Neutral Citation Number: [2010] IEHC 436

THE HIGH COURT

2010 89 MCA

IN THE MATTER OF SECTION 21(5) OF THE REFUGEE ACT 1996

(AS AMENDED)

BETWEEN

ILIRJAN GASHI

APPELLANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 1st day of December, 2010

1. The appellant in this case was declared to be a refugee on 13th November, 2001 based upon a positive recommendation of the Refugee Appeals Tribunal of 8th October, 2001, which had reversed an earlier negative recommendation of the Office of the Refugee Appeals Commissioner ("RAC") in a report dated 13th March, 2001. He claimed to have fled from Kosovo because he had been beaten by police as a suspected member of the Kosovan Liberation Army. The Tribunal Member found the applicant to be credible and truthful and based on UNHCR advice, decided that he was still at risk of persecution as someone who had refused to join or had deserted from the Kosovan Liberation Army. The Commissioner had also found the appellant credible, but had considered that the risk no longer continued.

2. Having been declared a refugee, the appellant sought to be reunited with his wife, an Albanian national, in March 2004. He claimed that he had met her while visiting his mother who was in hospital in Tirana and they had married there in 2004.

3. By letter of 9th December, 2008, the respondent's officials were notified by the UK Border Agency that the appellant had applied at the British Embassy for a UK visa and that, on examination, it had transpired from their fingerprint database, that the appellant's fingerprint matched an Albanian national in their records "Shahbani Ilir, 25/02/1997".

4. The appellant admits that this match is correct. He did indeed travel through the UK at that time and had been apprehended and fingerprinted. He says that he gave his father's name to the UK authorities. He denies, however, that he told the UK agency that he was an Albanian national. He told them that he was from Kosovo but of Albanian ethnicity.

5. Following receipt of this information, the respondent, on 8th December, 2009, issued the appellant with a formal proposal to revoke the declaration of refugee status on the ground that he had given "false and misleading information during the course of your asylum application". The letter continued:

> "You stated your nationality to be Kosovan and based your application on events taking place in that country at that time. Information now received from the UK authorities (copy attached) now indicates that you are, in fact, a national of Albania and not Kosovo, as indicated during the course of your asylum application."

6. The appellant was invited to make representations to the respondent against that proposal but it is accepted that he failed to do so. The solicitor he consulted at the time felt that there was nothing that he could do to help.

7. By letter of 4th March, 2010, the respondent revoked the declaration of refugee status and the appellant now appeals that decision pursuant to s. 21(5) of the Refugee Act 1996 (as amended). The reason given for the revocation is in precisely the same terms as that given in the proposal letter of 8 December 2009 (see para 5 above) and is based upon the information from the UK Border Agency to the effect that the appellant is not from Kosovo but is of Albanian nationality.

8. In the written legal submissions lodged for this application, much attention has been paid to the legal question as to the scope of the Court's jurisdiction in addressing the issues that arise under section 21(5). Indeed, counsel for the appellant would appear to be torn between this Scylla of pure judicial review and the Charybdis of a full *de novo* appeal hearing. The reason for the dilemma is as follows.

9. The specific ground for revocation is based upon the statement of the UK Border Agency that the fingerprint matches that of a person it describes as an Albanian national. No further enquiry has been made by the respondent as to the background to the information held by the Agency. As mentioned, the appellant accepts that he passed through the UK at the time and that the fingerprint is his own, but says that he never told them he was an Albanian national. Possibly, the Agency has misunderstood or misreported his claim to be of Albanian ethnic origin but a native of Kosovo. It is argued that such slight and hearsay information ought not to have been relied on to revoke a declaration of refugee status which was based upon a full acceptance of the appellant's credibility in truthfulness as to his Kosovan origin throughout the asylum process. At the very least, the respondent ought to have made further enquiries into the information held by the UK Border agency. Thus, the process by which the decision to revoke was reached was clearly flawed, so that if the court were to approach the matter as it would if subjecting such a decision to judicial review, it would quash the decision as unlawful.

10. This however poses a problem in that the information from the UK Border Agency was specifically put to the appellant and was not disputed because no representations on his behalf were made by way of response. The respondent was, accordingly, entitled to assume that the truth of the information and its interpretation by the respondent was accepted by the appellant and that he had

made no representations because he had no answer to the accusation that he had lied about being from Kosovo. On that basis, the Court would not annul the respondent's decision as unlawful if approaching the issue as it would an application to quash the decision on judicial review. The respondent would be held entitled to rely upon the information when it was not challenged and the Court would not entertain any new evidence or explanation as the basis for setting it aside.

11. There is no doubt, however, that this proceeding is not confined by the judicial review rules as it is a statutory appeal in which the Court can "as it thinks proper" either confirm the respondent's decision to revoke or direct that he withdraw it. The court is not, therefore, limited to judging the legality of the process by which the decision was made by reference only to the information before the respondent at the time. It can decide on the basis of the evidence now available whether the respondent was correct in finding that the original declaration had been given on the basis of information "which was false or misleading in a material particular" in accordance with paragraph (h) of s. 21(5) of the 1996 Act.

12. The Court can thus have regard to the appellant's explanation of what he claims to have told the UK Border Agency at the time, together with any other evidence he might now wish to adduce to prove, once again, that he is a native of Kosovo and that the information given in 2001 was not false or misleading at all. The Court is satisfied that such an approach is open to it under s. 21(5), notwithstanding the failure to make representations under sub-section (3) of the section at the time.

13. This approach, however, presents its own pitfall for the appellant because it is now clear and undisputed that, not only was he apprehended and fingerprinted in the United Kingdom, but he had made an asylum application and had stayed in England for a fortnight before abandoning the application and coming to Ireland. He also gave what he says was his father's name to the UK agency, rather than his own, although the reason for so doing is not easy to understand.

14. The United Kingdom asylum application was therefore concealed from the Irish authorities with a consequence that the basis for the asylum application was clearly false and misleading. Thus, questions 68 and 69 of the Asylum Questionnaire were answered as follows:

> "(68) Which countries did you travel through on your way to Ireland and how long did you spend in each one?
>
> Answer: I don't know a thing. All I know is that I arrived in Ireland on 15/12/1998.
>
> (69) Have you ever claimed asylum in any of the countries transited or in any other country - give details.
>
> Answer: No, because I didn't get a chance."

Furthermore, the description of his travel from Eastern Europe to Dublin by truck given during the s. 11 interview is also untrue.

15. There can be no doubt in the judgment of the Court that the concealment of the making of the asylum application in the United Kingdom is capable of coming within paragraph (h) of s. 21(1) as a material particular which was false or misleading. The formal questions posed at items 68 and 69 of the Asylum Questionnaire are posed for the purpose of obtaining replies and information upon which the asylum assessment will be made. The answers must therefore be material. Under what is now s. 11B of the 1996 Act, details as to how an asylum seeker travelled to and arrived in the State and whether or not the State is the first safe country in which the asylum seeker has arrived since leaving the country of origin, are matters which are required to be taken into consideration when assessing credibility. Section 11B was not introduced into the 1996 Act until 2003, but at the time when the appellant's asylum application was being considered, a corresponding provision was to be found in what was then s. 12(4) of the Act, in relation to the definition of a "manifestly unfounded application". Thus, an application could be treated as manifestly unfounded if an applicant "deliberately failed to reveal that he or she had lodged a prior application for asylum in another country".

16. Furthermore, the disclosure that an asylum application had been made in the United Kingdom could have led to the transfer of the appellant to that jurisdiction under the Dublin Convention arrangements then in place and might, at the very least, have led to further enquiries being made by the Irish authorities as to the content and detail of the United Kingdom asylum application, including the use of the false name. Accordingly, insofar as the respondent's decision is based upon paragraph (h) of s. 21(1), the Court is satisfied that the non-disclosure of the UK asylum application meant that the information upon which the original recommendation in favour of a declaration of refugee status was false and misleading in a material particular.

17. It is argued, however, that this is not sufficient to justify the revocation of the declaration and that the Court must be satisfied that the information in question was not merely false, but that it was "decisive" to the grant of the declaration at the time. This argument is based on the submission that s. 21(1) of the Act of 1996, must now be read in the light of Regulation 11(2) of the European Communities (Eligibility for Protection) Regulations 2006 (the "Regulations") and thus of Council Directive 2004/83/EC of 29th April, 2004 ("the Qualifications Directive") to which Regulations give effect in Irish law.

18. Regulation 11(2) provides as follows:-

> "Where –
>
> (a) Paragraph (a), (b), (c), (d), (e), (f) or (h) of s. 21(1) of the 1996 Act applies, as respects a person to whom a declaration is being given,
>
> (b) A person to whom a declaration has been given misrepresented or omitted facts (including through the use of false documents) and this was decisive for the granting of the declaration, or
>
> (c) A person to whom a declaration has been given should have been or is excluded from being a refugee,
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> the Minister shall, without prejudice to s. 21(2) of the 1996 Act, revoke or, as the case may be, refuse to renew the declaration."

19. This gives effect to provisions which are contained in Article 14.3 of the Qualifications Directive as follows:-

> "Member states shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of fact, including the use of false documents, were decisive for the granting of refugee status."

20. It is to be noted that under s. 21 of the 1996 Act, the Minister is given a discretion in the exercise of the power to revoke a declaration on any one of the grounds listed at paras. (a) – (h) of subsection (1): "The Minister may, if he or she considers it appropriate to do so . . . ." Article 14 on the other hand, distinguishes between circumstances in which a member state must revoke, end or refuse to renew refugee status (paras. 1 and 3) and those where a discretion to revoke is permitted (para. 4).

21. It is to be noted also that Regulation 11(2) thus continues the power of the Minister to revoke a declaration on all of the grounds listed in s. 21(1) with the exception of para. (g) but has removed the element of discretion by making revocation on the grounds in question mandatory. Regulation 11(2) also incorporates, however, in its subparas (b) and (c) the grounds listed as (b) and (a) in Article 14.3.

22. Thus it is the applicant's submission that although there is an obvious duplication between para. (h) of s. 21(1) and para. (a) of Regulation 11(2), the former should be construed as entitling the Minister to revoke on grounds of false or misleading information only where the information was decisive for the grant of the declaration. In other words, the information shown to be false must constitute the particular information on which the status of refugee was established, namely, the facts relating to the fear of persecution and the other components of the definition of refugee. It is argued that the concealment of the asylum application in the UK cannot be said to be "decisive" in that sense. The decisive facts were that the applicant was found to be outside Kosovo for fear of persecution as a suspected former member of the KLA.

23. The Court does not accept that the provision should be so narrowly construed. In the view of the Court the expression "decisive for the granting of refugee status" is used so as to require refugee status to be revoked where it is clear that the decision to grant it would not have been made had the true full facts been known. Thus, the provision covers the misrepresentation or omission of facts which are directly relevant to the assessment of the application for international protection.

24. In this regard it is to be noted that Article 4.1 of the Qualifications Directive recognises the duty of every applicant for protection to "submit as soon as possible all elements need to substantiate the application for international protection". Amongst the "elements" thus required to be submitted are statements and all documentation at the applicant's disposal regarding, *inter alia*, "identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes…" etc. (Article 4.2). It is on the basis of these "elements" that the facts and circumstances upon which the application for protection is based will be assessed. In other words, the decision to grant or refuse refugee status is based upon such information. The information in question forms the basis on which the decision is made and is "decisive" in that sense. As already indicated, it is clear that had it been known at the time that the applicant had made an asylum application in the UK; given a false name; been in the United Kingdom for longer than he admitted and arrived in the State other than by the truck from the continent, the assessment of the application would necessarily have been materially different including, in particular, the evaluation of the applicant's truthfulness and credibility. The concealment and misleading information must necessarily, therefore, have a bearing on the decision.

25. Although the connotation of the word "decisive" in English could be said to make it open to the interpretation of the provision contended for by the applicant, the Court notes that the use of that term in the English text of the Qualifications Directive is not so precisely reflected in other language versions. The misrepresentation or omission of facts is, for example, qualified in the French text in the phrase: "ont joué un role determinant dans la decision d'octroyer le statut de refugié". The corresponding phrase in the Italian text has the same sense: "ha costituito un fattore determinante per l'ottenimento dello status di rifugiato". Thus the question to ask is whether the application for protection would have been determined differently had the information not been misrepresented or concealed. In the judgment of the Court it is thus immaterial whether the revocation is based upon paragraph (h) as incorporated in Regulation 11(2)(a) or on sub-paragraph (b) and it is therefore unnecessary to consider the argument made to the effect that it was not competent for the Regulations to continue to permit recourse to paragraph (h) of s. 21(1) having regard to the exhaustive effect of Article 14.3 of the Qualifications Directive in stipulating the mandatory grounds for revocation.

26. It is accordingly clear to the Court that the declaration of refugee status obtained in 2001 was indeed tainted by misrepresentation and omission of facts and no doubt or dispute can now be raised as to that fact. That being so, this Court could not direct the respondent to withdraw the revocation. In the first place, even if there was some basis for questioning the adequacy of the information from the UK Border Agency relied upon by the respondent, no purpose would be served by directing the withdrawal of the revocation because the respondent would, effectively, be compelled to make a fresh revocation decision based upon the new information, having regard to Regulation (2)(b) and to the now mandatory character imparted to paragraph (h) of s. 21(1) by Regulation 11(2)(a) of the Regulations.

27. Secondly, if the issue on this appeal is whether or not paragraph (h) applies in this case, it is equally clear on the basis of the overall effect of the evidence now before this Court, that the Court must necessarily confirm the revocation. There is now before the Court uncontested evidence that the original declaration was given on foot of information which was false and misleading in a material particular. That is so, even if it is not precisely the same information as was invoked by the respondent when relying upon paragraph (h). The position might be otherwise if the new information disclosed during the appeal did not relate to the particular ground which had been relied upon by the respondent, but to one of the other grounds in paragraphs (a) and (h), such as, for example, that the appellant had since acquired a new nationality. In such a case, it might be appropriate to allow the appeal (assuming the Court was satisfied the existing revocation was unsound) in order to enable the respondent to reconsider the position in the light of the new information and afford the appellant an opportunity of making representations by reference to the different ground.

28. Here, however, it is clear that the basis of the original declaration was falsified by the withholding of material information so that if the issue before the Court is whether or not the respondent was correct in applying paragraph (h), the Court could not direct him to disapply it by withdrawing the revocation. In the view of the Court, the revocation of an existing declaration on this ground is not a finding that the appellant is not now and never could be, a refugee. It is a finding that the existing declaration has been rendered unsound by the falsity of the foundation on which it was based; and that the appellant should not be entitled to retain the benefit of the privileges and protection it has afforded. The revocation does not, however, preclude the appellant seeking to make a new application for refugee status or, if the respondent proposes to make a deportation order, seeking permission to remain in the State upon the ground that he still faces a risk of persecution or serious harm if returned to Kosovo, and thus attempt to convince the respondent that he genuinely does come from that country of origin. The prohibition on refoulement in s. 5 of the Refugee Act 1996, continues to apply at all stages, and is not confined to failed asylum seekers. If he convinces the respondent that he comes from a territory in which his life or freedom remain threatened if returned, he cannot be expelled from the State, irrespective of whether he is a failed asylum seeker or a former refugee whose status has been revoked.

29. For these reasons, the Court finds it proper to reject the appeal and to confirm the revocation decision.