Neutral Citation Number: [2010] IEHC 439

THE HIGH COURT

JUDICIAL REVIEW

2008 1101 JR

BETWEEN

G. V.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 7th day of December 2010

This is an application, pursuant to the provisions of s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000, for leave to seek an order of *certiorari* by way of judicial review setting aside the Decisions of the first named respondent made on the 11th September, 2008 and 15th September, 2008.

It is accepted that the applicants were married to each other on the 23rd December, 1989. It is accepted that the wife is an ethnic Croat and that the husband is an ethnic Serb. It is accepted that on the 13th December, 1991, because of the fighting between Croats and Serbs in the terrible and unfortunate war which followed the dissolution of the former State of Yugoslavia, they had to flee from their home in Croatia and, seek safety in a Serbian controlled enclave. It is accepted that they remained there until 1998 when they sought refugee status in Serbia, where they remained until March 2005.

On the 6th March, 2005, they arrived at the borders of this State and immediately sought asylum here. They claimed that they had a well founded fear of persecution if they returned to Croatia because the husband was an ethnic Serb and because theirs was a marriage crossing the ethnic divide between Croats and Serbs. In April 2005, the Refugee Applications Commissioner recommended that their application for refugee status should be refused by the second named respondent.

The applicants appealed from these decisions of the Refugee Applications Commissioner to the first named respondent. By reason of the provisions of s. 13(5) of the Refugee Act 1996, (as amended), the appeals were determined on foot of written submissions only. Following the commencement of earlier proceedings seeking judicial review, the initial Decisions of the first named respondent refusing the appeals and confirming the decisions of the Refugee Applications Commissioner was vacated by this Court by consent of the parties. On the 21st December, 2007, both appeals were remitted for reconsideration by a different Member of the first named respondent. By a Decision dated the 11th September, 2008, in the case of the husband and, a Decision dated the 15th September, 2008, in the case of the wife, the first named respondent refused the appeals and recommended that the decisions of the Refugee Applications Commissioner be confirmed.

The initial applications seeking leave to apply for judicial review were filed in this Court on the 3rd October, 2008. This means that the application on behalf of the husband was made seven days beyond and, the application on behalf of the wife two days outside the limit of fourteen days fixed by the provisions of s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, for the making of such applications.

Section 5(2)(a) of the said Act of 2000, conferred on this Court power to extend the time for the making of such applications provided that it considers that there is good an sufficient reason so to do.

I agree with Ms. McGrath, counsel for the respondents, that the proffered explanation for the delay in making these applications, that is, that the solicitors representing the applicants wished to retain the services of the same counsel who had successfully represented the applicants in the previous application for judicial review, even though that counsel was at the material time absent from the State attending a Legal Conference in another Member State of the European Union, does not amount to a good and sufficient reason for extending the time. The wish of the applicant or his solicitors to engage or to re-engage the services of a particular member or members of the Legal Profession or, the availability or convenience of such person or persons, cannot be a sufficient reason for this Court to extend the time. To do so, would be to act in disregard of the clear intention of the Legislature, expressed by the very limited time allowed by the provisions of s. 5(2)(a) of the said Act 2000, for the making of these applications, that they must be made with the utmost dispatch. It would be irrational, unreasonable and wholly disproportionate to hold that the freedom to choose a particular legal representative or representatives and their availability at the material time should outweigh the considerations of national sovereignty, general public good and the integrity of the Asylum System, which underlie this particularly stringent limitation period.

However, the matter does not end there. This Court is entitled to and, does, take account of the shortness generally even if not relatively by reference to the statutory time limit, of the delay of seven days in making the application on behalf of the husband and of the negligible delay of two days in making the application on behalf of the wife. In considering whether the applicants' have shown good and sufficient reason why the court should extend the time, the court is entitled to and must also have regard to the general merits of the application. If the applicants can establish that there are "substantial grounds" as required by the provisions of s. 5(2)(b) of the said Act of 2000, that is, reasonable, arguable and weighty and not just trivial or tenuous grounds, for contending that the Decisions of the Member of the first named respondent should be quashed, then, it would be unjust and altogether disproportionate for the court to refuse leave simply because of a delay of seven and of two days respectively in the making of these applications.

The applicants seek leave to challenge by way of judicial review the Decisions of the Member of the first named respondent on, in

effect, three grounds:-

> 1. That the conclusion of the Member of the first named respondent that the country of origin evidence accepted by her of discrimination in Croatia against ethnic Serbs and against the partners in marriages between ethnic Serbs and ethnic Croats did not amount to "persecution" as defined by s. 2 of the Refugee Act 1996, (as amended) and the European Union (Eligibility for Protection) Regulations 2006, was irrational, unreasonable and contrary to common sense.
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> 2. That the Member of the first named respondent failed to have any regard to and, failed to offer any reason for distinguishing three previous Decisions of the Refugee Appeals Tribunal where refugee status was recommended for partners in marriages between ethnic Serbs and ethnic Croats, whose country of origin was Croatia.
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> 3. That the Member of the first named respondent in her Decision made six material errors of fact which are such both individually and collectively as to render her Decision invalid or unsatisfactory.

In her Decision dated the 11th September 2008, the Member of the first named respondent, in summarising the written submissions, stated, that she had special regard to the text of an Email dated the 15th January, 2008, from the Refugee Documentation Centre. She referred specifically to findings by the Norwegian Refugee Council (18th April, 2006), the International Helsinki Foundation (1st May, 2006) and, the United States of America, Department of State, (6th March, 2007) all cited in that Email. It is manifest from her Decision that the Member of the first named respondent accepted these findings, which she sets out as follows in her Decision:-

> ". . . reference is made to the Norwegian Refugee Council report which refers to the fact that children in Vukovar go to different kindergartens and then to different schools, and that this parallel system could lead to the creation of two separate identities. It points out that the Serbs and the Croats do not want mixed marriages, they frequent separate Croat and Serb cafes, restaurants and clubs. The Norwegian Refugee Council considers the situation unsustainable (18th April, 2006).
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> Reference is made to the fact that little more than one third of the over 300,000 ethnic Serb IDPs and refugees have been able to return to Croatia. It offers the opinion that about two thirds of past returns are not sustainable and for the remaining Croat IDPs the main obstacle to return is the poor economic conditions in return areas. For Serb IDPs the main barriers to return and reintegration are property, housing issues and a lack of employment opportunities as well as continuing discrimination.
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> According to the International Helsinki Foundation, there are reports of cases of ethnically motivated discrimination in certain areas of employment, for example State institutions, hospitals, courts and schools reportedly rejected job applicants of those categories (of ethnic Serbs) although they had adequate training and instead hired people from other Croatian cities.
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> Reference is made to the US Department of State Human Rights Practices Report for 2006, which states that the government did not fully implement programmes providing housing to ethnic Serb refugees who lost access to socialised housing. While NGOs noted a significant decline in violence against ethnic Serbs, societal violence and discrimination against ethnic minorities, particularly Serbs and Roma, remained a problem.
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> It also refers to the fact that open discrimination continued against ethnic Serbs and Roma.
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> The same Email refers to the fact that the largest number of mixed marriages in 1991 was in Croatia, 27%, mostly between Croats and Serbs. Reference is made to the fact that religious leaders from the various religions remain engaged in campaigns against inter ethnic marital relations more than ten years after the war has ended. In relation to discrimination or persecution on the basis of mixed marriages the Email recites the fact that further information could not be found amongst sources available to the RDC."

In her analysis of the applicants' claim the Member of the first named respondent makes the following findings:-

> "The country of origin information points out that there is still open discrimination against ethnic Serbs in Croatia. The husband would find it difficult in obtaining public sector employment: though he had not previously worked in that sector.
>
> The husband will face some hardship and more than likely will face some discrimination in Croatia and the situation may well be unpleasant.
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> Inter ethnic tensions remain to some degree in Croatia and were worse in some parts, but the country of origin information does not refer to any incidents of violence against persons in mixed marriages.
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> The wife's family disapproved of her marriage to the husband and have effectively disowned her. On a visit by her in 1996, some of the local villagers behaved aggressively towards the wife and said that the husband should not return. However, regard must be had to the fact that 12 years have elapsed since the date of that visit.
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> The husband has had difficulties enforcing property rights and, was forced to sell his property at a value considerably below what he would have wished and lower than the then market value.
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> The applicants' legal representative in Croatia, while not suggesting that the applicants would not benefit from due process, does refer to evident discriminating behaviour by Croatian authorities towards Serbs."

The Member of the first named respondent concluded that this discrimination did not amount to "persecution" because she considered that it was not of such a nature and extent or, of such a degree, as to have consequences of a substantially prejudicial nature for the applicants. She considered that the degree of hardship, suffering, unpleasantness, social rejection, threats, civil and legal discrimination (short of denial of actual due process), that would more than likely be faced by the applicants should they return to Croatia would not be of such a level as to amount to "persecution" within the meaning of s. 2 of the Refugee Act 1996, (as amended), and the European Communities (Eligibility for Protection) Regulations 2006.

Counsel for the applicants and counsel for the respondents informed the Court that despite extensive research, they were unable to find any decision of the courts of this State dealing specifically with the issue of economic discrimination by Government and Non-Government Agencies. The court was referred to passages from two well known and highly regarded texts on the law relating to

refugees, "*The Refugee in International Law*" Professor Goodwin-Gill, 2nd Ed. Oxford University Press and "*The Law of Refugee Status"* Professor Hathaway, Lexis Nexis Butterworths, 1991. The provisions of paras. 53, 54 and 55 of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, dealing with discriminations in different forms, in some cases combined with other adverse factors such as an atmosphere of insecurity in the country of origin, were strongly relied upon by the applicants.

This Court is satisfied that the applicants, as mandated by the provisions of s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, have established "substantial grounds for contending", that the Member of the first named respondent erred in law in concluding that the hereinbefore recited facts as found by her in the context of the aforementioned country of origin information accepted by her did not amount to "persecution" within the meaning of s. 2 of the said Act of 1996 and the said Regulations of 2006. It is important to emphasise that this court is not purporting to express any view whatsoever as to the correctness or otherwise of the Decision of the Member of the first named respondent in this regard.

This Court accepts the submission by Counsel for the applicants that the Member of the first named respondent does not anywhere in her Decision, either directly or indirectly, mention or address three previous decisions of the Refugee Appeals Tribunal, - 69/3551/03A. A & B [2005]; 69/5509/02A & B [2006] and, 69/32501/01B [2004], - to which she was referred on behalf of the applicants. In each of these Decisions the Member of the Refugee Appeals Tribunal recommended that the applicants in question be granted refugee status as having established a well-founded fear of persecution in Croatia because they were an ethnic Serb and an ethnic Croat married to each other. The court is satisfied that the applicants have shown substantial grounds for contending that this total absence of any reference whatsoever, either direct or indirect, to any of these previous Decisions by the Member of the first named respondent in the instant case, is sufficient evidence to discharge the heavy onus on the applicants to show that they were in fact overlooked by the Member of the first named respondent. (See J*.A. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 310 per. Hedigan J.) This, the applicants say is particularly so where the Member of the first named respondent in her Decision, asserts that she had considered all the documents presented by the applicants in their appeals, and refers to those documents she considered to be the most pertinent for the purpose of determining the appeals. In *P.P.A. v. The Refugee Appeals Tribunal* [2007] 4 I.R.94, Supreme Court, Geoghegan J. (for the court) at pp. 105 and 106 held that:-

> "It is not that a member of a tribunal is actually bound by a previous decision, but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary."

That learned Judge gave as examples of possible persecution matters such as gross or official discrimination against homosexuals, problems of female circumcision or some concrete form of discrimination against a particular tribe. In that case, Geoghegan J. referred to, "consistency of decisions based on the same objective facts".

This Court is satisfied that the only reasonable conclusion which the Member of the first named respondent could have reached if she had considered these previous Decisions of the Refugee Appeals Tribunal, was that there were many and material differences between the facts in 69/3551/03A, A &B [2005] and 69/5509/02A, & B [2006] and, those in the instant case. The only facts which the cases had in common is that in the 2005 Case the applicant wife was an ethnic Serb married to an applicant husband who was an ethnic Croat, and they were living in an almost exclusively Serb area and, in the 2006 Case, the applicant was an ethnic Serb married to an ethnic Croat wife and living in Croatia. In 69/32501/01B [2004] the applicant was an ethnic Croat of Roma stock married to a husband who was an ethnic Serb and they were living in Croatia.

The Member of the first named respondent accepted the wife's evidence that she had been subjected to verbal abuse by neighbours on a constant basis and that her children had been subjected to racial taunts, vilification and hate abuse. The Member of the first named respondent accepted that, as a Croat and a Catholic, the applicant wife would probably face persecution because of her marriage to an ethnic Serb. The Member of the first named respondent noted that the Refugee Applications Commissioner had accepted that the country of origin information supported the assertion by the applicant wife that as an ethnic Serb her husband would face discrimination in post war Croatia. The Member of the first named respondent noted that the applicant husband's case was based on his Serb ethnicity and assumed political allegiances based upon his service in the Serb armed forces during the recent war. The Member of the first named respondent considered that the country of origin information verified that a Croat national of Serb ethnicity would be likely to face discrimination in Croatia and that the sole issue for decision, was whether such discrimination would amount to "persecution" within the meaning of the Act of 1996 (as amended) and the E.U. Regulations of 2006. The Member of the first named respondent held as follows:-

> "The Applicant related her husband's account of being threatened by an arrest warrant when they went to relatives in Serbia. The Applicant's account conforms to that of her husband in most respects. The Applicant states that her husband was sought by the Croatian authorities as an ethnic Serb. The Applicant believes that if she were to return to Croatia that she, along with her husband, would be arrested. Country of Origin information included in her husband's application substantiated the likelihood of false arrests of ethnic Serbs on a continuous and prolonged basis. It is evident that the Applicant was not a combatant in the war and would not by herself face persecution. However, given her association to her husband by marriage it can be stated that if her husband were subjected to persecution the Applicant would also likely be subjected to persecution particularly as she may be in a mixed marriage."

In the decision of January 2004, (69/32501/01B), the Member of the Refugee Appeals Tribunal concluded that the applicant wife by association through marriage with her husband had demonstrated a well-founded fear of persecution for reasons of ethnic and political opinion in Croatia.

It was submitted on behalf of the respondents that even though the facts appeared similar to those in the instant case, the member of the first named respondent would have been reasonably and rationally entitled to distinguish the decision in 69/32501/01B [2004], because it was substantially based upon country of origin information regarding the situation in Croatia in the period prior to January 2004, while the information relevant to the instant case related to the period prior to September 2008.

In my judgment the need to ensure consistency of decisions and to maintain public confidence in the asylum system, would render it incumbent upon the Member of the first named respondent, had she considered the matter and formed this opinion to expressly point to this reason as a basis for distinguishing the earlier case and to briefly refer to what she considered were the material changes in the situation in the country of origin between 2003 and 2008. This Court is satisfied that anything less would be insufficient to demonstrate that the decision of the Refugee Appeals Tribunal in the instant case was objectively fair and not merely arbitrary.

The court is therefore satisfied that the applicant has shown substantial grounds for contending that the Member of the first named respondent failed to have any or any proper regard to decision 69/32501/01B [2004] of the Tribunal and failed to offer any sufficient

reason for disregarding or distinguishing that decision.

It was submitted on behalf of the applicants that the Member of the first named respondent made six material errors of fact, which taken individually and cumulatively undermines the basis for her Decision. Counsel for the respondents submitted, that the alleged errors are tenuous are not material and, do not, "go to the heart of the decision making process and fundamentally undermine it", (*Tabi v. The Refugee Appeals Tribunal* [2007] I.E.H.C. 287 per. Peart J.). These alleged material errors are as follows:-

> 1. The Member of the first named respondent held that the letter from the applicants' lawyer in Croatia, on which she stated she had placed particular reliance, made no reference to a denial of pension rights or the right of private property restitution. In fact the letter states that the writer still meets with cases of a violation of basic human rights of ethnic Serbs in Croatia such as, . . . pension rights and the right of private property restitution.
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> 2. The Member of the first named respondent held that mixed Croat/Serb marriages were common in Croatia. This was based upon country of origin information regarding the situation in Croatia in 1991 and not in 2008.
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> 3. The Member of the first named respondent held that the applicant husband and wife had only lived for a brief period in Croatia. The evidence was that they had resided there from 1991 until 1998 when they had to flee for safety to a Serb controlled enclave.
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> 4. The Member of the first named respondent held that the country of origin information obtained from the Refugee Documentation Centre did not refer to any incidents of actual violence against persons in mixed Croat/Serb marriages. The country of origin information furnished on the 1st July 1998, contained an extract from an Amnesty International Report of May 1997, describing how Bosnian Croats had attacked persons in mixed marriages many of whom had been beaten, some severely.
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> 5. The Member of the first named respondent held that the applicants had left Croatia and were therefore not in a position not to give evidence regarding the situation there in September 2008. At para. 21 of his affidavit grounding this application for leave to seek judicial review the applicant husband states that, - "[Croatia] is the country where I grew up and I remain in contact with the position in Croatia and I know the situation there".
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> 6. The Member of the first named respondent in her Decision set out grounds of appeal which were neither submitted nor advanced by the applicants or by their solicitor and appear to relate to an entirely different case.

This Court is not satisfied that these errors are material or, that either singly or cumulatively they undermine the decision of the Member of the first named respondent, "read in its entirety and considered as a whole". (See the *Tabi* Case (above cited)). The court is satisfied that all the grounds of appeal actually advanced on behalf of the applicants are addressed in the decisions of the Member of the first named respondent. All that these alleged errors and, the correction of them purports to demonstrate is that in 1991, when the applicants were residing in Croatia, mixed Croat/Serb marriages were common and, in parts of Croatia the partners in such marriages had been attacked and beaten, sometimes severely. The Member of the first named respondent considered that this situation had changed by 2008 and, that while there was still some considerable discrimination against ethnic Serbs and persons in mixed Croat/Serb marriages in Croatia, it was not sufficient to amount to "persecution". This Court has already found that the applicants have established substantial grounds for contending that the Member of the first named respondent was incorrect in so concluding.

This Court is therefore not satisfied that the applicants have shown substantial grounds for contending that the Member of the first named respondent had made errors of fact which were so material to her conclusions, as to render her Decision invalid or unsatisfactory.

This Court considers that there are good and sufficient reasons for extending the period to enable this application to be made and, extends the period accordingly. The Court is also satisfied that the two grounds hereinbefore identified are substantial grounds for contending that the Decision of the Member of the first named respondent is invalid or ought to be quashed and, grants leave to the applicants to apply for judicial review on these two grounds only.