigration Act 1999, by s. 9(b) of the Illegal Immigrants (Trafficking) Act 2000 and by s. (7) of the Immigration Act 2003. The provisions of s. 13(5) and 13(6) are as follows:-

*"(5) - Where a report under subsection (1) includes a recommendation that the Applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in subsection (6), then the following shall, subject to subsection (8), apply:*

*(a) the notice under paragraph (b) of subsection (4) shall, notwithstanding that subsection, state that the Applicant may appeal to the Tribunal under section 16 against the recommendation within 10 working days from the sending of the notice, and that any such appeal will be determined without an oral hearing;*

*(b) notwithstanding paragraph (c) of subsection (4), where the Applicant has not appealed against the recommendation within 10 working days after the sending of a notice under paragraph (b) of that subsection, the Commissioner shall, as soon as may be, furnish the report under subsection (1) to the Minister.*

*(6) The findings referred to in subsection (5) are—*

*(a) that the application showed either no basis or a minimal basis for the contention that the Applicant is a refugee;*

*(b) that the Applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded;*

*(c) that the Applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;*

*(d) the Applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected); or*

*(e) the Applicant is a national of, or has a right of residence in, a safe country of origin for the time being so designated by order under section 12(4)."*

33. It is agreed that the applicant came to Ireland on foot of a valid visa issued by the Irish Embassy in Vietnam on 2nd December, 2009. He was accompanied by a priest who had wished to travel to meet with the priest who was in the church in north Dublin.

34. It is also clear that the Vietnamese priest returned to Vietnam on the 5th January, 2010 and the applicant applied for refugee status on the 11th January, 2010. At his interview he was asked why did he wait until the 11th January, 2010 before he applied for asylum and the applicant replied that the priest was there and he had to wait until he returned to Vietnam before he could seek asylum and that he had done a lot of thinking before he made the application. This appears to me to be the only question surrounding the issue of the delay at his interview and he was not asked any further questions about this delay nor asked to explain why he had to wait until the priest had returned to Vietnam before he could seek asylum. However in his questionnaire he stated "In the end, I decided to stay in Ireland and apply for refugee status because I believe that in Ireland, human rights and Religion are very respected. I have said to the priest N that I was very sorry to break my promise and decided to stay in Ireland. After Priest N returned to Vietnam, a few Catholics were helping and looked after me".

#### **Decision of the Court**

35. In the case of *U.P. v. Minister for Justice Equality and Law Reform & Ors* [2014] IEHC 567 Barr J. considered a similar finding. The applicant had arrived in Ireland on a student visa and following the expiration of his visa he applied for asylum in the State. In that case issues were raised in relation to the statistics which the applicant said were indicative of his limited chance of success on appeal without an oral hearing. In 2010 99% of non-oral appeals resulted in refusals, 98% were refused in 2011 and 100% of non-oral were rejected by the Refugee Appeals Tribunal in 2012. The applicant noted that in contrast, the refusal rate in 2012 for appeals on oral hearings was 90%. Barr J. considered the jurisprudence in relation to judicial reviews of the Refugee Applications Commissioner's recommendations. He quoted in particular from Hogan J.'s decision in *Sen He v. Minister for Justice Equality and Law Reform & Ors* (Unreported, High Court, 7th October 2011). Hogan J. held in that case that in assessing whether the Commissioner's decision was disproportionate it was necessary to ask whether the applicant's case would be unfairly hindered on appeal without an oral hearing. Hogan J. observed that while oral arguments undoubtedly form the backbone of the common law system of advocacy, it cannot be said that a purely paper based appeal in itself is necessarily unfair.

36. In the case of *U.P.* the applicant had waited for approximately 18 months following the persecution he claimed to have suffered in Pakistan in September 2009 before applying for asylum in the State on the 7th April, 2011. Barr J. stated:-

*"The court is satisfied that this is a case where it is appropriate to permit the Applicant to seek certiorari of ORAC's decision, rather than pursue the statutory appeal to the RAT. This is due to the fact that the finding made pursuant to s. 13(6) (c) of the Refugee Act 1996, as amended, has the effect of denying the Applicant an oral hearing before the RAT. Where there are negative credibility findings made against the Applicant, the loss of the right to an oral hearing is a serious matter and would put the Applicant in a very disadvantageous position in relation to his appeal. In these circumstances, it is appropriate to permit the Applicant to proceed with his application seeking certiorari of ORAC's decision."*

37. The explanation given by the applicant for the brief delay in applying for asylum appeared to me to be reasonable in that he had to wait until the priest had returned to Vietnam. He also indicated in his reply at his interview that he had done a lot of thinking before he made the application. I note his answers in the questionnaire in this regard. Again that appears to be reasonable. The applicant also said he told the priest who he travelled to Ireland with that he wanted to stay in Ireland and apply for asylum. Again this appears to me a reasonable explanation. I follow Barr J.'s decision in *U.P.* in finding that the Refugee Applications Commissioner failed to properly analyse the applicant's explanation for not seeking asylum sooner. It was open having regard to the issues of credibility for the Commissioner to make a recommendation under s. 13(6) (b). That is not what the Commissioner did in this particular case.

38. In those circumstances I find that the recommendation that s. 13(6) (c) was appropriate to this application is incorrect. I understand that the applicant had filed a without prejudice appeal to the Refugee Appeals Tribunal on the 8th March, 2010 and that despite being on notice that the applicant was considering seeking judicial review of the first named respondent's decision, the Refugee Appeals Tribunal determined and refused his appeal by a decision dated 29th March, 2010 which was subsequently judicially reviewed on or about the 15th January, 2015. In the latter proceedings the Refugee Appeals Tribunal conceded that its decision was unlawful and was quashed on consent.

39. In those circumstances an oral appeal should now proceed against the recommendation of the first named respondent that the applicant had not established a well-founded fear of persecution and that this appeal should be determined by different member of the Refugee Appeals Tribunal rather than the member who had previously made a decision on the papers.