Neutral Citation: [2014] IEHC 198

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 150 JR]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)

IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED)

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT

2000 AND

IN THE MATTER OF THE CONSTITUTION

BETWEEN

K. T. (GEORGIA)

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 28th day of March, 2014

The Delay Point

1. The respondents made the following point in relation to alleged delay on the part of the applicant. It was stated that on 17th November, 2010, the Minister made a decision not to revoke an earlier deportation order made in relation to the applicant. The applicant was informed of this decision by letter dated 18th November, 2010. The Minister amended the deportation order on 17th November, 2010. However, it was submitted that that application runs from the time of notification, which was the following day, 18th November, 2010. The proceedings were commenced by notice of motion issued on 16th February, 2011, which were returnable for 7th March, 2011. It was submitted that no application was made to move the motion at that time. It was submitted that time runs from when the matters are moved in court which, in the respondent's submission, was the day of the hearing before the High Court on 22nd November, 2013. In these circumstances, it was alleged that the applicant had allowed the proceedings to lie fallow and that, on grounds of delay, he should not be entitled to proceed with this application.

2. In order to determine this point, it is necessary to set out the chronology of the proceedings. The impugned decision was notified to the applicant by letter dated 18th November, 2010. The proceedings issued in the central office on 16th February, 2011. The first return date of the motion was 7th March, 2011. On that date, the respondent sought an adjournment until 28th March, 2011.

3. On 28th March, 2011, the respondent sought an adjournment until 9th May, 2011, and gave an undertaking not to deport the applicant until that date. On 9th May, 2011, the respondent sought an adjournment until 16th May, 2011, with the undertaking continuing until then. On 16th May, 2011, the respondent sought an adjournment until 30th May, 2011, with the undertaking continuing until then. On 30th May, 2011, the respondent sought a further adjournment until 27th June, 2011, with the undertaking continuing.

4. On 27th June, 2011, the respondent sought the list to fix dates on 18th July, 2011, and indicated that the undertaking would lapse on 4th July, 2011, and that it would be up to the applicant to seek priority in the list to fix dates.

5. On 18th July, 2011, an application for priority was refused by Cooke J. and the proceedings were then repeatedly adjourned at the following list to fix dates held on 5th December, 2011; 12th March, 2012; 16th July, 2012; 3rd December, 2012; and 29th April, 2013.

6. The applicant was deported on 11th October, 2012. He established contact with his solicitor who immediately travelled from Cork to Dublin with a set of papers for the purpose of moving an injunction application. However, the plane had departed before the injunction application could be made.

7. At the list to fix dates on 29th April, 2013, Clark J. invited applications for priority and having heard the circumstances of the within proceedings and on being informed that the applicant was maintaining contact with his solicitor, the case was listed for hearing on a telescoped basis on 22nd November, 2013. It was submitted on behalf of the applicant that despite proceedings having been listed before the High Court on 12 occasions, it was never indicated that the respondent would rely on any time or delay issue to dismiss the proceedings.

8. The court was referred to the decision in *K.B. v. Minister for Justice, Equality and Law Reform & Anor* [2013] IEHC 169, where Mac Eochaidh J. had the following to say in relation to delay points:

> *"To this, I wish merely to add that I would be extremely reluctant to entertain an application to dismiss proceedings four years after the institution of those proceedings where the first indication of a complaint about delay is to be found in the written submissions filed in the days before the hearing. If a State respondent is keen to pursue a genuine delay point, this itself should not be delayed, and I say this having regard to the particular circumstances of failed refugee judicial review applicants who live, generally, in very difficult circumstances on a mere €19 or so a week. It would be*

unconscionable to permit proceedings to fail on a time point where an applicant might have endured significant hardship over many years waiting for such a simple point to be determined. There would be much merit in such time points being advanced expeditiously and by motions in limine. "

9. In circumstances where there was no indication that the respondent would take any time point or allege delay, it would be unfair to allow such a point to be taken so late in the day by the respondent. Given the history of the matter as set out above, I am satisfied that it is proper to allow the applicant an extension of time within which to bring the proceedings herein.

Background
10. The background to this case is somewhat complex. It is necessary to give a brief summary of the background so as to properly understand the issues which arise in the case. The applicant is a geologist and was born on 11th January, 1959. He is a citizen of Georgia.

11. The applicant alleges that he fled Georgia to escape persecution due to his political activities there. He fled in 1993 to Azerbaijan where he remained until 1994 when an amnesty was issued by the Georgian government allowing Georgians who were politically active, such as the applicant, to return. The applicant continued his political activities but experienced problems again after the elections of 1995. He became a senior member of his party and for this reason he was monitored by the government. He states that his phone calls were censored and his movements were followed.

12. He was arrested after the 1999 elections and was charged with being involved in an attempted coup and betrayal of the country. He was accused of organising illegal demonstrations against the government. The applicant claims that these are false accusations and charges which were made against him by the government.

13. The applicant states that the police raided his house during which his pregnant sister-in-law was pushed and as a result lost her baby. He instructs that he was released after one day because the authorities feared the negative publicity following the incident with his sister-in-law. In 2000, he fled to Switzerland where he claimed asylum. He returned to Georgia in 2004, after the revolution, in the hope that political and other changes in his own country would allow him to live there without fear of persecution. However, he encountered problems at the border where he was detained by immigration officials due to passport irregularities. He states that his passport had expired. When the authorities did a background check they discovered his political background and he states that they interrogated him and beat him until he was unconscious. The applicant states that he was taken to a psychiatric prison where he spent about nine days in detention and was charged with resisting the authorities.

14. After this, the applicant left Georgia again and came to Ireland. He arrived in the State on 10th August, 2004, and applied for asylum on the following day. He made this application under the name Tamaz Karlovich Chikobava. In the course of the questionnaire which he filled in, he gave an incorrect account as to what he had done in the years 2000 to 2004. He stated as follows:

"In 1992, I took part in the Abkhaz-Georgian war, after being wounded I had to take part in the civil war on the side of ex-President Gamsakhurdia, after the war I was forced to leave Georgia. After the amnesty I returned to my home land. I joined a political organisation, the 'Konstantin Gamsakhurdia Society'. In 2001, I began to work in the Adzhard territory based in the military special services unit. After the overthrow of the chairperson of the autonomous (region), Aslam Abashidze, I was subjected to investigation by the new government of Georgia, which started to persecute supporters of Aslam Abashidze. "

15. The applicant developed health difficulties. He states that he was told by medical officials in this country that he was suffering from T.B. As he had not received treatment for this condition, he decided that he would have to go elsewhere for treatment. He withdrew his application for asylum on 12th November, 2004, and indicated that he wished to voluntarily repatriate to Georgia. In fact, he did not return to his homeland, but went instead to Switzerland where he hoped to receive medical treatment.

16. After some time in Switzerland, during which time it is not clear whether he received medical treatment, he went to Germany for a short period. Thereafter, he travelled to Holland where he was detained by immigration officials and held for ten months. On his release, he travelled to Belgium where he was finger printed by the immigration authorities. These disclosed that he had already sought asylum in Ireland. Accordingly, he was returned to Ireland in May, 2006 pursuant to the Dublin II Regulation.

17. On 6th February, 2007, an application was made on behalf of the applicant pursuant to s. 17(7) of the Refugee Act 1996, for readmission to the asylum process. This application was refused by letter dated 3rd June, 2007.

18. On 26th March, 2008, the applicant made an application for subsidiary protection and for leave to remain in the jurisdiction. Prior to this, and after the withdrawal of his asylum application, a report on the file had been carried out on 9th March, 2005, and it recommended that the Minister should make a deportation order. The Minister proceeded to make a deportation order on 5th May, 2005.

19. On 26th March, 2008, the applicant made an application for subsidiary protection and sought leave to remain within the jurisdiction. As the deportation order was made prior to 10th October, 2006, the applicant was not entitled to seek subsidiary protection.

20. The Refugee Legal Service made representations pursuant to s. 3 of the Immigration Act 1999, on 26th March, 2008. The applicant relied on the documentation which had been submitted with his purported subsidiary protection application as the basis for saying that returning him to Georgia would breach s. 5 of the Immigration Act 1999. The applicant submitted a large volume of personal documentation together with country of origin information in support of his application. The applicant had, by this stage, come clean in relation to his true identity and in relation to his activities between 2000 to 2004. By letter dated 6th February, 2007, the Refugee Legal Service submitted two newspaper articles on behalf of the applicant. These articles consisted of interviews with the applicant as a representative of opposition political parties in Georgia. It is not possible to definitively date the newspaper articles but they are said to have been printed in or around 1999. One of the documents names the applicant as one of the founding members of a party called "*Heart of Georgia XXI*".

21. On 16th October, 2010, an examination of the entire file was carried out by an executive officer of the repatriation unit pursuant to s. 3(11) of the Immigration Act 1999. In the course of a thorough examination of the file, it was noted that the applicant had submitted an amount of documentation to include the following: a diploma and translation; a certificate and translation; a work booklet and translation; a copy of a letter from the Ministry of Justice of Georgia and translation; copy of a letter from the Georgian Liberty and Unity Movement dated 23rct March, 2008; and an extract from the international Centre for Civic Culture of Political Parties of Georgia in which the applicant's name is noted as one of the founding members of the "*Heart of Georgia XXI*".

22. The applicant's legal representatives had also submitted a number of documents which were obtained from the Swiss authorities where he had made a previous application for asylum. These documents included a copy of a driver's license and a copy of the letter from the Swiss Embassy in Ireland which enclosed the documents. In addition, the applicant had submitted a number of personal letters.

23. As the previous consideration of the applicant's case was made in 2005, the executive officer then proceeded to examine up to date country of origin information. In this regard, the executive officer looked to the following: a BBC news report dated 18th June, 2010; an extract from the UK Home Office, country of origin key documents: Georgia, 15th July, 2008; an extract from the US Department of State 2009 Country Reports on Human Rights practices in Georgia, 11th March, 2010; and an extract from the US Department of State Country Reports on Human Rights practices in Georgia dated 11th March, 2010, in relation to freedom of assembly and freedom of association. The executive officer also had regard to the revisions in the same document dealing with the new criminal procedure code and in information as to the Public Defender's Office taken from their website. She also had regard to a portion of the report which noted that there were a number of NGOs and human rights groups operating in Georgia. Also in that report, the executive officer had regard to an extensive extract dealing with the conduct of criminal trials under the new criminal procedure code, wherein it was stated:

> *The new CPC mandates the entirely new role for the judge of an objective arbiter and decision maker, who has no role in prosecuting or defending the case. The new CPC also includes a presumption in favour of pretrial release instead of pretrial detention for the accused; clearer terms and defendant protections governing the negotiation, conclusion, and court approval of plea agreements; and more progressive bail and other mechanisms to guarantee the defendant's presence at pretrial proceedings and trial, all of which will help to lessen the number of defendants incarcerated pending trial. "*

24. As a result of her examination of the material contained in the report, the executive officer came to the following conclusion:

> *"The country of origin information above states that a new CPC (Criminal Procedure Code) was scheduled to go into effect on 1st October, 2010. It states that it provides for due process and fair trial protections and that it was extensively vetted through parliamentary committee hearings and diverse working groups that included NGOs. It is stated that the central philosophy of the new CPC is to establish legal foundations with adversarial court proceedings, hearings, and trials that balance the interests of the state with the rights of the accused, with the judge serving as a neutral and detached magistrate tasked with ensuring fair proceedings. "*

25. The executive officer also had regard to a BBC report dated 6th August, 2009 entitled "*Georgia Conflict A Year On*".

26. The examiner also had regard to a report by Caritas International Country Sheet Georgia January 2010. This indicated that the applicant would not experience any fear of persecution arising from his position as a failed asylum seeker. Having reviewed all the above information, the executive officer came to the conclusion that country of origin information confirmed that there was a functioning police and independent judicial system in Georgia and she was satisfied that state protection was available to the applicant in Georgia. For this reason, she was of opinion that repatriating him to Georgia would not be contrary to s. 5 of the Refugee Act 1996, as amended.

27. The executive officer also had regard to the applicant's rights under Article 8 of the European Convention on Human Rights and came to the conclusion that the making of a deportation order would not constitute a breach of his right to respect for private life, nor would it constitute an interference with his right to respect for family life under Article 8. The executive officer concluded with the following recommendation:

> *"Tamaz Chikobava 's case was considered under s. 3(1 I) of the Immigration Act I999, as amended, and under s. 5 of the Refugee Act I996, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights. In light of the above factors, I recommend that the Minister amends the deportation order to include the name T.K. (name redacted) and affirms the deportation order in respect of Tamaz Chikobava a.k.a. Chikobava Tamaz Karlovich a.k.a. T.K. (name redacted)."*

28. The executive officer's report was accepted by the Minister for Justice and Law Reform and, on 17th November, 2010, the deportation order of 5th May, 2005, was amended by the addition of the name "*T.K*. " thereto.

29. The applicant was deported to Georgia on 11th October, 2012. There was no information before the court as to how the applicant has been treated since being repatriated to Georgia.

Conclusions

30. I am satisfied that the country of origin information before the Minister showed significant changes in the laws relating to criminal proceedings. The adoption of the new criminal procedure code would go a long way to ensuring a fair trial in Georgia. In the circumstances, the Minister was entitled to come to the conclusion that there was a functioning police system and an independent and functioning judicial system in that country. It was open to the Minister to come to the conclusion that if the applicant faced some form of criminal prosecution on his return to Georgia, he would receive a fair trial under the new criminal procedure code.

31. In *Smith & Ors. v. Minister for Justice, Equality and Law Reform & Ors* [2013] IESC 4, the Supreme Court held that when making an application to revoke a deportation order, where the original deportation order was not contested by way of judicial review, there should be new material, which was not available at the time the deportation order was made, on which it could be alleged that the decision not to revoke the deportation order was illogical or unreasonable. In the course of his judgment, Clarke J. stated as follows:

> *"5.4 While there are many aspects of the system which contribute to the delay of which I have spoken, there can be little doubt but that permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances would contribute to such delays and have an adverse effect on the orderly implementation of the Irish immigration system. It seems to me to follow that it is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows*

that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light a.(such new circumstances."

32. I am satisfied that in this case there was new information in the form of the up to date country of origin information which was referred to by the executive officer in her examination of the file. However, that new information did not support the contention that the applicant would face persecution if returned to Georgia, but was to the contrary effect, that there was a new criminal procedure code which ensured a fair trial with fair procedures before an independent judiciary. In the circumstances, I am satisfied that the Minister was entitled to come to the decision that he would not revoke the deportation order made on 5th May, 2005. This conclusion was supported by the evidence which was before the Minister when considering the application in 2010, pursuant to s. 3(11) of the 1999 Act. Accordingly, I dismiss the applicant's application for judicial review herein.