Neutral Citation Number: [2005] IEHC 108

THE HIGH COURT
JUDICIAL REVIEW

[2004 468JR]

BETWEEN

DARKO IVKOVIC AND TATJANA KOLBAS

APPLICANTS

and

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

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered on the 14th day of April 2005.

The applicants seek leave to issue an application for judicial review seeking an order of prohibition preventing the "second named respondent's scheduled Tribunal member for the applicants appeal hearing on Tuesday 1st June, 2004 from proceeding with the matter". Certain other consequential relief is also sought.

The applicant applied *ex parte* and obtained an order from the High Court (Gilligan J.) on the 27th May, 2004, restraining the Refugee Appeals Tribunal member assigned from hearing the appeal until after Wednesday 9th June for further order. That order has been extended from time to time or an undertaking given. Nothing turns on this difference.

When the application for leave came on before me it was agreed by counsel for the applicant and counsel for the respondents that this application is subject to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and accordingly I heard it on that basis. The applicants must establish that they have substantial grounds to obtain leave.

Background facts.

The applicants are from Croatia and arrived in Ireland in February, 2002, and applied for refugee status. The applicants are of Serb ethnicity. The applicants were refused a recommendation of refugee status by the Refugee Applications Commissioner and appealed to the Refugee Appeals Tribunal. On the 7th May, 2003, Mr. Donal Egan sitting as a member of the Refugee Appeals Tribunal held an oral hearing of the appeal of each applicant. Prior to that hearing the solicitors then acting for the applicant Siobhan T. Foley & Co., Tralee, Co. Kerry sent to the second named respondents a video cassette of a documentary pertaining to the allegedly invidious situation of ethnic Serbs within Bukovar and the persecution suffered therein because of their ethnicity. It is alleged that notwithstanding requests made that Mr. Egan failed to view and have regard to the contents of the video.

Subsequently a decision was issued recommending a refusal of refugee status of each of the applicants. Thereafter a motion was issued seeking leave to apply for an order of *certiorari* of the decision of the Refugee Appeals Tribunal. The grounds relied upon included the refusal to view the video which is perceived by the applicants to contain important objective country of origin information. In the statement of grounds filed in the first proceedings (exhibited to the grounding affidavit in these proceedings) it was alleged that the decision given by Mr. Egan as a member of the second named respondent relied upon country of origin information which suggested that the objective situation in Croatia was not such as would warrant the grant of asylum to ethnic Serbs on the basis of a well founded fear of persecution owing to that ethnicity. The applicants alleged that such country of origin information used in the assessment of the applicants' claim for asylum and superseded by what they perceive and allege to be "more actuate and pertinent objective third party information" contained in the said video cassette.

Those proceedings were settled and on the 3rd March, 2004, I made orders, on consent in each of those proceedings in which leave was granted and the decisions of the Refugee Appeals Tribunal dated 31st October, 2003, were vacated and the appeals were remitted to the Refugee Appeals Tribunal for hearing, one in conjunction with each other. There were also orders for the applicants' reasonable costs to be paid by the respondents and to be taxed in default of agreement. The final order was that the proceedings be struck out. In those proceedings to which I will refer as the first set of proceedings the applicants herein instituted separated proceedings.

By letter dated 12th May, 2004, addressed to the applicants' current solicitors, Collins, Crowley & Co., the applicants were informed that the new oral hearing was scheduled for Tuesday 1st June, before Mr. Jim Nicholson as the member of the Tribunal.

By letter dated the 18th May, and sent by courier addressed to the Chairperson of the Refugee Appeals Tribunal Messrs. Collins, Crowley forwarded *inter alia* a copy of the video tape which differed from the earlier copy of the tape insofar as it was now in Serb-Croat language with English subtitles and which it was stated "contains up to date and relevant country of origin information pertaining to the applicants application for asylum". In the same letter a request was made that facilities be provided for the viewing of the video tape during the oral hearing and suggested that the interpreter could corroborate whether the subtitles were correct. Certain other documentation to be relied upon was also included. The affidavit of Luis Pena, Legal Assistant with Collins, Crowley & Co. which grounded the *ex parte* application before Mr. Justice Gilligan only referred to one subsequent communication from the Refugee Appeals Tribunal to Collins, Crowley & Co. namely a letter dated 24th May, from Mary Ita O'Sullivan, Staff Officer, Assigning Unit in the following terms:

> "We refer to the notice of appeal with covering letter dated 19th February 2003 submitted in connection with the your client's appeal. The member of the Tribunal to whom this case has been

assigned does not wish to view the submitted video".

It appears to have been on the basis of this evidence that the *ex parte* injunction was granted by Gilligan J. Subsequent to the issue of notice of motion and service of papers on the applicants a replying affidavit sworn by Deirdre Bodkin an Executive Officer of the Refugee Appeals Tribunal was filed and in addition two affidavits from the applicants a further affidavit of Mr. Pena. From those affidavits it appears that there were additional communications and that the total communications subsequent to the assignment of Mr. Nicholson as the member of the Tribunal appear to have been the following:
(1) Letter dated 6th May, 2004, from Mary Ita O'Sullivan, Staff Officer, Assigning Unit to Síobhan T. Foley & Co., Solicitors, Tralee in identical terms to the letter referred to above of the 24th May.
(2) The letter from Collins, Crowley & Co. of the 18th May referred to above.
(3) A letter from Síobhan T. Foley & Co. addressed to Mary Ita O'Sullivan of the 21st May, 2004, referring to a conversation and returning the letter of the 6th May, 2004.
(4) A telephone conversation between Mr. Luis Pena and Ms. Laura Cooney of the Refugee Appeals Tribunal. Mr. Pena states on affidavit that he informed her that the video submitted was nine minutes in duration and had English subtitles. He submitted that it should be viewed during the appeal hearing. He then states at para. 3 of the supplemental affidavit "I understood the Refugee Appeals Tribunal member had indicated that he would hear the evidence first and then decide whether or not to look at the video submitted should the member decide to view the video evidence I understood facilities would be made available for him to do so."
(5) On the 25th May, 2004, Mr. Pena received a letter dated 24th May from Ms. Cooney who is stated to be of the Scheduling Unit which states "I wish to acknowledge receipt of your document dated 18th May, 2004, the contents of which have been noted". It made no reference to the telephone conversation or the viewing of the video.
(6) On the 26th May, 2004, Mr. Pena received the letter from Mary Ita O'Sullivan, Staff Officer, Assigning Unit also dated 24th May, 2004, referred to above. Mr. Pena states on affidavit that having regard to Ms. O'Sullivan's role as Staff Officer in the Assigning Unit "I understood [the letter] to represent the final and only written decision on the matter, that the Tribunal member assigned would not view the video evidence as it followed my earlier conversation with Ms. Cooney."
It was following receipt of this letter and it is explained on affidavit by reason of the fact that the 27th May was the last day of the Easter term that the application was made and injunction obtained restraining the hearing of the appeal on the 1st June.

Preliminary objection
Counsel for the respondents raised as a preliminary objection the fact that Mr. Pena had not disclosed to the court when making the *ex parte* application the conversation which took place between himself and Mr. Cooney. I am satisfied there was an obligation on Mr. Pena to disclose this material fact to the court when making the *ex parte* application. That obligation existed even if it was also reasonable for Mr. Pena to conclude from the two letters of the 24th May, 2004, from Ms. Cooney and Ms. O'Sullivan of the Refugee Appeals Tribunal that the latter represented the final decision of Mr. Nicholson. If this were an application to set aside the *ex parte* injunction obtained then it would be relevant. However the application before me is an application for leave and the full picture is now disclosed on affidavit and therefore does not appear to be a ground upon which leave should be refused.

Statement of grounds
The applicants seek leave to issue an application for judicial review seeking an Order of Prohibition effectively preventing Mr. Nicholson, as a member of the Refugee Appeals Tribunal proceeding with the hearing and determination of the applicants' appeal. The grounds upon which they claim to be entitled to such an order are set out in the statement of grounds dated 31st May, 2004. The material grounds, after certain preliminary recitals of fact are:
vi. The first named applicant brought judicial review proceedings which were settled on the basis that the applicant herein would have a full rehearing, that hearing is scheduled to take place on 1st June, 2004. The applicants at all times understood that the video that was the subject matter of the earlier judicial review proceedings would be viewed by the Tribunal member scheduled to conduct the rehearing having regard to the nature of the objective information contained in the video which is of some eight or nine minutes duration. A second video with English subtitles was provided to the Refugee Appeals Tribunal when the date of the rescheduled hearing became known.

vii. The applicants' solicitors by letter dated the 24th,May, 2004 have now been informed that the member scheduled to conduct their refugee appeal, Mr. James Nicholson has refused to look at the video containing relevant evidence.

viii. By declining and/or failing to consider this crucial piece of objective evidence, the second respondent has compromised the applicants right to natural and constitutional justice and fair procedures in the treatment of their appeal and should be prohibited by order of this Court from proceeding to determine

the applicants' appeal.

ix. Without prejudice to the above submissions, the applicant has a reasonable apprehension that the second respondent, his servants

or agents, pre-judged the said appeal.

x. In those circumstances, the second respondent's determination refusing to view the video is a breach of fair procedures and would render any decision made in such a context unsatisfactory and contrary to constitutional justice.

As already indicated this is an application on which consent is being considered in accordance with s. 5 of the Act of 2000. Hence in accordance with the decision of the Supreme Court in *In re Article 26 of The Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 the applicants must establish substantial grounds for asserting that they are entitled to the relief in the sense of "reasonable" "arguable" and "weighty" grounds and the grounds must not be "trivial or tenuous".
Where, as in this application, the applicants in their grounds rely upon assertions of fact they must also in relation to those facts meet the standard set out by the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. In that case, the test set out by Finlay C.J. at p. 378 for an application for leave *ex parte* included establishing:

> "(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by judicial review.
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks".

Applying the "substantial grounds" standard of s. 5 of the Act of 2000 to the above test it appears that the applicants herein must establish *inter alia* (i) that the facts averred to in the affidavits would be sufficient, if proved, to support substantial grounds for the form of relief sought by judicial review; and (ii) that on those facts substantial grounds in law can be made out that the applicants are entitled to the relief which they seek.
The above test does not take account of the possibility of conflicting acts by reason of replying affidavits as it was stated on an *ex parte* application for leave. Whilst in this application there is a replying affidavit there are no material facts in dispute but and the court should take into account also the facts stated in the replying affidavit.
In relation to the grounds set out above I have reached the following conclusions on the relevant facts for the purpose of the leave application.
(1) Whilst the failure of Mr. Egan as a member of the Refugee Appeals Tribunal to view the video at the first hearings was the primary ground relied upon in the first judicial review proceedings and those proceedings were settled upon the basis that the decisions of the Refugee Appeals Tribunal were vacated and there would be further oral hearings there is no evidence before the court that as part of the settlement there was an agreement on behalf of the Refugee Appeals Tribunal that the video would be viewed at the further oral hearings. Accordingly the factual basis for ground (vi) in the statement of grounds has not been made out.
(2) The video in issue contains country of origin information which the applicants consider crucial to their claim for asylum, particularly having regard to the basis of the earlier decision. The applicants consider that this video must be viewed by a person determining their claim for asylum if all the relevant evidence is to be considered.
(3) There is a difference between the information available to the applicants through their solicitors Collins Crowley & Co. on the date of the issue of the motion seeking leave on the 31st, May, 2004 and that now available to the court following the delivery of the replying affidavit sworn by Ms. Bodkin on behalf of the Refugee Appeals Tribunal on the 22nd June, 2004.
(4) The relevant information available to the applicants through their current solicitors as of the 31st May, 2004, was the following:
(i) Mr. Nicholson was the assigned member of the Refugee Appeals Tribunal to hear and determine their appeals. This occurred someday prior to the 6th May, 2004.
(ii) By letter of the 18th May the applicant through their solicitors submitted the video with English subtitles.
(iii) The oral hearing was fixed to the 1st June.
(iv) On the 24th May the applicants through their solicitor were informed by a Ms. Cooney of the Refugee Appeals Tribunal that Mr. Nicholson would hear the evidence first and then decide whether he would hear the video.
(v) By the 26th May the applicants through their solicitors had the following information in relation to the attitude of Mr. Nicholson:
(a) The oral indications given on the phone by Ms. Cooney on the 24th May.
(b) A letter also dated the 24th May from Ms. Cooney referring expressly to the letter of the 18th May with the video and not making any reference to the subsequent conversation.
(c) A further letter also of the 24th May from Ms. O'Sullivan of the Refugee Appeals Tribunal (bearing the reference on the letter from Collins Crowley of the 18th May) and stating "the member of the Tribunal to whom this case is being assigned does not wish to view the submitted video".
Hence, I find that the factual basis for ground (vii) is made out.
The factual basis for grounds (vii), (ix) and (x) is a refusal by Mr. Nicholson to view the tape. They are also premised upon a continuing refusal by Mr. Nicholson to view the tape. As of the 31st May, 2004, it was reasonable for the applicants on the information available to them to conclude that Mr. Nicholson had determined definitively that he would not view the video. Notwithstanding the oral conversation on the 24th May it appears that having regard to the letter of the same date from Ms. Cooney which makes no reference to the conversation and the separate letter of the 24th May from Ms. O'Sullivan it was reasonable for the applicants through their solicitors to conclude that the final decision as of that date of

Mr. Nicholson was that he would not view the tape. Accordingly on the information as communicated to the applicants prior to the 31st May I am satisfied that they have both laid the factual basis and would have substantial grounds such as to entitle them to leave on these grounds.
However having regard to the notice procedure provided for in s. 5 of the Act of 2000 it appears that the court must take into account the facts as disclosed by the replying affidavit and determine whether at the date of the hearing of the application for leave both the factual basis continues to be made out and on such factual basis there exists substantial grounds for contending that the applicants are entitled to the relief sought. The following additional factual matters are established by the affidavit of Ms. Bodkin.
(i) The applicants previous solicitors were informed by letter of the 6th May that Mr. Nicholson did not wish to see the submitted video

(para. 5).

(ii) A copy of the letter from Collins Crowley of the 18th May was sent to Mr. Nicholson. Ms. Cooney spoke with him on the 24th May in relation to the submitted video tape. Mr. Nicholson indicated on that day he would hear the evidence in the appeals prior to deciding whether to view the tape (para. 8).
(iii) The only explanation offered for the inconsistent oral and written information given on the 24th May as to Mr. Nicholson's intentions is set out at para. 11 of Ms. Bodkin's affidavit which states:
"11. 1 say that the true position in relation to this appeal and the videotape is therefore that the Member of the Tribunal has indicated that at the oral hearing of these appeals he proposes firstly to hear the evidence adduced in the matter. Having heard this evidence he will then decide whether to view the tape and the applicants will of course be in a position at the hearing to indicate to the Member why he should then view the tape. I say that it was only as a result of administrative overlap between two different sections of the Tribunal that two letters dated the 24th of May 2004 were sent to Messrs. Collins Crowley & Company. One letter indicated that the Member would not view the video submitted and the other informed them of the Member's true intentions in relation to the hearing of this appeal and the viewing of the videotape"
It was accepted at the hearing that the last sentence in the above paragraph is inaccurate. The second letter of the 24th May did not inform Messrs. Collins Crowley & Co. of Mr. Nicholson's true intentions. The letter being referred to is Ms. Cooney's letter which was silent as to his intentions.
It is noted that Ms. Bodkin who swore the affidavit on behalf of the Refugee Appeals Tribunal is not a person who had any direct involvement in the matters at issue in this application. No affidavits have been sworn by Mr. Nicholson or by Ms. Cooney or Ms. O'Sullivan. Taking into account for the purposes of the leave application the hearsay evidence offered by Ms. Bodkin of the conversation between Mr. Nicholson and Ms. Cooney and some communication between Mr. Nicholson and Ms. O'Sullivan it suggests that Mr. Nicholson made two decisions in relation to this video tape. He appears to have made a first decision prior to the 6th May, 2004, that he would not view the video tape. That decision may have been made at a time when the video tape did not have subtitles. However there is no evidence of the reasons for Mr. Nicholson's first decision. Secondly Mr. Nicholson appears to have made a decision on or shortly before the 24th May that he would firstly hear the evidence in the appeal prior to deciding whether to view the video tape.
By reason of the above facts I have concluded that at the date of the hearing of this application as a matter of probability;
(i) Mr. Nicholson made a decision not to view the video tape in question. This decision was made prior to the 6th May.
(ii) Mr. Nicholson made a further decision on the 24th May that he would hear the evidence prior to making a decision as to whether or not he would view the video tape.
(iii) There is no evidence before the court as to whether or not Mr. Nicholson was aware that he was making two different decisions in relation to the viewing of a video tape in the same appeals or as to the reasons for which Mr. Nicholson reached either decision.
(iv) The second decision of Mr. Nicholson was never communicated to the applicants in writing. The only decision communicated in writing was the decision to refuse to view the video tape.
(v) No evidence of communications between Mr. Nicholson and Ms. O'Sullivan who communicated the decision in writing has been offered to the court. In the absence to any evidence to the contrary the court must assume that on each of the dates Ms. O'Sullivan communicated that decision in writing she believed that decision to be the current decision of Mr. Nicholson. It was communicated both by letter of the 6th May, 2004, and to the applicants' current solicitors by letter of the 24th May, 2004.
The position in relation to the grounds now sought to be relied upon by the applicant is not satisfactory. The statement of grounds is dated 31st May, 2004, and was prepared and drafted at a time when the applicants believed by reason of the letter from Ms. O'Sullivan of the 24th May that Mr. Nicholson was unwilling to view the video tape.
In response to the changed factual position as disclosed in the affidavit of Ms. Bodkin the only step taken on behalf of the applicants was to deliver and file a further affidavit of Mr. Pena in which the conversation is accepted. However Mr. Pena makes one further significant point in his supplemental affidavit at para. 9 of his affidavit. He asserts that by reason of the consequence of this series of events that the applicants' appeals should be listed before another Tribunal member "to ensure the applicants' can have confidence in the proper and appropriate consideration of all matters pertaining to their appeal; to uphold the integrity and impartiality of the determination procedures and having regard to the requirements of justice."
However no attempt was made to amend the statement of grounds to add what is effectively a ground of objective bias.
At the hearing of the application for leave the response of counsel for the applicant to this situation was to:

(1) Submit that even if the court took the view that the current position of the Tribunal through Mr. Nicholson was that he would hear the evidence and then determine whether to view the video that the applicants remained entitled to leave to seek an order of prohibition on the grounds set out at para. E(viii), (ix) and (x); and
(2) To seek leave to amend the statement of ground so as to add a ground of objective bias by reason of the position of Mr. Nicholson and the Tribunal as disclosed in the correspondence passing between the Tribunal and the applicants' present and former solicitors and even taking into account the affidavit of Ms. Bodkin.
On these submissions I have concluded firstly that the applicants have established substantial grounds on each of the grounds (e) (viii) (ix) and (x) subject to two amendments.
By reason of the initial determination of Mr. Nicholson that he would not view the tape and notwithstanding the subsequent decision that he would hear evidence before deciding whether or not he would view the tape I have concluded that there are substantial grounds for contending that it would be a breach of the applicants' right to fair procedures and/or natural and constitutional justice if the applicants appeal, including of necessity a decision as to whether or not the tape will be viewed as part of the appeal were now to be heard and determined by Mr. Nicholson. I am satisfied on the facts of this case that there are substantial grounds for contending that the applicants are entitled to have the appeal heard and determined by a member of the Tribunal who has not already made a decision that he would not view the video tape in question.
In reaching this conclusion I wish to make to clear that if the initial and only decision of Mr. Nicholson had been to the effect that he would hear the evidence firstly before deciding whether or not to view the tape I would not consider that there are grounds for contending that such approach was in breach of the applicants' right to fair procedures and/or natural and constitutional justice.
Accordingly I would grant leave on the grounds set out at paras. (viii) (ix) and (x) subject to amendment as follows:
(viii) By determining that he would not view the video tape in question, and notwithstanding his subsequent decision, Mr. Nicholson as the member assigned of the second named respondent has compromised the applicants right to natural and constitutional justice and fair procedures in the treatment of their appeal and should be prohibited by order of this Court from proceeding to determine the applicants appeal.
(ix) Without prejudice to the above submissions, the applicant has a reasonable apprehension that the second respondent, his servants
or agents, pre-judged the issue as to whether or not to view the video tape in question.
(x) [without amendment]
In support of the application to amend the statement of grounds so as to add an additional ground of objective bias counsel for the applicant submitted that this necessity only arose by reason of the facts disclosed in the affidavit of Ms. Bodkin.
Whilst counsel for the respondents objected to any amendments being made he was offered by the court and did not consider it necessary to have any adjournment to deal with the application for leave based upon objective bias.
Counsel for both parties referred me to the decision of the Supreme Court in *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 and in particular extracts from the judgments of Murphy J. and Geoghegan J. Counsel for the applicant relied upon the analysis of Geoghegan J. commencing at p. 251 of the three different situations in which bias may occur and submitted that on the facts of this case it came within the third situation described as follows:
"(3) Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken *O'Reilly v. Cassidy* [1995] 1 I.L.R.M. 306, or the judge having been involved in a different capacity in matters which were contentious in *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 I.L.R.M. 408, or where there was evidence of prejudgment by a person adjudicating *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419"
It is submitted that on the facts of this case there is evidence of prejudgment of the issue as to whether or not the video tape would be viewed.
Counsel for the respondent relied in particular on a passage from Murphy J. at p. 243 where he stated:

> "It is unnecessary to express any view on whether all the circumstances listed by Lord Bingham as being unexceptional would be similarly treated in this jurisdiction or whether, indeed, a comparable list here would be even longer. It is sufficient for the purposes of this appeal to emphasise that not all extraneous factors are fatal to the reality or appearance of impartiality in the exercise of the judicial function. Accordingly, a party asserting bias must prove, by appropriate evidence and to the required standard, not only the existence of a particular relationship, circumstance or factor but also that it falls outside the permitted limits".

I have concluded on the facts of this case that for the purposes of a leave application the applicant has established on the affidavits that there is evidence of prejudgment by Mr. Nicholson of what is perceived by the applicants to be a crucial issue in the case. Further it appears to me that the applicants, by reason of the unfortunate factual history of these appeals must be considered as being reasonable persons in having an apprehension of bias by Mr. Nicholson by reason of the decision taken by him and communicated to them that he would not view the video tape.
Whilst it would have been preferable that the applicants through their solicitors at an earlier stage would have indicted an intention to seek to amend the statement of grounds by adding a ground of objective bias in response to the affidavit of Ms.

Bodkin I have concluded that there is no prejudice to the respondents in permitting the amendment to be made and that justice requires that the applicant should be now permitted to amend.
Accordingly I will grant leave on an additional ground in the following terms:
(xi) By reason of the determination of Mr. Nicholson as a member of the second named respondent that he would not view the video tape in issue and notwithstanding his subsequent decision there exists a circumstance of objective bias such that the applicants are entitled to have their appeals determined by a member of the second named respondent other than Mr. Nicholson.

Conclusion

Accordingly I will grant leave to seek the reliefs sought at para. d of the statement of grounds upon the ground set out at paras. e - (i)-(v) inclusive, (vii), (viii) and (ix) (as amended as indicated above), (x) and (xi) as set out above.