Neutral Citation Number: [2007] IEHC 475

THE HIGH COURT

[2005 No. 882 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

A. C.

APPLICANT

AND

DENIS LINEHAN MEMBER OF THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Gilligan J. delivered on the 4th day of May, 2007.

1. The applicant in these proceedings seeks leave to apply for *inter alia* an order of *certiorari* quashing the decision of the first named respondent refusing the applicant's appeal against the recommendation of the Refugee Applications Commissioner that the applicant is not entitled to refugee status as well as an injunction preventing the second named respondent from deporting the applicant pending the determination of the proceedings.

2. The applicant claims to be a Kosovan of Roma ethnicity who has sought asylum status on the grounds of race/membership of a social group. The Refugee Applications Commissioner recommended against granting refugee status to the applicant on the 16th day of December, 2004 and the Refugee Appeals Tribunal affirmed this recommendation by decision dated 28th day of June, 2005. This decision was communicated to the applicant by letter dated 19th day of July, 2005. The notice of motion seeking leave to apply by way of judicial review for the various reliefs sought issued on 5th day of August, 2005.

3. The first issue that arises is necessity for an extension of time. The application herein is out of time by a minimal period and the applicant satisfies me, on affidavit as sworn on 26th day of April, 2007 that the very short delay in the particular circumstances of this case is not in anyway attributable to the applicant and in the circumstances I make an order granting extension of time for the applicant to bring this application for leave to apply for judicial review.

4. The grounds upon which the relief is sought herein is on the basis that the first named respondent failed to act in accordance with the requirements of natural and constitutional justice, that the first named respondent failed to have relevant considerations and in particular that he failed to have regard to the applicants explanation as to the inability of the agents of the State to protect him. Further the applicant alleges that the first named respondent made selective use of the country of origin information and relied solely upon that information which in his opinion tended to undermine the applicant's account without making any reference to the country of origin information in support of the applicant's account.

5. In his decision of 28th June, 2005 the first named respondent *inter alia* came to the conclusion, that because the applicant stated that he did not make any complaint to the State authorities concerning his alleged treatment there cannot be said to be a failure of State protection if the State has not been given an opportunity to protect its citizens and further taking all factors into account the tribunal member did not think that there was a persistent element to the alleged persecution of this particular applicant and that allied to the fact that State protection would appear to be available when one takes into account the various peace forces that are in Kosovo the first named respondent concluded that the applicant was not a refugee within the meaning of s. 2 of the Refugee Act. The first named respondent did accept that the reason why the applicant left Kosovo related to certain events that took place in March 2004 in Mitrovica and the first named respondent was of the view that there was general unrest for a short period of time during that particular month. He also accepts that many members of the Roma Community were caught up in the disturbances but took the view that persecution must at least be persistent and should result in serious ill treatment without just cause.

6. The country of origin information which the first named respondent had before him was the UNCR position on international protection needs to individuals from Kosovo in light of recent inter ethnic confrontations as prepared in Geneva and dated 30th day of March, 2004. This report is of importance because the various confrontations which took place in Mitrovica affecting the applicant occurred between the 17th and 20th March, 2004 and the applicant left his homeland on 25th March, 2004. The report comes to a conclusion that members of all minority groups such as Roma should continue to benefit from international protection in countries of asylum. There is no doubt from the content of the country of origin reports that the applicants general account as to what occurred is highly credible.

7. There is then an ICG Europe report bearing number 155 as dated 22nd April, 2004 and this sets out in some detail a chronology of violent events between the 17th and 19th March, 2004 in Mitrovica and there is then a UNHCR report as prepared in Kosovo in June 2004. This report refers to persons who were the subject matter of the various violent incidents finding refuge in KFOR camps, IDP collective centres or private host families. There is an OSCE report of July 2004 and paragraph 9 of this report is quoted extensively by the Tribunal member at p. 12 of his decision. This report of July 2004 sets out that there are extensive police and military personnel available in the area of Mitrovica and that as of that point in time the KFOR presence was made up of 2,358 troops under French command. In my view the issue that arises is that for the Tribunal member who has stated that there cannot be said to be a failure of State protection if the State has not been given an opportunity to protect its citizens is a statement which depends on country of origin information or independent evidence that if a person such as the applicant who was a member of the Roma ethnic minority community were to seek State protection because of the events in Mitrovica around the 17th/18th March, 2004 such State protection would be available and would be granted to him. The Tribunal member took the view that State protection would appear to be available when one takes into account the various peace forces present but the applicant himself, and I accept that this statement may go outside of the averments as set out in the grounding affidavit, clearly stated in evidence before the Tribunal member that the various peace keeping forces could not help him.

8. Counsel for the respondents quite properly in my view accepts that the reference to various peace keeping forces is a reference to the State/agents of the State.

9. Accordingly the Tribunal member had evidence before him from the applicant that the State/State agents could not help him and no where in the country of origin information is it reported that members of the Roma ethnic community could make application for assistance to the State/State agents and that the State/State agents could effectively assist them. It does not appear to me that to state that members of the Roma ethnic community could perhaps find shelter with UN peace keeping forces or that there were 2,358 UN troops in the area gives rise to viable State assistance or protection from State agents. There was no independent evidence available in documentation from country of origin reports as to the situation in March 2004 as regards members of the Roma ethnic community being able to report matters of persecution to the State authorities and receiving viable State protection. In my view an arguable case is made out on substantial grounds that there were not sufficient facts and not sufficient country of origin

information before the Tribunal member for him to have come to the conclusion that State protection would appear to be available and that there cannot be said to be a failure of State protection if the State has not been given an opportunity to protect its citizens.

10. Furthermore the Tribunal member took the view that persecution must at least be persistent and serious ill treatment without just cause. The Tribunal member does not appear on the face of his decision to take issue with the fact that there was persecution of the applicant but his view was taking all the factors into account before him he did not think that there was a persistent element to the alleged persecution of this particular applicant. Persecution has to be viewed on a forward looking test and it does not appear that there was any country of origin information or other information available to the Tribunal member beyond July 2004 which would form the basis for his conclusion that there was not a persistent element to the alleged persecution or potential persecution of the particular applicant. In my view there is an arguable case made out on substantial grounds on the applicant's behalf in this regard.

11. It also appears that there was before the Tribunal member the psychological report from Erin McNulty Psychologist as dated 16th May, 2005 which does indicate that the applicant shows substantial evidence of having been traumatised and remains psychologically vulnerable. It does appear on the face of the decision as handed down by the Tribunal member that he did not consider the content of this medical report in anyway especially having regard to his conclusion that there was no persistent element to the alleged persecution of the particular applicant. In my view the applicant makes out an arguable case on substantial grounds that the Tribunal member ought to have considered in his deliberation the content of the report from the psychologist dated 16th day of May, 2005.

12. In these circumstances I will grant the applicant leave to apply for judicial review for the reliefs as sought at D(i) and (ii) on the grounds as set out at para. E(i) (ii) and (iii) of the statement required to ground an application for judicial review.