

THE HIGH COURT
JUDICIAL REVIEW

[2009 No. 267 J.R.]

BETWEEN**I. D.****APPLICANT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 11th day of June 2013**

1. The Ossetian people live in North Ossetia which is in the Russian Federation and in South Ossetia which is in Georgia.
2. In South Ossetia the Ossetians and the indigenous Georgians are in conflict and the Georgian state tends to support indigenous Georgians while Russia supports the Ossetians, causing conflict between Russia and Georgia.
3. The applicant in this case is a Georgian national from South Ossetia and is of joint Georgian and Ossetian ethnicity. He fled South Ossetia and Georgia and arrived in Ireland in August 2005 where he sought asylum. His claim was based on an allegation of persecution connected with his double ethnicity, his membership of the Labour Party and the fear of conscription into the Georgian Army.
4. The applicant's claim for asylum was rejected by the Refugee Applications Commissioner and then by the Refugee Appeals Tribunal on 6th October 2006, which decision was challenged by way of judicial review. Those proceedings were compromised. The matter was remitted to the Refugee Appeals Tribunal for reconsideration but before the hearing war broke out between Russia and Georgia in August 2008.
5. In connection with the new hearing, a supplemental submission in addition to the notice of appeal was made to the Tribunal on 19th November 2008, on which day an oral hearing was conducted by the Tribunal. This supplemental submission addressed a new claim on behalf of the applicant.
6. The war which erupted between Georgia and the Russian Federation killed hundreds of people on both sides and injured thousands of others. Significant displacement of persons occurred. The new submission argued that the applicant had consequently become a refugee *sur place*. Reference was made in the submission to Regulation 6(1) of the European Communities (Eligibility for Protection) Regulations 2006, which provides:

"A well founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the protection applicant left his or her country of origin."

The supplemental submission argued:

"It is submitted that the applicant has protection needs *sur place* as a result of the war between Georgia and the Russian Federation which began on the 7th August 2008, as a consequence of which, according to the Parliamentary Assembly of the Council of Europe, some 192,000 persons were displaced. In its Resolution 1633 (2008), the Assembly expressed concern that a total of 25,000 displaced persons from south Ossetia are considered to be 'permanently' unable to return to their original places of residence and states that these numbers should be seen in the context of the approximately 222,000 persons who remain displaced from the previous conflict in the early 1990s. BBC News reported on 10th August 2008 that '[t]housands of people are known to have fled into the neighbouring Russian region of North Ossetia and other parts of Georgia'."

7. The new submission went on to say that according to the Norwegian Refugee Council, almost 83,000 South Ossetians remain displaced from the August 2008 conflict, with little prospect of return.
8. The submission also referred to the decision of the European Court of Human Rights in *Cyprus v. Turkey*, 10th May 2001, in support of the proposition that "refusal to allow the return of . . . displaced persons to their homes . . . was a violation of Article 8 of the European Convention on Human Rights". It was argued that the inability of the South Ossetians to return to their homes is a violation of Article 8 of the European Convention on Human Rights.
9. It was also submitted to the Tribunal that this human rights violation constituted persecution by reason of Regulation 9(1) of the 2006 Regulations which provides that "Acts of persecution for the purposes of section 2 of the 1996 Act must: (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention . . ."
10. Therefore, a comprehensive though concise submission was made to the Tribunal that the applicant had become a refugee *'sur place'* because of the war of August 2008, which resulted in displacement of South Ossetians and their inability to return home, such inability to return home, it was argued, being a breach of human rights which constituted persecution.
11. The complaint made in these proceedings is that the applicant's claim to be a refugee *sur place* was not determined by the Tribunal.

Did the Tribunal determine the '*sur place*' claim?

12. Section 3 of the Tribunal's decision is entitled 'The Applicant's Claim' and it sets out the reasons the applicant left Georgia in August 2005. This section of the decision contains no mention of the '*sur place*' element of the applicant's claim.

13. Section 4 of the Tribunal's decision is entitled 'Submissions' and the Tribunal Member records submissions made on the applicant's behalf as follows:

"He is a refugee and the incidents relied upon can take place subsequent to the Applicant leaving his country of origin.

Hathaway - this says that there is no distinction between a person who flees for a reason of persecution and a person who finds themselves in the position whereby the incidents are as such after they have left the country. It was submitted that the applicant is a refugee.

Attention is drawn to the Parliamentary Assembly resolution where it is stated that 222,000 persons remain displaced from the previous conflict. A BBC News report of 10th August 2008 states that thousands have fled into the neighbouring region.

Turkey European Court of Human Rights. Regulation 9(1) of the European Communities (Eligibility for Protection) Regulation 2006 was also referred to. The latest Home Office 3.6.11 of the United Kingdom Home Office Guidance Note was referred to and 3.6.7 was also referred to. Reference was made to 3.6.11 of the UK Home Office Guidance Note which states that it is feared that the state authorities relocation is not feasible. *Rostas v. The Refugee Tribunal* was referred to [sic].

14. That quoted text seems to refer - if somewhat obliquely- to the *sur place* claim.

15. Section 5 of the Tribunal decision is entitled 'Law' and it sets out or mentions many statutory provisions including s. 2 of the Refugee Act 1996; s. 1 of the 1996 Act; s. 11A(3) of the 1996 Act; s. 16(16) of the 1996 Act; s. 16(16A) of the 1996 Act; s. 11B of the 1996 Act; s. 11C of the 1996 Act; Article 5.3 of the 2006 Regulations; Article 5(1) and (5)(2) of the Regulations; Article 2 of the Regulations; Article 8 of the Regulations; Article 9 of the Regulations; and Article 10 of the Regulations. Nowhere is Article 6(1) of the Regulations referred to which is the key legislative provision underpinning an application and determination of refugee '*sur place*' claims.

16. Section 6 of the Tribunal decision is entitled 'Analysis of the Applicant's Claim' which deals comprehensively with the allegation that the applicant suffered persecution as a member of the Labour Party. Part of the original asylum claim advanced by the applicant was that members of the Labour Party would be arrested and forced to fight in conflict zones. The Tribunal Member notes that there is no country of origin information to support that contention.

17. But he goes on to say:

"I am of the view that in view of the international attention that the conflict attracted that there would be some Country of Origin Information available supporting his claim if such incidents had occurred. Having heard his evidence, observed his demeanour and taking account of the generally known facts in respect of the political situation in Georgia, it is only reasonable to expect that the United Kingdom Home Office would refer to this if it had occurred or the Applicant himself would have proffered Country of Origin Information supporting this contention. Having heard his evidence and observed his demeanour, I find his evidence to be neither plausible nor credible and I find it undermines his credibility."

18. Insofar as this finding refers to the consequence of the war and thereby part of the refugee *sur place* claim, it answers only an allegation that the war gave rise to conscription. No such claim was ever made by the applicant. This reference to the conflict, (which is not identified as the Russian Georgian War), is not a determination of the *sur place* claim which was based on a contention that the war prevented persons returning home, not that the war gave rise to conscription or a fear or conscription.

19. The Tribunal Member deals also with the claim that there was forced conscription in Georgia, generally, and rejects this on the basis of absence of evidence to support the claim.

20. The Tribunal rejects the general credibility of the applicant but proceeds to examine the possibility of internal relocation and decides, having reviewed the authorities on this theme, that there was state protection available and internal relocation in Tbilisi was realistic. The decision concludes as follows:

"All of the principles above have been applied in consideration of the Applicant's case and I conclude that the Applicant has

(a) not shown a failure of State protection; and

(b) in addition or in the alternative, it would not be unduly harsh to expect the Applicant to relocate to the locations identified in the Country of Origin as capable of providing protection.

Tbilisi would not only provide the Applicant with protection against the risk of persecution he claims and also better access to social inclusion services. I find that it would be reasonable to require the Applicant to relocate to Tbilisi. The Applicant in this case did not give any reason why Tbilisi would not provide a reasonable alternative to leaving his country of origin."

21. The respondent defends the decision of the Tribunal by arguing that one can only become a refugee *sur place* by reference to events which have occurred in one's home country since departure. The applicant, it is argued, left South Ossetia in 2004 because of a violent incident and that circumstances have not changed since that time. It is argued that the 2008 war had no effect on him. In its statement of opposition, the respondent pleads, somewhat surprisingly, that it was not required to address the issue of protection needs which arise *sur place* in respect of the applicant and that the applicant did not establish a refugee *sur place* claim for the assessment of the respondent.

Conclusion

22. The applicant made a concise *sur place* claim orally and in writing on 19th November 2008, which was described in paragraph 10 of this judgment. At no stage does the Tribunal give a decision on that *sur place* claim. It remains unanswered to this day. There are many decisions of the High Court which require the Tribunal Member to decide the claim advanced. Previous decisions of this court in

E.P.A v. The Refugee Appeals Tribunal [2013] IEHC 85; *B.O.B v. The Refugee Appeals Tribunal & Ors* [2013] IEHC 187; and *A.A.S. v. Refugee Appeals Tribunal* [2013] IEHC 144, *Rita Voga v. Refugee Appeals Tribunal* (High Court, Ryan J., 6th October 2010), not to mention the Supreme Court in *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3 all refer to the requirement to address the central issue advanced. The *sur place* claim was not determined. In accordance with these authorities, failure to answer the *sur place* claim deprives the decision of its legality.

23. As this was a telescoped hearing I grant leave to seek judicial review and grant an order of *certiorari*. The Tribunal's decision comprehensively deals with the original asylum claim. Therefore the decision is quashed and remitted to re-hear the *sur place* claim only.