THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 264 J.R.]

K.B.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE OFFICE OF THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 12th day of April 2013

1. Where the Refugee Appeals Tribunal accepts that an applicant for refugee status has suffered past persecution, how should it lawfully approach the grant or refusal of the protected status? This is the principal issue which arises in these telescoped judicial review proceedings.

2. The applicant is a citizen of Togo who sought asylum in Ireland in 2006 on the basis of persecution suffered arising from his involvement with an opposition political party. He claimed he was detained and beaten by State security forces on a number of occasions between 2002 and 2005, and he says that he fears repetition of this treatment should he return to Togo. The Tribunal Member has set out an account of the applicant's past persecution and his involvement with political campaigning in opposition to the Government of Togo. The applicant accepted that he was not an officer of the political party with which he was involved, but that he was somewhat more than an ordinary party member and had distributed pamphlets for the party and had suffered as a result. His brother, though involved with a different political party, successfully sought asylum in Ireland.

3. The Tribunal Member also set out his description of the applicable law, including the definition of a refugee pursuant to s. 2 of the Refugee Act 1996 (as amended) (the "1996 Act") and the provisions regarding the burden of proof (s. 11A(3) of the 1996 Act) and the provisions regarding the assessment of credibility (s. 11 of the 1996 Act). Particular mention was made by the Tribunal Member of the central statutory provision at issue in these proceedings, that being Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006, which implements Article 4 of the Qualification Directive 2004/83/EC. Regulation 5(2) provides that a factor to be taken into account in determining if an applicant is entitled to protection includes "The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution and such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."(emphasis added). The underlined portion of Regulation 5(2) does not appear in the parent Directive and is an additional legislative provision which the domestic legislator has added to the matters which are to be taken into account in determining if an applicant is entitled to protection.

4. In assessing the claim for protection, the Tribunal Member summarised the persecution said to have been suffered as follows:

- "Threats to him for his involvement in politics.
- Bodily injury (loss of teeth).
- Unlawful detention without trial.
- Inhuman treatment."

5. The Tribunal Member was satisfied that these acts constituted severe violation of basic human rights so as to constitute acts of persecution for the purposes of s. 2 of the 1996 Act. Summarising his conclusions on the evidence given on behalf of the applicant, the Tribunal Member said:

> "The applicant's credible evidence was supported to the historical background was set out succinctly by the applicant's brother's evidence. The applicant's credible evidence was supported to the extent that medical evidence demonstrated that the injuries he claimed he sustained have in fact been sustained (while it cannot show the context from which they were sustained it is nonetheless corroborative of the general thrust of the applicant's evidence). Accordingly, I find that there is a greater than reasonably likely that the applicant has been a victim of past mistreatment at the hands of the state authorities and although this is not a condition precedent nor determinative, it is highly relevant (see para. 45 of the UNHCR handbook where an assumption can be made that a person has a well-founded fear of being persecuted if has already been the victim of persecution or reg. 5(2) where it is a serious indication of well-founded fear) [*sic*]."

6. The Tribunal Member carefully analysed the country of origin information and concluded that matters had sufficiently improved in Togo such that the applicant could not establish or had failed to establish that he would be persecuted there on his return. The conclusions are stated thus:

> "In undertaking an analysis of any prospective risks facing the applicant great care (or anxious scrutiny) must be employed. Obviously such analysis cannot be conclusively determinative and necessarily requires supposition that he would not be identified nor targeted for ANY Convention reason. However, taking into account the size of Togo, the lapse of time that he has been absent since the 29th April, 2005, the large population in Togo, the improvements to date, and presence of international observers and the return by the UNHCR of some 40,000 former refugees it is, in my view, reasonable to suppose that the applicant would not be at risk of persecution if he was to return to Togo."

7. At the hearing of this action, attention was paid to the manner in which the Tribunal Member had described the legal consequences which follow from a positive finding of past persecution. In *Rostas v. The Refugee Appeals Tribunal* (Unreported, Gilligan J., 31st July 2003), the learned trial judge referred to certain common law authorities on this point. In particular, he referred to the decision of the US Court of Appeals entitled *Chanchavac v. INS* 207 F.3d 584 (9th Cir. 2000) (US Court of Appeals for the 9th Circuit) which held

that:

> ". . . An applicant who demonstrates that he suffered past persecution is entitled the legal presumption that he has well-founded fear of persecution."

That court also said:

> "The INS may rebut the presumption, arising from proof of past persecution, that the petitioner has a well-founded fear of persecution on account of a protected ground by showing that conditions in the applicant's home country have changed ... However, the INS does not satisfy its burden simply by introducing 'information about general changes in the country'. It must undertake an individualised analysis of how changed conditions will affect the specific petitioner's situation. We find that the INS failed to carry its burden."

Gilligan J., at p. 28 & 29 of *Rostas*, also stated that while past persecution:

> ".. is not determinative of the issue because the test is prospective, it may in fact be a good indicator of what a person may face on return to his country of origin and it may be assumed that a person has a well founded fear of persecution if he has already been the victim of persecution of one of the Convention reasons. It is generally accepted that it is only if there has been a significant change in the situation prevailing in the country of origin that the prospective test for existence of persecution or a risk of persecution may not be satisfied."

8. Fortunately, I am not required to decide whether a person who has suffered past persecution bears the evidential burden of establishing that matters have not improved in his or her home country. (In passing I note that the US case law suggests that it is for the protection decision maker to establish that persecution will not reoccur.) Nor am I required to decide whether the changes which the Tribunal Member in this case identified in Togo were of the sort that would rebut a presumption of extant threat of persecution.

9. The principal legal argument advanced by the applicant is that the final part (underlined above) of Regulation 5(2) of the E.C. (Eligibility for Protection) Regulations was not adverted to in any way by the Tribunal Member. This failure, according to the applicant, vitiates the decision. In support of this argument, the applicant refers to the decision of Cooke J. in *M.S.T & J T v. Minister for Justice, Equality and Law Refor*m [2009] IEHC 529 and the decision of Hogan J. in *N. v. Minister for Justice, Equality and Law Refor*m [2011] IEHC 451. Whilst both of these decisions challenged refusals of subsidiary protection rather than refugee status, Regulation 5(2) applies, for present purposes, in the same manner to applications for subsidiary protection and to applications for refugee status. Therefore, the explanations of the law by the learned High Court judges are applicable to the facts of this case.

10. In *M.S.T*, Cooke J. explained the meanmg of the additional words in Regulation 5(2) as follows:

> "29. The ordinary meaning of the additional wording appears to be that, what might be called a 'counter-exception' to para. (ii) above is created to the effect that, even if there is no reason for considering that the previous serious harm will now be repeated, the historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility ..."

In the judgment of Hogan J. in *N v. MJELR*, the effect of Regulation 5(2) was considered. The relevant passages to which I wish to refer are as follows:

"The Minister's Analysis

> 35. These considerations notwithstanding, Regulation 5(2) nonetheless falls to be applied in its entirety. [*Emphasis added*]. What conclusions, accordingly, can be drawn at this juncture?
>
> 36. The task confronting the Minister was a three-fold one. He was first required to ask himself whether the applicant had suffered "serious harm" in the past. If the answer to this question was in the affirmative, he was then required to consider whether there were good reasons to consider that such persecution or serious harm would not be repeated should the applicant be returned to Uganda. If that question was affirmative (*i.e.*, in the sense that it was considered that the risk of future persecution was small), the Minister was nonetheless required to consider the application of the counter-exception, namely, whether there were compelling reasons arising out of previous persecution or serious harm alone such as might nevertheless warrant a determination that the applicant is eligible for protection."

Hogan J. then proceeded to examine the manner in which the first two of the tasks confronting the Minister had been carried out.

11. With respect to the third task that the Minister was required to carry out, he said as follows:

> "42. So far as the third limb of the test is concerned, it is plain from the decision in *MST* that the potential application of the counter-exception in Regulation 5(2) must also be considered. This means that if the Minister is satisfied that there is no reason for considering that the previous serious harm will now be repeated, he must nonetheless consider, in the words of Cooke J., whether the 'historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility'."

12. The learned judge concluded that the third task had not been undertaken by the Minister and the decision was consequently unlawful.

13. I accept the submissions on behalf of the applicant that the inquiry required to be made under the counter exception in Regulation 5(2) of the E.C. (Eligibility for Protection) Regulations was not carried out and consequently the decision of the Tribunal Member was *ultra vires*. The respondent has urged that there is no evidence that the past persecution suffered by the applicant would trigger the counter exception and that in the *M.S.T.* case (and to a lesser extent in the *N v. MJELR* case) such evidence was available and the failure to carry out the third task provided by Regulation 5(2) was therefore inexcusable. I don't accept that the facts of this case preclude the possibility that the past persecution, which was accepted by the Tribunal Member, would not trigger the protections of the counter exception. The sufferings were described by the Tribunal Member as 'a severe violation of human rights'. Even if there were no facts which might permit a decision-maker to deploy the protections of the counter exception, the failure to consider the possibility would be fatal to the decision.

14. Given that this matter is, by order of the court, to be remitted to the Refugee Appeals Tribunal in accordance with 0. 84, r. 27, I

emphasise that I make no findings as to whether the Tribunal Member correctly expressed the effect of any legal presumption or the nature of any evidential burden arising from a finding of past prosecution. Neither do I make any finding as to whether the Tribunal Member was able to identify such altered circumstances in the applicant's home country to justify the applicant's return there without fear of persecution.

15. Given that these are telescoped proceedings, I formally grant leave to seek judicial review and accede to the application for final reliefs moved in the notice of motion.

16. Finally, I wish to say a word about delay m the institution of these proceedings.

17. The applicant received the respondents' decision on 5th February 2009, which indicates that proceedings ought to have issued by 19th February 2009. Proceedings issued on 11th March 2009, a delay of approximately 20 days. I accept that the applicant is blameless in the delay and acted in a manner consistent with a keen interest in the institution of judicial review proceedings. He contacted the Refugee Legal Service in Cork within the 14-day period for the institution of proceedings. They were unable to assist him and he then contacted a private solicitor in Dublin who did not receive the applicant's full file until 26th February 2009. Counsel was instructed and with admirable expedition, prepared an opinion within three days.

18. I have no hesitation in finding, in accordance with the dicta of lrvine J. in *A. & Anor v. Refugee Applications Commissioner* [2008] IEHC 440 that good and sufficient reasons have been advanced to extend time and I do so without hesitation.

19. 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*.