

THE HIGH COURT

2004 81 J.R.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

BETWEEN

CEZAR CROITROIU

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin delivered the 21st day of June, 2005.

1. The applicant herein initiated judicial review proceedings on 3rd February, 2004 seeking an order of certiorari upon the recommendation of the Refugee Applications Commissioner that he not be declared a refugee together with various declaratory reliefs with respect to the "safe country of origin" provisions implemented by the respondents.

2. By notice of appeal dated 28th January, 2004 an appeal was lodged by the applicant with the Refugee Appeals Tribunal without prejudice to his right to seek judicial review of the said recommendation on the advice of his legal advisors in order to meet the strict time limits set down by statute. The applicant contends that at all material times the Refugee Appeals Tribunal (the first named respondent herein) was aware that the decision of the Refugee Appeals Commissioner was the subject matter of judicial review proceedings. Further the applicant states that the said judicial review proceedings were served on Chief State Solicitor as solicitor for the respondents. It is contended therefore that in the circumstances the first named respondent had constructive notice of the proceedings against the Refugee Appeals Commissioner and the second third and fourth named respondents herein. These judicial review proceedings were against the Commissioner were initiated on 3rd February, 2004.

3. Although the High Court judicial review proceedings against the Commissioner (the first set of proceedings) has been adjourned on a number of occasions the first named respondent herein decided to proceed to deal with the appeal. The applicant contends that this decision was *ultra vires* arbitrary and unreasonable and contrary to constitutional and natural justice.

Background

4. The background to this application can best be understood by a brief chronology of events. On 15th September, 2003 the applicant's country of origin Romania was determined to be a safe country of origin. Two weeks thereafter he left that country and on 6th October, 2003 applied for refugee status in this jurisdiction. On 15th October, 2003 he filled out a pro forma questionnaire which was translated on 30th October, 2003. It was decided by the Commissioner that the interview should take place on 4th November, 2003. However in order to allow certain documents which the applicant contended would assist his case the actual interview was adjourned until 6th January, 2004. I am informed that on 18th November, 2003 the documents were notarised in Romania. On 23rd December five weeks the documents were sent to Ireland by post.

5. On 5th January, 2004 the applicant states that he contacted his solicitor for the first time and as a result his solicitor sent a brief letter to the Commissioner seeking adjournment of the interview due to take place on Tuesday 6th January, 2004.

6. This letter dated 5th January, 2004 read "Re Cezar Croitroui

Dear Sirs

With reference to the above named we confirm that we have just been instructed by this man and would ask you that you postpone his interview for a further two weeks. It is currently scheduled for Tuesday 6th January, 2004 at 13.30." The interview however was not adjourned. It proceeded on 6th January, 2004. On that date the applicant was not represented or he contends was he given the opportunity to make legal submissions. The recommendation from the Commission's delegated officer was made on 12th January, 2004. It recommended against a granting of refugee status. A secondary recommendation was made on 15th January, 2004. On 16th of that month notice in writing of such recommendation was sent to the applicant. On 19th January, 2004 the applicant states that certain supporting documentation which would have assisted him in his interview arrived in this country. On 28th January, 2004 a notice of appeal was lodged to the first named respondent as against the decision of the Commissioner.

As stated earlier judicial review proceedings against the Commissioner were commenced by way of notice of motion on 3rd February, 2004. These were served upon the Chief State Solicitor's office. There is not evidence however that the Refugee Appeals Tribunal, or its delegated officer Mr. Eamonn Barnes, had any knowledge of the initiation of these proceedings. By reason of the nature of the application and finding, the applicant was entitled to an accelerated hearing which was conducted in documentary form. On 9th February, 2004 nine days after the appeal was lodged the relevant decision, which was impugned in these proceedings was made by the Refugee Appeals Tribunal.

The return date for the judicial review motion against the Commissioner in the first set of proceedings was 3rd March, 2004. On 2nd May, 2004 judicial review proceedings were commenced against the respondents in these proceedings where ultimately the return date was 14th July, 2004.

7. The application before the court is for leave to bring judicial review proceedings.

8. While other grounds are raised in the notice of motion the argument was in truth confined to the issue of fair procedures. In this context it is contended that the matters in issue are

(a) The decision of the first named respondent to proceed with his hearing when the first set of proceedings against the Commissioner were being challenged (although there is no evidence that this was known to the Tribunal)

(b) The nature of the decision made by the first named respondent which it is contended is of an irrational nature and

(c) The failure of the Refugee Appeals Tribunal to refer to or have regard to the fact that the Commissioners Officer did not accede to the application to adjourn the interview on 6th January, 2004.

9. A subsidiary issue arises regarding the appropriateness of judicial review upon the facts of this case.

10. It is accepted that nothing in the Illegal Immigrants (Trafficking) Act of 2000 entitles a person to legal advice at interview. But it is contended the forms and the nature of the interview provide for the possibility of such legal representation.

11. The applicant contends that the Commission official should not have proceeded to make his decision in the absence of documentation which he contended was being prepared and readied in his native country. He contends that this documentation would have substantiated a contention that he had a well founded fear of persecution within the meaning of the 1951 Convention relating to the status of refugees as amended by the 1967 protocol thereto, and s. 2 of the Refugee Act 1996.

12. The applicant states that as appears from the questionnaire submitted to the Commissioner he has endured malicious prosecution, wrongful imprisonment and assaults by the Romania police and members of the PDSR owing to his active membership of the PNTCD (the National Peasants Party Democratic Convention). The applicant states that he was also assaulted and hospitalised previously when he complained about the refusal of the authorities to issue him with a revolution-participant card to which he was entitled owing to his active role in the overthrow of President Ceaucescu.

13. The applicant claims that he participated in the 1989 revolution which deposed the Ceaucescu communist regime. He claimed to the Commissioner that in spite of this he was denied an identification card which entitled those who took part in the revolution to certain benefits. He states that when he complained about this to the authorities he was seriously beaten by the police. He also says that he was wrongly convicted of threatening a man with a gun who had stolen his mobile phone. The applicant also alleges that during his activities as a local leader of the political opposition he suffered police maltreatment. It is upon that basis he contends that there is a violation of his right to recognition as a person before the law as set out in Article 6 of the Universal Declaration of Human Rights and other cognate international declarations.

14. In the course of consideration as to whether or not the applicant had a well founded fear of persecution the following matters were adverted to by the commission official.

1. The denial of an identity card which conferred certain benefits on the holder could not be viewed as a form of discrimination sufficiently grave to merit the term persecution
2. The fact that the applicant was only 17 at the time of the anti Ceaucescu revolution. Thus there might have been a certain plausibility in the refusal of the authorities to grant him benefits such as tax exemptions.
3. The fact that he was beaten by the police after complaining to them about being refused the post revolution ID card.
4. The fact that he did not contact any government human rights agency ombudsman or non government human rights group to redress for this alleged maltreatment.
5. The fact that his problems with the authorities began in 1992 is to be according to his account is to be contrasted with the fact that he did not contact any human rights agency at that point or any time thereafter.
6. The fact that his family sued the police for an alleged beating of the applicant in 1992 cannot provide a basis for fear as a reason for failing to explore the human rights agencies in his own country as a potential source of redress and is inconsistent with his contention that he is afraid to do so.

15. The kernel of the issue insofar as relates to the Commission's recommendation is set out as follows

"The credibility of the applicant's story is undermined by his failure to produce any legal or medical documents relating to the beatings he alleges having received at the hands of Romanian police. He had also failed, up to the time of writing, to produce any legal documents relating to his alleged trial in connection with possession of a firearm in a public place. Since the applicant's interview was originally scheduled for November 4th of last year (2003) his continuing failure to provide such material must cast doubt on the veracity of his claims.

The reference to the "alleged trial" refers to a conviction for possession of a firearm where the applicant stated that his sentence had been reduced on appeal from six years to two years suspended.

16. He states that he sued the police for maltreatment he alleged having suffered at their hands in 1992. He stated that the staff of the hospital which treated him for his injuries did not identify the two police officers who brought him to the hospital and this made it difficult for him to find the names of those individuals.

17. Under s. 13(6) of the Act of 2000 there is a presumption that the applicant is not a refugee unless he shows reasonable grounds for the contention that he is such.

18. Based on the evidence before him the Refugee Appeals Commissioner was satisfied that s. 13(6)(e) applies to the case and the applicant had not rebutted the presumption that he is not a refugee. This recommendation as stated earlier was dated the 12th January, 2004 and was made the subject of a secondary recommendation on 15th of that month.

19. While the notice of appeal dated 28th January, 2004 was exhibited with the applicant's affidavit. The decision of the Refugee Appeals Tribunal, unfortunately, was not.

20. It is clear that once the matter came before the Refugee Appeals Tribunal the documentation included that which had by then become available that is a record of the applicant's trial and the decision of the Romanian courts. The essential point made by the applicant is that by that stage the die was cast his credibility undermined and an inexorable process initiated whereby the appeal would be heard by way of documentation only.

21. It is to be noted however that this documentation did form part of the material which was before the Refugee Appeals Tribunal. They were received by the applicant on or about the 19th January, 2004 having been translated and posted from Romania before Christmas. The documents consisted of a decision No. 596A of the Botosani Court – Criminal Section, a certificate of appreciation for participation in the revolution of national salvation (the overthrow of Ceaucescu) and newspaper photographs of participants in the revolution including a photograph of the applicant. The applicant contends that the decision by the Refugee Appeals Commissioner to refuse to adjourn the hearing of 6th January, 2004 was flawed in circumstances where he had first contacted his solicitors on 5th of

January, 2004 and that they had informed the Commissioners that they would not be able to be present at the interview on the 6th of that month. Refusal of the adjournment therefore it is contended, amounted to an impermissible obstruction of the applicant's exercise of his constitutional right to be legally represented and to fair procedures.

22. One turns then to the decision of the Refugee Appeals Tribunal made pursuant to s. 16(2)(a) of the Refugee Act 1996 as amended. It is unnecessary to rehearse the totality of the contents of this decision. Suffice it to say that the Tribunal considered that the assertion of persecution by reason of the withholding of a particular category of identity card from the applicant was vague, lacking in specificity and most unconvincing. It was further concluded by the Tribunal member (Mr. Barnes) that such ground would not in any event constitute a basis for a finding of a well founded fear of being persecuted. Mr. Barnes points out that in addition they refer to matters arising before 1995 and it is difficult therefore to see how they could have any relevance to the applicant's decision to leave Romania at the end of September 2003.

23. Mr. Barnes then deals with the second part of the applicant's assertions relating to an allegation that he was wrongly and maliciously accused by the police of a false imprisonment and a possession of a firearm in relation to a named person whom he had accused of having stolen a mobile telephone from him. The applicant asserted that the reason why the wrong accusation by the police was made was that the person whom he had accused of theft of the mobile telephone was the nephew of a senior police officer whom the applicant had identified as having ill treated him some years before. He alleges that he was wrongly detained for a month and ill treated during his detention and that he was convicted and sentenced all on connection with this matter. Mr. Barnes states that the applicant's allegations in this regard are vague and in his view very unconvincing notwithstanding the documents referred to at s. 4 of the notices of appeal. These are the additional documents to which reference has been made earlier and which were not before the Refugee Appeals Commissioner.

24. Mr. Barnes went on to state that even if these documents were true however the applicant's maltreatment arose because he had accused the nephew of a senior police officer of theft and not for any of the reasons mentioned in s. 2 of the Act. Any suggestion of a connection between this and the earlier allegation of political prejudice referred to above would, in a Tribunal member's view be very tenuous and much too remote. With regard to the applicant's assertion that he was targeted for maltreatment of his activities as local leader of a political party Mr. Barnes also considered that this assertion was vague and lacking in specificity and was unconvincing. Having regard to the totality of these findings Mr. Barnes concluded that the applicant had not demonstrated that he was outside his country of nationality owing to a well founded fear of being persecuted for reasons of political opinion or of membership of a particular social group or for any other reason mentioned in s. 2 of the Act or that he was unable or, owing to any such fear, willing to avail of the protection of that country. He concluded that the applicant had not discharged the burden of proof provided for in s. 11(a)(3) of the Act. He was not satisfied on the basis of a reasonable likelihood having considered the matters referred to in s. 16(16) of the Act that the applicant is a refugee within the meaning of s. 2 and accordingly pursuant to s. 16(16)(a) he considered that the recommendation of the Commissioner dated 15th January, 2004 should be upheld.

Consideration of the issues

25. As a matter of fact I do not consider that the additional documentation bears out the applicant's narrative. Indeed, regrettably from the standpoint of the applicant it appears that such documentation indeed bears out the views which Mr. Barnes took of it. Moreover there is absolutely no basis to demonstrate that the findings made by the Tribunal were unreasonable. Moreover I consider that on the facts of this case the findings of the Tribunal subsume the findings of the Refugee Applications Commissioner (see *Okungbow v. Refugee Appeals Tribunal and Others* decision of 8th June, 2005, *G.K. v. The Minister* [2002] 2 I.R. 418 and *Savan v. The Minister* 7th May, 2002).

26. Moreover I am of the view that the particular documents (in the context of this case) were not such as could have had any bearing or effect on the issue of credibility. Indeed on a common sense viewing of the documentation in question the documents in issue actually bear out the conclusions arrived at by Mr. Barnes in the Refugee Appeals Tribunal.

27. Granted the procedure before the Tribunal was a paper one. To that extent the applicant was not granted an oral hearing. But the critical question in this case is not whether the documentation could have made a difference but the fact that the documents demonstrate that they could not have done so having regard to the issues which the commissioner must decide at first instance and the Tribunal on appeal. Put briefly the documentation in no way bore out any question of social persecution, related to events far too remote to provide a basis for such a contention and indeed described alleged findings of criminal activity against the applicant which in no way demonstrate political involvement, political persecution or any matter which would bring him within the category of a refugee. Put at its highest the only matter which the documentation demonstrates is that there was a record of a court proceeding in Romania. The content however could or would have been of any assistance to the applicant in making out his case.

28. Turning to the question of whether or not the Commissioner's official should have granted adjournment I think the following matters are of importance from the legal standpoint. I accept that as a proposition of law an adjournment should be granted when there are reasonable grounds therefore (see *Cooke v. Cooke* [1919] I.R. 248). It is fundamental to such a proposition however that the application for adjournment must be made in good faith and be reasonable. On the facts of this case the interview had already been adjourned from 4th November until 6th January. No documentation was placed before the Commissioner on 6th January despite the elapse of two months. It is puzzling, to say the least that although the documents were apparently notarised in Romania on 18th November, 2003 they were not apparently sent to Ireland until 23rd December of that year. The elapse of this five week period is not fully or properly explained nor is the fact that apparently no effort was made to transmit this documentation by fax or email. This could have been very simply done within a few days from the date of notarisation of 18th November, 2003. No explanation was furnished to this court as to this elapse of time. Indeed the documentation did not apparently arrive until 19th January, 2004. This is explained by reason of delays occurring in Romania as a result of the Orthodox Christmas on the 6th January. I do not regard this as a reasonable or adequate explanation.

29. Of equal significance is the fact that the applicant did not consider it necessary to seek legal representation until Monday 5th January, 2004 relating to an interview to be conducted on 6th of that month that is the following day. It will be noted that the letter transmitted (by fax) to the Refugee Appeals Commissioner does not furnish any explanation as to why the matter should be adjourned. No reference is made to the documentation awaited from Romania. While understandable the Commissioner's official was left with a situation where no legal representative appeared on 6th January to explain what was the basis of the application or why the matter should be adjourned. I do not consider that in those circumstances the decision to proceed with the interview was unreasonable particularly having regard to the nature of the proceeding that is an interview. I do not think that any fact or circumstance has been referred to (despite the skilful submissions of Mr. O'Dualachin S.C.) which would indicate that the Commissioner had acted in a manner which was *ultra vires*.

30. Nor do I consider that the facts of this case are in anyway comparable to those in *Dawson v. District Justice Hamil* [1989] I.R. 275 or *Flynn v. Ruane* [1989] ILRM where in my view the facts are entirely distinguishable.

31. In my view this case is more akin to the decision of O'Caoimh in *Byrne v. Scally* on 12th October, 2000. I do not think, on the facts of particular case that it can be shown that legal representation could, or even might, have led to a different decision at either level.

32. Moreover as has been remarked on a number of occasions the applicant is not a mere passive participant in the process. There is an onus upon him to actively participate. He completed a questionnaire on 15th October, 2003 which include the question as to the issue of legal representation. He had therefore literally months to seek legal representation or advice and did not do so.

33. It has been urged that on the facts of this case the court should not hold that the finding of the Commissioner was in any case subsumed into that of the Tribunal. It is contended therefore that the facts of this case are distinguishable from that of *Okungbowa*. On the facts of this case I am not persuaded that this is so. I accept that in this case the initiation of judicial review proceedings was contemporaneous with the lodging of the appeal. Once the decision is made it is indeed true that the applicant did not allow delay to occur, at least in this instance. It is true also that the Tribunal was put on notice that there was an objection to the Commissioner's procedure. Attention was also drawn to the nature of the additional documentary evidence.

34. In *Okungbowa* the issue was whether the remedy of judicial review was appropriate as against the Tribunal in circumstances where the applicant chose to proceed by way of judicial review only after the Tribunal decision and not at the time of or immediately after the time of recommendation of the Commissioner.

35. The instant case it is clear, on the facts, that the issue as to the course of action adopted by the applicant is not fundamentally in point. Because the true point is that there is no demonstrable material which can show that the Tribunal erred in principle in the appeal or that there was any material which would justify the court intervening by judicial review.

36. Having regard to the foregoing I am not satisfied that there has been any error in principle such as would give good grounds for judicial review and accordingly I must decline the application for leave.