Neutral Citation: [2016] IEHC 517

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 270 J.R.]

BETWEEN

G.B.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The applicant is a member of the social liberal party in Moldova, which at the time with which the application is concerned had been an opposition party to the ruling communist party.

2. The applicant was elected mayor of his area. In that capacity he was accused of corruption in 2004 as part of a series of measures which were taken against opposition politicians in Moldova. He was provisionally suspended from his position as mayor and replaced by a member of the communist party.

3. He was then prosecuted for recording false data in official documents. He challenged the prosecution on the basis that he had not engaged in any criminal activity. However, his suspension was affirmed by court order in 2004, at a hearing at which he and his lawyer were not present. An appeal against that decision was made and refused on the grounds that only the prosecutor could appeal a decision of an examining magistrate.

4. Shortly thereafter, he made a complaint to the General Prosecutor regarding the individual prosecuting the applicant, on the grounds that he had a personal interest in the prosecution as he was linked to the former mayor. He submitted an application to replace the prosecutor, and a complaint regarding his suspension which was combined with a cessation of pay and an inability to work for a number of months.

5. He engaged in contact with the Council of Europe in relation to his case and that of similar opposition party mayors who were also suspended and replaced by government mayors in the context of similar allegations. The Congress of Local and Regional Authorities of the Council of Europe prepared a document entitled "4th Monitoring Report on Local Democracy in Moldova" in January 2005, in which the rapporteur expressed at para. 81 and 82 "*strong criticism of the Moldovan central authorities regarding the use of the mechanism of initiating criminal proceedings against the opposition local politicians…we were struck by the fact that such measures seem to be applied primarily if not exclusively against local politicians from opposition parties rather than against local politicians loyal to the governing party*".

6. The applicant left Moldova for Ireland in 2006.

7. In February, 2007, the local court ordered the applicant's arrest *in absentia*.

8. In June, 2008, the Ministry of Internal Affairs wrote a letter to the applicant's wife stating that the Centre for Combating Economic Crimes and Corruption had declared the applicant a wanted person.

9. In January, 2008, the applicant was declared wanted internationally across the Commonwealth of Independent States.

10. In January, 2009, the Ministry of Internal Affairs wrote stating that the applicant was summoned to attend at the penal investigation unit.

11. In March, 2009, the applicant was charged with an offence in relation to the land transfer. He was convicted *in absentia*.

12. In January, 2012, the Supreme Court upheld the conviction of the applicant but reduced his sentence from the eight years, which had been imposed at first instance, to a six-year term of imprisonment.

The Asylum Claim

13. The applicant applied for asylum on 6th September, 2006. A s.13 report rejecting the claim on behalf of the Refugee Applications Commissioner was prepared on 18th December, 2006. The applicant appealed this decision to the Refugee Appeals Tribunal.

14. The tribunal refused the applicant's appeal on 17th June, 2010. The applicant then commenced a first set of judicial review proceedings [2010 No. 160 J.R.] challenging that decision.

15. On 25th November, 2013, the proceedings were settled and an order of *certiorari* was made on consent by McDermott J. quashing the decision and remitting the matter back to the tribunal.

16. The second tribunal decision was made by Ms. Majella Twomey on 15th April, 2015. The present judicial review arises in respect of that decision. The applicant's statement of grounds was filed on 20th May, 2015, slightly out of time.

17. Leave for the present proceedings were granted by Mac Eochaidh J. *ex parte* on 6th July, 2015. Time was extended for that purpose.

Extension of Time

18. Where time is extended on an *ex parte* basis, it is open to a respondent to take issue with the extension when the matter comes for an *inter partes* hearing. In the present case, Ms. Catherine Duggan B.L., for the respondent has sensibly not taken issue with the order of Mac Eochaidh J. extending time and I am grateful to her for the practical approach adopted in that regard.

Is the Minister a necessary respondent to proceedings under section 5 of the Illegal Immigrants (Trafficking) Act 2000?
19. In this case the applicant originally named the tribunal as a respondent and did not name the Minister. Section 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, as enacted, required that an application for judicial review in relation to a decision to which the section applies, which includes a decision of the Refugee Appeals Tribunal refusing an asylum appeal, must be made on notice to the Minister. That section, as amended by the Employment Permits (Amendment) Act 2014, no longer contains the requirement for notice to the Minister. Thus, while it was the practice to name the Minister for Justice and Equality as a respondent prior to the 2014 Act, this no longer appears necessary as a matter of law. The Minister submitted that she was a necessary party under O. 84, r. 22(6). However I do not think that she is in the same category as for example the notice parties in *O'Keefe v. An Bord Pleanala* [1993] 1 I.R. 39 or *Spin Communications v. I.R.T.C.* [2000] IESC 56 (Unreported, Supreme Court, 14th April, 2000), where licence applicants were viewed as potentially affected by the quashing of a decision. The Minister has no direct stake in judicial review of refusal of asylum in the sense that she is required to follow the recommendation of the tribunal whatever it may be. As against that, one can see the logic from the Minister's point of view in seeking to uphold any negative decisions as this minimises the extent to which the State may have to take further measures as a downstream consequence of ultimate recognition. While that makes it appropriate that the Minister should be joined if she applies, it would not be in my view a strong enough interest to say that she is a necessary party without which the proceedings are improperly constituted. Indeed that would be a curious and unappealing argument for the Minister to make seeing as she has recently been responsible for the repeal of the requirement that she be a named respondent. However the Minister through Ms. Duggan has made clear that, notwithstanding such repeal, she wishes to continue to be named as a respondent in such cases so I made an order adding her as a respondent by consent. To avoid such applications in future it would be better if the Minister was routinely named as a respondent in s. 5 cases, but failure to do so does not render an application defective save where relief is actually sought against the Minister (for example by seeking to quash a decision made by her). The main consequence of failing to do so would seem to be likely to be a waste of time caused by applications to join the Minister. That consequence is best avoided by joining the Minister to begin with.

Credibility Issues
20. Generally, the applicant's credibility was accepted by the tribunal. There are findings in relation to when he claimed to be ill and how he came to receive the Supreme Court decision, but these are certainly not central to anything the tribunal had to decide, and even if the tribunal's analysis of credibility in this regard was flawed, it would not entitle the applicant to relief, a position that Mr. Colm O'Dwyer S.C. (with Mr. Anthony Lowry B.L., who also addressed the court), for the applicant, accepts. It is, therefore, not necessary to consider the credibility issue further in this judgment.

When does prosecution become persecution?
21. The real point of difference in this case between the applicant and the tribunal is that the tribunal, as emphasised in a very able submission on its behalf by Ms. Duggan, characterises what happened to the applicant as mere prosecution, whereas the applicant contends that it amounts to persecution. Where should the fault-line be drawn?

22. By virtue of reg. 9 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), reflecting art. 9 of the Qualification Directive 2004/83/EC, it appears to me that there is an essentially three-part test for determining when prosecution becomes persecution.

23. Firstly, the court must ask itself pursuant to art. 9(2) whether the act alleged to have occurred comes within the specific types of persecution enumerated – in this case whether prosecution is "*disproportionate or discriminatory*". If so, this is a matter to which the court can have regard, although satisfying this test is neither, in itself necessary, nor automatically sufficient, for a finding of persecution (see Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd ed.) p. 1176: acts set out in art. 9(2) "*do not qualify per se as acts of persecution*").

24. The second limb of the test is whether there is, in essence, a "*severe violation of basic human rights*" amounting to persecution as defined by art. 9(1)(a). In determining this, the decision maker should have regard to a holistic view of the circumstances in the country concerned in terms of its legal system overall: see *Iqbal v. Secretary of State for the Home Department* [2002] UK IAT 2239 (28th June, 2002) para. 25.

25. A third leg of the test is, even if art. 9(1)(a) is not satisfied, whether there is an accumulation of measures such as to affect an individual in a similar manner, in accordance with art. 9(1)(b) (see Hailbronner and Thym, pp. 1175-1176).

26. The first question, namely whether the prosecution or punishment of the applicant is disproportionate or discriminatory, reflects the UNHCR Handbook on the Procedures and Criteria for Determining Refugee Status, paras. 56 to 59, which refers to "*excessive*" punishment, "*penal prosecution*" for a Convention reason, or circumstances were the law is not in conformity with human rights standards. As noted at para. 59 of the Handbook, it is often not the law but its application that is discriminatory, a point made by Clark J. in *R.B.D. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 48 (Unreported, High Court, 22nd January, 2014) at para. 16, where reliance is placed on the work by Prof. James C. Hathaway *The Law of Refugee Status* (1st Ed.) (Butterworths 1991) at p. 179 referring to "selective prosecution". The same principle is referred to in Andreas Zimmerman's *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford, 2001) p. 598, para. 68.

27. Hailbronner and Thym p. 1178 (in Part D III by Judge Harald Dörig) comment that in German law, "*excessive punishment of an ordinary law offence on political grounds … has always been regarded as an act of persecution*" (citing a German Constitutional Court decision of 4th December 2012, No 2 BvR 2954.09 para. 24).

28. In the 2nd edition of *The Law of the Refugee Status* by James C. Hathaway and Michelle Foster (Cambridge University Press 2014 at p. 245), the authors comment that persecution may arise where "*an otherwise valid criminal law is enforced in a discriminatory manner*", citing *Tuhin v. Ashcroft*, 60 Fed. Appx. 615 (7th Cir. 2003) and *Lin v. Immigration and Naturalisation Service* [2001] 238 F. 3d. 239 at pp. 244 – 246 (United States Court of Appeals, Third Circuit, 24th January 2001). While I commented in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016) at para. 29 that Hathaway's analysis was at times that of an advocate rather than a disinterested academic, in relation to this issue I accept the submission made by Mr. O'Dwyer that Hathaway's discussion on this aspect is a fair reflection of the law relating to the Geneva Convention.

Did the tribunal apply the correct test?
29. As a general proposition, it is not necessarily essential that a decision maker state the legally correct test, as long as it is applied in substance (see my decision in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016) para. 115).

30. In this case, the tribunal member did not state the test as outlined above, arising by virtue of reg. 9 of the 2006 regulations. I must therefore go on to consider whether this test was applied in substance. I am not satisfied that it was. Given that the

prosecution of the applicant was discriminatory, it is far from clear why that did not lead to a finding that he was being persecuted. Furthermore, I can find no analysis of whether he has suffered a severe violation of his basic human rights as required by reg. 9(1).

31. The analysis of the tribunal member comes to a somewhat abrupt if not juddering conclusion at para. 6.41 of her decision in an ensemble of findings, some of which are favourable to the applicant and some of which are unfavourable. At the end of the listing of these factors, it is simply asserted that the prosecution does not amount to persecution. There is no clear reason articulated or even discernible as to why this is so, or why the conclusions unfavourable to the applicant rectified and outweighed those favourable to him.

32. Under those circumstances I consider that the tribunal did not in fact apply the correct test, and indeed, separately from that, that there is a lack of clear reasoning in the decision contrary to the requirement for reasons as laid down in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297; see also *A.P. v. Minister for Justice and Equality (No. 2)* [2014] IEHC 241 (Unreported, High Court, McDermott J., 2nd May, 2014); *T.A.R. v. Minister for Justice, Equality and Defence* [2014] IEHC 385 (Unreported, High Court, McDermott J., 30th July, 2014).

Was it rational to find that due process on an appeal rectified a discriminatory prosecution?

33. There is a further independent dimension to this matter which illustrates a separate and even more significant infirmity in the approach taken. The tribunal decided, in essence, that the applicant had been afforded due process at the stage of the Supreme Court of Moldova, and the decision must be read as essentially implying that, in the tribunal's view, due process at the appeal stage outweighed and rectified the discriminatory selection of the applicant on political grounds for prosecution in the first place.

34. However, in my view, any conclusion that due process on the appeal rectified discriminatory prosecution of this nature is completely irrational in the *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39 sense. Such a matter could only be rectified by acquittal on appeal.

35. The discriminatory prosecution of the applicant on political grounds and the imposition of a six-year sentence arising by virtue of his membership of an opposition party is clearly a severe violation of his human rights for Convention reasons.

36. There is nothing on the papers to suggest that there is any evidence that he was, in fact, guilty of a criminal offence, and I would reject Ms. Duggan's suggestions to the contrary which seem to extrapolate unduly from the fact that the applicant was involved in a land transaction to an unwarranted assumption that this involves some responsibility for an allegation that the transaction was corrupt. But even if, which I do not accept, he was in fact guilty of some act of corruption, that is, in no way, an answer to the point that he was selected for prosecution on a discriminatory basis, having regard to his membership of an opposition party.

37. The present case represents a central instance of persecution which the Geneva Convention was designed to protect against: the imprisonment for lengthy periods of individuals based on their opposition to a particular regime. That is persecution in a classic form. The idea that, having selected a person on a discriminatory basis, no fundamental breach of human rights could be said to have occurred if due process is afforded from that point onwards in the conduct of the prosecution so selected, is clearly fundamentally misconceived, entirely irrational, and indeed nonsensical. The illusory "due process" thus afforded to a person oppressively selected would be familiar to Franz Kafka.

38. It is no answer to this point to suggest that a tribunal member has a "discretion" to determine where, on the spectrum, as a matter of degree, oppressive treatment turns into persecution (*G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262 (Unreported, High Court, 1st July, 2011), per Ryan J. at para. 15 (referred to by Hogan J. in *D. v. Refugee Appeals Tribunal* [2011] 3 I.R. 736, which decision also relied on *M.S.T. v. Refugee Appeals Tribunal* [2009] IEHC 529 (Unreported, High Court, Cooke J., 4th December, 2009)). Those decisions do not deal with the issue of the incorrect application of the appropriate legal test, a lack of reasons, or sheer irrationality given the accepted findings of fact. In the present case, those infirmities provide three independent but mutually reinforcing reasons why the decision must be quashed.

Order

39. For the foregoing reasons, I will order:

> (i) that an order of *certiorari* do issue removing for the purposes of being quashed the decision of the first named respondent rejecting the appeal of the applicant in relation to his asylum claim, which decision was dated 15th April, 2015;
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> (ii) that the appeal be remitted to the first named respondent for rehearing by a different member;
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> (iii) that the matter be adjourned to enable the respondents to consider any application for leave to appeal.