

THE HIGH COURT

[2010 No. 744 J.R.]

BETWEEN

C.R.D.L AND K.A.S.D (A MINOR) (BOLIVIA)

APPLICANTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER, THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY
AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 21st day of May, 2015

1. On the 20th March 2015 this Court gave judgment on an application for a judicial review by the above named applicants and refused the application for *certiorari* of the decision of the Refugee Applications Commissioner and indicated that the matter could now proceed to be heard by the Refugee Appeals Tribunal in accordance with law.

2. The applicant now applies under 5(3)(a) of the Illegal Immigrants Trafficking Act 2000 for a certificate of leave to appeal to the Court of Appeal on the basis that the judgment "involves a point of law of exceptional public importance" and that "it is desirable in the public interest" that such appeals be taken. The criteria to be applied by this Court in ruling on the application for a certificate under s. 5(3)(a) are not in dispute.

3. Following from the decisions of Cooke J. in *I.R. v. The Minister for Justice Equality and Law Reform & Refugee Appeals Tribunal* [2009] IEHC 510 and the decision of Clarke J. in *Arklow Holidays v. An Bord Pleanala* [2007] 4 I.R. 112 I say the following principles appear to apply:-

- 1) The case must raise a point of law of exceptional public importance.
- 2) The area of law involved must be uncertain such that it is in the common good that uncertainty be resolved for the benefit of future cases.
- 3) That it is desirable in the public interest that an appeal should be taken to the Court of Appeal.
- 4) The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the appellant's arguments.
- 5) The point of law must arise out of the Court's decision and not merely out of some discussion at the hearing.
- 6) The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements.
- 7) The importance of the point must be public in nature and must therefore transcend well beyond the individual facts and the parties of a given case.
- 8) The requirement that the court be satisfied that it is desirable in the public interest that an appeal should be taken to the Court of Appeal is a separate and independent requirement from the requirement that the point of law is one of exceptional importance. On that basis even if it can be argued that the law in a particular area is uncertain the court may not on the basis, *inter alia*, of time or costs consider that it is appropriate case to certify the case to the Court of Appeal.

4. I have considered the written submissions and oral submissions of counsel for the applicant and counsel for the respondent. I think it is useful to view the facts of this particular case. In August 2008 the first named applicant began suffering the harassment of a man. She said this man harassed her and threatened her and her child to the extent that she felt forced to leave the country. She moved to Argentina in March 2009 but she believed that the man traced her there. She returned to Bolivia in July 2009. In September 2009 she was harassed again by the same man. She found the situation unbearable and decided to flee the country.

5. S. 2 of the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996") requires that for a person to be considered a refugee they must have "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group (this Court's emphasis) or political opinion".

6. This application was taken by way of an application for *certiorari* of the decision of the Refugee Applications Commissioner and the judgment of this court indicated that the matter can now proceed to be heard by the Refugee Appeals Tribunal in accordance with law.

7. Counsel for the applicant sought a certificate from this court to the Court of Appeal in relation to three proposed questions:-

- a) Can an applicant such as the first applicant herein establish "membership of a particular social group" based on her gender in the circumstances of the present case by reference to the definition set out in s. 1 (1) of the Act of 1996 (as amended) independently of the requirements of Article 10 (1) (d) of the Procedures Directive and Regulation 10 (1) (d) of S.I. 518 of 2006?
- b) Has the respondent thus applied the correct test in applying s. 13 (6) (a) of the Act of 1996 to the present application with respect to the nexus Convention grounds?
- c) In the light of the right to an effective remedy under Article 39 of the Procedure Directive are the applicants entitled not to have s. 13 (6)(a) of the Act of 1996 applied to their case in the light of adverse credibility findings identified in the decision of the respondent?

8. The applicants had submitted that the claim made by the first named applicant was that she was the victim of gender based harassment and assault in Bolivia and therefore a member of particular social group.

9. The Refugee Applications Commissioner in the section 13 report [notes:-](#) "It is clear she was not physically harmed by this man. While the applicant claimed she was harassed by this man, she was unable to provide any information including the man's name or where he lived or why he persisted in allegedly following her. The applicant did not report the man who was allegedly harassing her to the police. The applicant appeared to be a victim of an unfortunate but random act of criminality". When the applicant was questioned as to whether she feared anyone else in Bolivia other than this man she stated "I am just afraid he will do something to my son".

10. The Refugee Applications Commissioner said that in order for the applicant to bring herself under the scope of the Act of 1996 the applicant's claims must be considered sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights and in particular the rights from derogation cannot be made. However the Commissioner said that the applicant had not provided sufficient evidence to show she was targeted to the degree that would constitute a violation of her human rights. Nor did the applicant provide evidence to demonstrate she was physically harmed or that the alleged harassment would amount to persecution as defined in the European Communities Regulations. In effect what the Refugee Applications Commissioner is saying is that the actions of the man did not amount to acts of torture or cruel inhuman or degrading treatment. Article 9 of the European Communities (Eligibility for Protection) Regulations 2006 provides that:-

"9. (1) Acts of persecution for the purposes of section 2 of the 1996 Act must (this Court's emphasis):

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a)."

11. In relation to the question posed at Q. 1 that is suggested by the applicant, I am absolutely satisfied that the issue of gender does constitute a social group. The Refugee Convention does not explicitly list sex or gender as a protective group. I am satisfied that in a modern society where the issues of gender have been developed to such an extent that the notion that women, sex or gender may constitute a political social group for the purposes of refugee law is widespread in Europe and as such should be recognised in this jurisdiction. Hathaway and Foster cite unusually the domestic codification of the Refugee Convention in Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela which provide that gender based claims are within the ambit of the Convention protection.

12. Hathaway and Foster makes the following points:-

"The Refugee Convention, unlike most modern constitutional and international human rights instruments, does not explicitly list sex or gender as a protected ground, a position likely attributed to its historical origins. But it surely is axiomatic that a gender based group is defined by an innate, immutable, characteristic and hence within the ejusdem generis rule approach, to social group."

13. They proceed to say:-

"Notwithstanding these positive theoretical developments, Applicants may nonetheless still encounter practical difficulties in successfully establishing gender based claims."

14. Counsel for the respondent indicates that the Refugee Applications Commissioner found that the applicant's claim failed because the treatment she complained of was of criminality rather than persecution.

15. There was further argument in relation to the question of whether or not the applicant had prospect of success in her appeal to the Tribunal if it were a document-only appeal.

16. Counsel on behalf of the respondent also argues that the decision of the Court is that the applicant ought to have availed of her statutory right to appeal to the Tribunal where she is entitled all of the points raised in her notice of appeal. Counsel on behalf of the applicant says that the Refugee Appeals Tribunal will take the decision of this court delivered on the 20th March 2015 as a legal decision in respect of Convention nexus.

17. This Court is of the view that if no further arguments were advanced to the Refugee Appeals Tribunal then it would be appropriate for the Refugee Appeals Tribunal to follow the judgment of the Court. However, should further arguments be placed before the Tribunal and the Tribunal were to find that the Tribunal Member was bound by the decision of this court in relation to the decision of the Refugee Applications Commissioner I would suggest that this would be a wrong approach. The Refugee Appeals Tribunal under s. 16(2) of the Act of 1996 may (a) affirm a recommendation of the Commissioner or (b) set aside a recommendation of the Commissioner and recommend that the applicant should be declared to be a refugee. In those circumstances the Tribunal has an absolute discretion and any decision on the part of a member of the Refugee Appeals Tribunal in slavishly following the judgment of this Court would of course be a substantial ground for a successful judicial review.

18. In those circumstances I cannot hold that the point of law of exceptional public importance has been established by the applicant in relation to the first question posed by the applicant.

19. The issue with regard to s. 13(6)(a) of the Act of 1996 is a matter which has been discussed in a number of recent cases. The statement of grounds in this case suggested that the decision to deny the applicants an oral hearing of the recommendation was disproportionate or unreasonable.

20. In this case there was a delay from the applicants arriving in Ireland on the 1st November 2009 and her application for asylum was made on the 3rd February 2010. It appears to me that an appropriate case may seek to challenge the constitutionality of s. 13(a) on the basis of inequality but at the moment it is open to the Refugee Applications Commissioner to make such a recommendation which is not appealable. I am not satisfied that a point of law of exceptional public importance arises in relation to this issue.

21. Article 39 of the "Procedures Directive" - Council Directive 2008/85/EC which deals with minimum standards on procedures in

Member States for granting or withholding refugee status. Article 39 provides that:-

"Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal."

Whilst there is some question as to the constitutionality of s. 13(5) and s. 13(6) of the Act of 1996, same was not pleaded in this case and in those circumstances I am satisfied that this third point does not raise a point of law of exceptional public importance in this case.

Decision of the Court

22. In summary for the reasons stated above, I am not satisfied that the three questions posed by the applicants constitute points of law of exceptional public importance.