

THE HIGH COURT
JUDICIAL REVIEW

2008 361 JR

BETWEEN**R. A.****APPLICANT****AND****REFUGEE APPEALS TRIBUNAL****AND****RESPONDENT****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL****NOTICE PARTIES****JUDGMENT OF MS. JUSTICE M. CLARK, delivered on the 20th day of July, 2010**

1. The applicant seeks *leave* to apply for judicial review of the decision of the Refugee Appeals Tribunal, dated the 5th December, 2007 to affirm the recommendation of the Refugee Applications Commissioner that he should not be granted a declaration of refugee status. In order to seek leave, the applicant requires a three-month extension of time. The hearing took place on the 15th April, 2010. Mr Hugo Hynes, S.C. with Mr Karl Monahan, B.L. appeared for the applicant and Mr Daniel Donnelly, B.L. appeared for the respondents. In an *ex tempore* decision delivered on that day, the Court indicated that it was not satisfied that the applicant had identified grounds either for the extension of time or the grant of leave. These are the reasons for that decision.

Background

2. The applicant who claims that he served with the Soviet Army in Afghanistan is from the Adjarian region of Georgia. The asserted basis for his fear of persecution was that in 2002 he worked as a bodyguard for a senior member of the "Revival" party of the Autonomous Republic of Adjara in Georgia and at the same time he became a member of that political party. When President Saakashvili came to power he brought Adjara within the control of central government. The leadership of the Revival party then left Georgia for Russia. There was a history of conflict between the Revival Party and the national Georgian army before Adjara was joined with the rest of Georgia. The applicant who opposed the new regime admitted to some "fist fighting" with the central government at that time but denied any involvement in atrocities or war crimes and claimed that members of the party who were known to be part of the resistance were persecuted by the Saakashvili government and compelled to leave. He personally feared that he would be recognised as a party member because of his position as a body guard and because he was sometimes engaged on border duties. He therefore fled Georgia for Moscow where he lived for 12 months with an acquaintance in temporary dwellings. He did not apply for asylum in Russia because he did not think he would be successful as his facial features and accent indicated his Georgian origins which were not liked there. He came to Ireland via Ukraine, Poland, Germany and France using false documentation. He said he left his passport and driver's licence in Russia. He claimed a fear of being killed or imprisoned in Georgia and said he would have to hide for the rest of his life.

3. The Refugee Applications Commissioner made a negative recommendation in his case based on the absence of any evidence that former "regular members" of the party suffered notable difficulties in Adjara or elsewhere in Georgia since May, 2004. It was noted that his family members remained in Adjara. His "extremely poor" knowledge of the Revival party and its workings was found to seriously undermine his credibility and it was not found credible that he would be recognised as a member of the resistance for the reasons given. A negative finding was also made by reason of his failure to apply for asylum at an earlier time and it was ultimately concluded that he did not submit any credible evidence that the possibility that he would suffer persecution on return to Georgian would be anything other than negligible.

The Appeal

4. The applicant appealed to the Refugee Appeals Tribunal and an oral hearing took place at which he was represented by counsel. An attendance note kept by the RLS caseworker records that the applicant told the Presenting Officer that he had left his passport and driver's licence in Russia and his party membership card in Georgia and that he had been unable to retrieve them.

5. During the appeal hearing a U.K. Home Office *Operational Guidance Note* (O.G.N.) on Georgia was furnished by the Presenting Officer which indicated that the situation had improved in Georgia. He was asked why he could not return. The applicant disputed the information in the O.G.N., saying that there was a dictatorship in Georgia where he would be considered a traitor. The applicant's counsel submitted a number of previous RAT decisions relating to successful Georgian applicants and made submissions on each. The appeal failed and the recommendation of the Commissioner was affirmed.

Delay

6. The impugned decision was notified to the applicant by letter dated the 13th December, 2007. The within proceedings did not issue until the 2nd April, 2008 and therefore some three months after the expiry of the 14-day time limit set out in s. 5(2) (a) of the Illegal Immigrants (Trafficking) Act 2000.

7. The affidavit evidence before the Court prepared by Ms. Sarah Ryan Solicitor indicates that the applicant acted with reasonable expedition in seeking legal representation and that his solicitor acted with due haste in the drafting of proceedings in early January, 2008. Unfortunate personal circumstances outlined in affidavit of Ms Ryan provide good and sufficient reason for a delay up to the beginning of February, 2008 but no explanation was provided for the eight-week delay between then and the 2nd April, 2008. In the circumstances, the approach of the Court is to have regard to merits of the case and to assess whether the interests of justice

require the grant of an extension of time.

The Impugned Decision

8. By decision dated the 5th December, 2007, the Tribunal Member affirmed the Commissioner's negative recommendation. Among the reasons provided for rejecting the appeal were the lack of a reasonable explanation for the absence of identity documentation and the failure on the part of the applicant to seek state protection. The judgment of Herbert J. in *Kvaratskehlia (D.K.) v. The Refugee Appeals Tribunal* [2006] 3 I.R. 368 on the presumption of state protection was quoted and relied upon. The Tribunal Member found that the applicant had not provided clear or convincing evidence of the inability of the Georgian State to protect him and concluded:-

"I find that no such clear and convincing evidence has been supplied to the Tribunal and in circumstances where the Applicant's evidence runs counter to the Country of Origin information before the Tribunal I find that this undermines the Applicant's credibility. I find that the Country of Origin Information, specifically the United Kingdom Home Office Guidance Note, is a reliable statement of conditions in the country."

9. Finally, the Tribunal Member found that the applicant's credibility was undermined by his failure to provide a reasonable explanation for his failure to seek asylum in Russia or France.

10. The applicant seeks to challenge the decision on the basis of unfair procedures mainly because he had no prior notice of the UK Home Office O.G.N. on Georgia (2007) which states:-

"2.2 In May 2004, following public protests in the breakaway Georgian province of Ajara the autocratic President of Ajara, Aslan Abashidze, fled to Moscow. Ajara was restored to central Government control and there was a decline in human rights abuses, particularly concerning the press and freedom of association. Georgia's Parliament introduced a new Ajaran Constitution and fresh Ajaran legislative elections were held on 20 June 2004. Ajara's elections were won by a local offshoot of President Saakashvili's National Movement party."

11. However, as was pointed out by Mr. Donnelly, B.L. on behalf of the respondent, the applicant and his counsel were already on notice of the substance of paragraph 2.2 which merely replicates the passage from a U.S. Department of State report on Georgia (2004), which was appended to the s. 13 report and relied upon by the applicant in his notice of appeal. That quotation states:-

"NGOs reported a deterioration in the human rights situation in the autonomous region of Ajara under the region's President, Aslan Abashidze. In May, following public protests of Abashidze's attempt to manipulate parliamentary elections and tense negotiations with Tbilisi, Abashidze fled for Moscow in May, which led to the restoration of Ajara to central Government control and a decline in human rights abuses, particularly concerning the press and freedom of association."

12. There is therefore no substance in the complaint that the applicant was taken by surprise by the Presenting Officer's reliance on the O.G.N. This ground manifestly must fail.

13. The applicant's second argument was that the assessment of state protection was fundamentally flawed as his asserted fear was of the current government in Georgia because of his involvement with the previous regime in Ajara and in the 2004 resistance. The Tribunal Member did not give any consideration to the effectiveness of any protection provided to such a returnee targeted by the new regime. The Court finds that there would be merit in that submission if it had been accepted that the applicant had been persecuted in the past or that there would be a real risk that he would be persecuted on his return because of his alleged connection with the Revival party. However the reason for the confirmation of the Commissioner's negative recommendation is found in the Tribunal Member's summary of his other three findings. These were first, that the three previous RAT decisions bore insufficient relevance to the appeal. An examination of those decisions indicates that the account given of events in Georgia by those successful appellants was found to be supported by COI whereas in the present case, the applicant's evidence was found to run counter to COI. That finding is therefore entirely rational.

14. The second finding was that the applicant's credibility was undermined by reason of the absence of any identity documents. The applicant was aware that his identity documents were an issue before the Commissioner. Considering that his family remain in Ajara and that he had served in the Soviet Army before the break up of the USSR, it is surprising that he was unable to obtain some evidence of identity. It was therefore perfectly open to the Tribunal Member to make a negative credibility finding on that issue.

15. The final negative finding relates to the applicant's failure to give a reasonable explanation for not seeking asylum in the first safe country in which he arrived. His explanation for staying in Russia for more than a year without seeking protection was that he might have experienced difficulties as a Georgian. However he travelled through several countries including France before coming to Ireland and the only explanation offered for not applying there was that people told him to come to Ireland. The Tribunal Member cannot be criticised for concluding that the applicant had failed to substantiate his claim that Ireland was the first safe country in which he arrived. He was perfectly entitled to rely on this aspect of s. 11B of the Refugee Act 1996 to doubt the applicant's credibility.

16. The decision as a whole leads to the conclusion that it is based on a lack of credibility and not on the availability, effectiveness or otherwise of state protection. The operative finding is that *"the Applicant's evidence runs counter to the Country of Origin information before the Tribunal"*. The Commissioner's earlier finding had been that no evidence could be found in COI which showed that ordinary members of the Revival party had suffered any difficulties at the hands of the new regime since May 2004. The applicant was on notice of that finding and the burden of proof lay with him at the appeal stage to show that he is a refugee, pursuant to s. 11A(3) of the Refugee Act 1996. However the applicant provided no evidence at the appeal stage to support his claim that he would be recognised and targeted as a regular member of the Revival party or to rebut the finding made by the Commissioner. In those circumstances, the question of the availability of state protection really did not arise and the Tribunal Member's conclusions on state protection were redundant to the decision which is otherwise legally sound. Nothing would be gained therefore by identifying the assessment of state protection as a substantial ground requiring further argument.

Conclusion

17. In the light of the foregoing, the Court is satisfied that neither the merits of the case nor the broader interests of justice determine that there is any good or sufficient reason for the extension of time or the grant of leave. Leave is therefore refused.

18. As indicated to the parties on the 15th April, the Court will make no order as to costs as these proceedings could have been avoided if the Tribunal Member's redundant assessment of state protection had exhibited no flaws.

