

**THE HIGH COURT
JUDICIAL REVIEW**

[2010 No. 1592 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

R. B.

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 25th day of November, 2014

Background

1. The applicant was born on 20th April, 1973. He is a citizen of Armenia. He went to school in the capital, Yerevan, and also attended college, obtaining a qualification in business studies.

2. His difficulties began in 1993 while he was doing his military service. He was stationed near the front line in a war with the neighbouring State, Azerbaijan. The applicant witnessed an incident between a new recruit and some members of the Fedayin, a paramilitary type group, who were trying to take his new uniform from him. The applicant intervened and the Fedayin members went away. Later that night, the applicant saw the Fedayin men return to where the new recruit was in the trenches. They shot the new recruit and then ran away. The applicant went to the soldier's aid, but was not able to save his life. The applicant stayed with the body. It was extremely cold and, as he did not have heavy winter clothes on, the applicant lost consciousness. He was eventually found and brought to hospital suffering from frostbite. He was detained in hospital for six months. At one stage, consideration was given to amputating his leg, but this was not done and he was discharged fully fit. The applicant was greatly upset by this incident.

3. Some years later in 1997, the applicant was returning home, when he came upon a group of policemen trying to arrest one of a group of demonstrators. They were mistreating the man. The applicant went up and asked them what they were doing. They told the applicant to stay away, that it was none of his business. They then asked the applicant for his identity documentation. The applicant says that the policemen pushed him and abused him and told him to stay away. As he was leaving, he overheard one of the men saying that the applicant's face looked very familiar. The applicant realised that the man was one of the men who had shot the soldier in 1993.

4. On the following day, the policemen came to the applicant's home. They asked his father where the applicant was. His father said that the applicant was out. The men said that they wanted to talk to the applicant. They left a message that they would meet the applicant in a week's time. The applicant could not recall where the meeting was to take place, as he did not keep the appointment.

5. A week later when the applicant had not contacted the policemen, they returned to the house. They were very angry when they found that the applicant was not at home. They forced the applicant's parents to give them the applicant's passport. They demanded that the applicant should go to the police headquarters on the following morning.

6. The applicant did not go to the headquarters, but took refuge in his aunt's home in a different part of the city. The policemen came to his parent's house that evening. They broke the door and demanded to know where the applicant was. When his parents and brother did not say where the applicant was, the policemen proceeded to smash up things in the apartment. His mother tried to save her home. The policemen pushed her aside and her arm was broken. They attacked the applicant's father, who was trying to protect his wife. When his brother attacked one of the men, he was struck with the butt of a gun and was knocked unconscious.

7. When the policemen left the apartment, the applicant's mother telephoned the aunt's apartment and told the applicant not to come home.

8. The applicant's father took his mother and brother to the hospital for treatment. After that the family split up and lived in different places: his father lived with his brother, his mother lived in her brother's home and the applicant's brother came to live with him at the aunt's house. The next day, the applicant resigned from his job at the bank to avoid a similar type of attack at that location.

9. The applicant lived at his aunt's home for a number of months. He felt that he could not continue to live like that, so he joined the Jehovah's Witnesses. He lived with them in different parts of Yerevan and outside the city.

10. In March 1998, the applicant went with his family to vote in the general election. The security guards at the polling station recognised the applicant. It was the same policeman who had recognised the applicant before. They attacked the applicant. He received a broken nose in this assault. His brother and father took him to hospital. He was detained in hospital for seven or eight days and had an operation to his nose. On discharge, the applicant went to live with the Jehovah's Witnesses again, this time outside the city of Yerevan.

11. In the spring of 1998, the applicant's father had an appointment with the general prosecutor to try to find out what was going on. However, before that meeting took place, the general prosecutor was assassinated while out walking his dog.

12. Between 1998 to 2000, the applicant describes himself as being a refugee in his own country. All his family were affected. He did not see them very often. The applicant lived with the Jehovah's Witnesses and he was trying to prove to them that he was a trustworthy person. He could not become a full member of the group, because he had carried arms whilst in the army. However, they gave him a chance to become a member and to live as they did.

13. By that time, the Armenian Apostolic Church in cooperation with the government started a new campaign against all religious sects. The Armenian population was getting ready to celebrate 1,700 years of the Christian religion being the main religion in Armenia. Some members of the Christian Apostolic Church attacked the Jehovah's Witnesses living in the town of Vardenis. The applicant was knocked unconscious in the attack. He was taken to the same hospital as before. He says that he was detained in hospital for about 40 days.

14. During his stay in hospital, the applicant's father contacted a friend and asked him to help get the applicant out of the country. The man took the applicant out of Armenia on 23rd August, 2000, and he arrived in the State on 29th August, 2000.

The Asylum Process

15. On arrival in Ireland, the applicant applied for asylum. In his ASY1 form and questionnaire, he stated the reason for seeking asylum was political, but it became apparent at interview that his claim derived from his affiliation with the Jehovah's Witness Faith Group and the persecution of this group by the Armenian Apostolic Church, which is recognised by the Armenian Government as the national church. In addition, he had fears arising from the fact that, while in the Armenian army he had witnessed the unlawful killing of a fellow soldier by other soldiers.

16. The applicant's asylum claim was rejected by the Commissioner and on appeal by the Tribunal. The Tribunal noted that:-

"while the applicant may privately hold beliefs of the Jehovah's Witness Faith, it is not certain that he would have been readily identified for persecution as a member of that church in Armenia from the information he was given at the appeal hearing, nor from the information apparent from the documentation available."

17. The applicant applied for leave to remain in the State on 14th November, 2002. Among the documents submitted were two letters from his GP, Dr. Helen Whelan, stating that the applicant *"continues to suffer Post Traumatic Stress Disorder and depression"* and *"is seriously suicidal"*.

18. The Minister made a deportation order on 17th June, 2003, which was notified along with the underpinning file notes by letter dated 10th July, 2003. By letters dated 21st July, 2003, the applicant's solicitor asked that the matter be reconsidered in the light of a further letter from Dr. Whelan. However, the Minister replied by letter dated 30th July, 2003, stating that the matters raised by Dr. Whelan had already been considered, as the new letter added nothing to the original letters.

19. Consulting Psychiatrist, Brian McCaffrey, prepared a forensic psychiatric report following an interview with the applicant on 8th June, 2005, and a further additional report following an interview on 28th July, 2005. In the additional report, Dr. McCaffrey says that:-

"[the applicant] has attempted to harm himself in the past on at least two or three occasions since coming to Cork by taking overdoses of tablets...these suicidal thoughts were a direct result of his fears of being deported back to Armenia...his anger is obvious. I repeat his (sic) a high risk person for suicide if he is deported."

These medical reports were submitted to the Minister.

20. By letter dated 1st February, 2010, an application for subsidiary protection was also submitted to the Minister and further submissions and reports were submitted by letters dated 7th July, 2010, and 27th September, 2010. Country reports attested to the fact that attacks directed towards Jehovah's Witnesses were ignored by the Armenian authorities.

21. By letter dated 14th December, 2010, the respondent informed the applicant that there was no discretion allowing the Minister to consider applications for subsidiary protection from persons who were the subject of a deportation order prior to the entry into force of the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) on 10th October, 2006. Therefore, it was not possible to consider the application for subsidiary protection. However, the applicant was informed that the subsidiary protection application was considered as an application seeking the revocation of the deportation order. The letter went on to inform the applicant that *"the outcome of the consideration is that the Minister's earlier decision to make a deportation order in respect of you remains unchanged"*. Attached to that letter was the consideration of the file made under s. 3(11) of the Immigration Act 1999.

The Revocation Decision

22. In the consideration of the application to revoke the deportation order, there was country of origin information submitted which stated that Jehovah's Witnesses were discriminated against and that attacks against them went unpunished. The report supported the applicant's contention that the government authorities had failed to protect Jehovah's Witnesses from attack and discrimination.

23. In these circumstances, it was submitted on behalf of the applicant that the Minister's finding that *"Armenia has a functioning security force and civilian authorities generally maintained effective control of the security forces, therefore State protection is available"*, was unreasonable. The applicant submitted that this was a generalised statement which did not address the particular case made by the applicant in relation to the risk to which he would be exposed as a Jehovah's Witness. The finding was irrational in the light of the country reports supportive of the applicant which stated that the authorities ignore religious based attacks.

24. The respondent submitted that the applicant was not a Jehovah's Witness due to the fact that he had carried arms during his period of military service. It was also submitted that his knowledge of the religious group was *"unclear"* and that he was unable to correctly answer generic questions on the group, during his asylum assessment. He admitted that he had not made contact with the Jehovah's Witnesses in Ireland.

25. It was submitted that consideration of the up-to-date country of origin information, confirmed that the discrimination against Jehovah's Witnesses arose primarily as a result of conscientious objection to military service, which gave rise to the imprisonment of a number of Jehovah's Witnesses *"for refusing to perform military service on grounds of conscience"*. The COI relied upon indicated that Armenia is a signatory of the European Convention on Human Rights. The COI notes reports of attacks on Jehovah's Witnesses with investigations of such reports being slow or non-existent.

26. The court has regard to the fact that there was credible COI which established that the Jehovah's Witnesses suffered

discrimination in Armenia and that attacks upon them would go unpunished. The Tribunal Member in holding that there was a functioning police force in Armenia, did not have regard to the particular dangers which would face the applicant as a Jehovah's Witness. The applicant is entitled to have the decision of the respondent quashed on this ground.

Interference with Private Life

27. When the deportation order was made on 17th June, 2003, there was no assessment of the interference with the applicant's private life as guaranteed by Article 8 of the European Convention on Human Rights, since the European Convention on Human Rights Act 2003 did not come into force until 31st December, 2003.

28. In considering the revocation application in 2010, the Minister did have regard to Article 8. The Minister begins the assessment by referring to the decision in *R. (Razgar) v. Home Secretary* [2004] 2 A.C. 368 and in particular to the questions posed therein, which were in the following terms:-

"(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?"

29. In carrying out his assessment, the Minister also noted that:

"It is submitted that Mr. B. has integrated well into Irish society and has made many friends. It is also noted that a psychiatric report from Brian McCaffrey, Consultant Psychiatrist dated 28/7/2005 states that:-

'R. has just one friend in Ireland. He has no social life and avoids contact with people in Cork.'

It is submitted that Mr. B. is being treated for depression in the State and is at high risk of self harm."

30. The assessment says that:-

"In considering the first (Razgar) question, it is accepted that if the Minister decides to affirm the deportation of Mr. B., that this has the potential to be an interference with his right to respect for private life within the meaning of Article 8(1) of the ECHR."

31. The assessment then sets out information in relation to Armenia including information relating to that country's mental health resources. The Minister finds, however, that *"in addressing the second (Razgar) question, and having weighed and considered all of the above factors"*, it was not accepted that there are any exceptional circumstances in this case such that there is a sufficiently real risk that deporting R.B. would be in breach of Article 8.

32. The applicant submitted that in *A.M.S. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 57, the High Court examined the legality of the Minister's refusal of a family reunification application made on behalf of a Somali refugee, who sought reunification in respect of his mother and two siblings. The application was refused on the basis that the family members were likely to become a burden on the State and also by reference to Article 8 of the European Convention on Human Rights. The Minister's assessment under Article 8 began with the observation that a refusal of the application *"would engage the applicant's rights to respect for private life"* (in other words, the first *Razgar* question was answered "yes"). The assessment then continued as follows:-

"Having weighed and considered the facts of the case, it is not accepted that any interference with the applicant's right to family life will have consequences of such gravity as to constitute a violation of Article 8. As a result, the decision to refuse the application for family reunification herein does not constitute a breach of the right to respect for family life under Article 8 ECHR. (The second Razgar question was thus answered 'no')."

33. At para. 66, Mac Eochaidh J. stated that the phrase "consequences of such gravity" does not mean that there must be grave consequences arising from a negative decision before Convention rights are engaged. He stated as follows:-

"In any event, the phrase 'consequences of such gravity' is derived from the jurisprudence of the European Court of Human Rights and has been explained by the Court of Appeal in England and Wales. Contrary to common usage in administrative decisions, the phrase does not mean that there must be grave consequences arising from a negative decision before Convention rights are engaged. Decision makers are on the wrong path if they are in search of 'grave consequences' of a negative decision. In V.W. (Uganda) v. Secretary of State for the Home Department [2009] EWCA Civ. 5, Sedley L.J. pointed out that:

'22. As this court made clear in AG (Eritrea) [2007] EWCA Civ 801, ss. 26-28, the phrase 'consequences of such gravity' in question (2) posits no specially high threshold for art. 8(1). It simply reflects the fact that more than a technical or inconsequential interference with one of the protected rights is needed if art. 8(1) is to be engaged."

34. The applicant submitted that a clear question arose for decision in this case: has the applicant a private life in the State or has he not? It was submitted that the decision making was flawed because there was no finding on this question, or, insofar as there was a negative finding, it was one which depended only on a consideration of the adequacy of health services in Armenia.

35. It was submitted that in this instance, the Minister had purported to resolve the second question set out in *Razgar*, simply by asking whether or not he was required to permit the applicant to remain here in order to allow him to avail of superior medical services. The essence of question 2 is a determination whether or not the right to a private life is engaged by the decision making. It was submitted that the Minister had not made a determination on that issue.

36. The respondent submitted that no issues in respect of either the applicant's private life or his family life were advanced by him in his application to the Minister, which solely addressed issues of potential alleged harm in a claim for subsidiary protection. The only representations made on behalf of the applicant concerned alleged fear of harm premised upon facts already advanced for his asylum application. In these circumstances, it was submitted that the applicant could not have a complaint about the nature or extent of the Minister's consideration thereof.

37. The respondent submitted that nonetheless the applicant's right to private life and family life was addressed and the position as previously known to the Minister was considered including his mental health issues. Although contrary information had been submitted by the applicant as to whether or not he had "made many friends" or had "just one friend" since his arrival in the State, at a time when issues personal to the applicant were last being advanced to the Minister, it was clear that the focus of the applicant was in respect of his mental health. The Minister considered this in detail when deciding whether there would be a breach of Article 8 regarding his private life and ultimately concluded that deporting the applicant to Armenia would not be in breach of Article 8. His family life was also considered. It was submitted that the Minister's determination in respect of ECHR issues was clear and reasons therefore were evident from the s. 3(11) consideration.

38. I am satisfied that in this instance, the Minister did not properly address the second of the *Razgar* questions. The essence of this question, as correctly submitted by the applicant, was a determination of whether or not the right to a private life was engaged by the decision making. The respondent has not made a determination on this issue. The decision will have to be struck down on that account.

The Psychiatric Reports

39. At the time of the earlier applications, the applicant had relied upon the medical reports submitted by his GP, Dr. Whelan. These were very brief and only referred to the general question of suicide in a very perfunctory manner. The first report dated 20th September, 2002, merely stated that the applicant "who is seeking asylum is seriously suicidal". The second report from Dr. Whelan dated 11th October, 2002, stated that the applicant continued to suffer from PTSD and depression. He was awaiting treatment in St. Michael's Unit, Mercy Hospital, which was a psychiatric unit. The third report, which is undated, stated that the applicant was subject to suicidal tendencies when under stress. It also noted that he suffered greatly from depression and was on medication, which, although it helped, did not really improve his overall situation.

40. The psychiatric reports submitted by Dr. McCaffrey were of a different degree altogether. In a comprehensive report running to five pages, Dr. McCaffrey had this to say following an interview with the applicant on 8th June, 2005:-

"My impression following the interview, I had with him is that R.B. is a genuine, honest person who has a history of having had horrific experiences in his home country, Armenia, and if he were deported back there he is convinced that he will be killed by the government authorities who were in fact members of a paramilitary group the Fedayins, after he witnessed some of their members murder a young army soldier in 1993 and because of their attempt to find him, he fled the country in 2000.

He talked in a calm manner about how he would kill himself by suicide before he would allow anyone to deport him back to Armenia. He went into detail in giving me a reason why suicide is his only option and talked about how he saw this action in the eyes of a God he believes in. He is, in my opinion, a high suicide risk person if he is deported.

On the other hand he convinced me that he is not an economic migrant but has a genuine claim for asylum – in the true sense – that Ireland for him could be a safe place to live in. If he is sent home he is convinced he will face execution."

41. In a follow up report from an interview on 28th July, 2005, the doctor stated as follows:-

"He has attempted to harm himself in the past on at least two or three occasions since coming to Cork by taking overdoses of tablets. He has a lot of faith in his GP, Dr. Helen Whelan. He told me about how he went to a priest in Cork a number of years ago and said he wanted to thank the Irish people for what they did for him and then wanted to say goodbye. The priest thought he was going away but when he realised that R. was contemplating suicide, alarm bells rang and the priest talked about how God would view this act. These suicidal thoughts were a direct result of his fears of being deported back to Armenia.

R. has just one friend in Ireland. He has no social life and avoids contact with people in Cork. He is angry and told me that he no longer has any concern about what effect his death by suicide will have on his family back home.

His anger is obvious. I repeat that he is a high risk person for suicide if he is deported."

42. The change of circumstances was the fact that in the light of the two reports from Dr. McCaffrey, the applicant had to be seen as a credible suicide risk if returned to Armenia.

43. The applicant referred the court to the decision of Cooke J. in *C.U.H. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 93, where the learned judge stated as follows:-

"36. Two further letters dated the 21st January, 2011, and the 8th February, 2011, submitted additional letters of support. Amongst the items submitted with the second of those letters is a medical report dated the 1st February, 2011, supplied by Dr. Amjad Hayat of the Department of Haematology at Galway University Hospital. The report in question contains the following:

'Was she to be expelled from Ireland and forced to discontinue her comprehensive care and treatment regime her condition would certainly deteriorate and she would be at risk of death. I have grave concerns that, Covenant will not receive the complex treatment she requires, in a public hospital in Nigeria. Without appropriate care her prognosis is poor with a reduced life expectancy.'

37. In the judgment of the Court this report is the only item in the submission made for this second application to revoke the order which could arguably be said to raise a new matter which required the Minister's consideration. Insofar as the first named applicant's medical condition had been put forward as a humanitarian consideration for not deporting her, it has largely been advanced on the basis that the medical treatment and healthcare available in Nigeria would be inferior to that available to her in this country. That was the basis upon which the Minister considered that her medical condition did not furnish a reason for not repatriating her to Nigeria either under s. 5 of the Refugee Act 1996, or by

reference to her entitlement to protection under Articles 3 and 8 of the ECHR. The quoted paragraph in this medical report appears to be the first occasion upon which a medical opinion has been advanced to the effect that her expulsion from the country and forced discontinuance of her current treatment would place her at risk to her life. In this regard it can be contrasted with the less urgent advice given in the medical report quoted in paragraph 14 above.

38. This new report is considered and extensively quoted in the memorandum which accompanied the Minister's decision to refuse the present application to revoke. It is considered both in relation to Article 3 of the ECHR and Article 8 in the context of the entitlement to protection of private life. The Court notes that in each place in the memorandum, the author quotes the same two passages from the first, second and third paragraphs on the second page of the medical report of the 1st February, 2011, but there is no mention of the paragraph quoted above in para. 36 of this judgment.

39. Having considered the medical report and other supplementary items together with a review of case law and country of origin information relating to the treatment for this condition in Nigeria, the author of the memorandum concludes:

'Having considered all of the above factors, including in particular the applicant's medical condition and country of origin information relating to medical treatment available in Nigeria, it is not accepted that there are any exceptional circumstances in this case such that there is a sufficiently real risk that deporting C. U. to Nigeria would be a breach of Article 3. The fact that the circumstances of the applicant in Nigeria may be less favourable than those enjoyed by the applicant in Ireland does not in itself exist as exceptional circumstances.'

40. Similarly, in relation to the impact of deportation for the purpose of Article 8, the author concludes:-

'Having weighed and considered the facts of this case set out above, it is not however accepted that any such potential interference would have consequences of such gravity as potentially to engage the operation of Article 8. As a result, a decision to deport C. U. does not constitute a breach of the right to respect to private life under Article 8 of the ECHR.'

41. In the judgment of the Court, having regard to the criteria to be applied to the Minister's obligation when considering an application for revocation, the only respect in which it might be argued that the Minister has failed in his obligation in this case is in relation to the possible significance of the final paragraph on the second page of the report of Dr. Hayat. It is arguable that the appraisal made by the Minister for the purposes of s. 5 of the Act of 1996, and Article 8 of the ECHR was based upon an understanding that what was at issue was a discrepancy in the standard of available medical treatment for these conditions as between this country and Nigeria. It is *inter alia* arguable for the purpose of the present application for leave, that the medical opinion in question has greater significance and required consideration of the issue as to whether discontinuance of the current treatment regimen would in itself expose the first named applicant to a risk involving a potential infringement of s. 5 of the 1996 Act, or of Articles 3 and 8 of the ECHR."

44. The respondent submitted that the reference to suicidal ideation had been there all along and was not a new or changed circumstance.

45. The court is of opinion that the medical report submitted on the revocation application constituted new information, which had to be considered on the question of the revocation of the deportation order. While it is true to say that suicide had been mentioned in Dr. Whelan's reports, it was only referred to in passing in what were very brief reports, whereas the reports from Dr. McCaffrey put the issue of suicide on a much firmer footing. In the light of these reports, there was a credible risk that if deported, the applicant would commit suicide. This had to be taken into account by the decision maker. While the revocation decision makes reference to Dr. McCaffrey's reports, it does not deal with the reports in any explicit way. The decision maker should have addressed the fact that there was credible evidence that the applicant was a suicide risk. As this was not done, the decision will have to be quashed.

Delay

46. The applicant also submitted that regard should be had to the length of time that the applicant was in the country when considering the issue of having a private life within the State. Testimonials had been submitted from various witnesses, showing that the applicant was well liked and reference was made to the decision in *E.B. (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, where Bingham L.J. stated as follows:-

"It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship."

47. In this case, where the applicant has been in the country since 2000, it is appropriate that when considering whether the applicant has established a private life in the State, the decision maker should have regard to the length of time that the applicant has been in the State when making the decision whether or not to revoke the deportation order.

48. For the reasons set out herein, I will quash the decision of the respondent dated 21st October, 2010, which was affirmed on 10th December, 2010, and direct that the matter be referred back to the respondent for further consideration under s. 3(11) of the Immigration Act 1999, as amended.