Neutral Citation Number: [2006] IEHC 132

THE HIGH COURT
JUDICIAL REVIEW

Record Number:2005/410/J.R.

BETWEEN

DAVID KVARATSKHELIA

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Herbert delivered the 5th day of May, 2006.

1. In her "Conclusion and Decision", the learned member of the Refugee Appeals Tribunal states as follows:-

> "In summary, even though I have grave doubts about much of the Appellant's evidence, I accept that the Appellant may be at genuine risk of serious harm. I do not accept however that he has shown a failure of state protection by clear and convincing evidence. In the circumstances I must uphold the recommendation of the Refugee Appeals Commissioner."

2. For this reason and, because I do not consider it relevant to the decision of the Court on this application for judicial review, I see no purpose in setting out the lengthy background to this application.

3. At p. 17 of her Decision the learned member of the Refugee Appeals Tribunal had found that:-

> "Given the societal attitude in Georgia it is likely that the Appellant would indeed be subject to ridicule, harassment and indeed violence, and in that respect I believe there is a genuine risk of serious harm."

4. At pages 18 and 19 of her very detailed and careful Decision the learned member of the Refugee Appeals Tribunal finds as follows:-

> "In *Ward* at 724-726 the Supreme Court of Canada addressd the issue how, in a practical sense, a refugee claimant proves a state's inability to protect its nationals. The view taken was that "clear and convincing" confirmation of the state's inability to protect must be provided as absent some evidence, nations should be presumed capable of protecting their citizens.

5. At p. 130 of the Law of Refugee Status, Hathaway states:

> "Obviously there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming."

6. I conclude that the Appellant in this case has not shown "clear and convincing" evidence that he suffers or would suffer from a failure of state protection as it relates to his claim. He never approached the authorities for assistance and, while I accept that he may have felt apprehensive about doing so, if he was the subject of a criminal offence – assault upon his person – he should have reported these acts at least. I note that President Mikhail Saakashvili was cited as saying that his government would not permit "any kind of discrimination" against homosexuals and while actions speak louder than words I consider that the fact that homosexuality was decriminalized over 4 years ago, taken with the attitude of the leader of the country raises a presumption that state protection is available to someone in the Appellant's position. The Appellant's evidence does not displace this presumption in circumstances where assistance was not sought.

7. Where in Professor Hathaway's words, the refugee claimant ought reasonably to vindicate his or her basic human rights against the home state, refugee status is inappropriate. The application of this principle is illustrated by *Kadenko v. Canada* (Solicitor General) (1996) 143 D.L.R. (4th) 532, 533-534 (F.C.:C.A.), (HUGESSON AND DÈCARY J.J.A. AND CHEVALIER D.J.).

> "Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country's political and judicial institutions."

8. It was contended on behalf of the Applicant at the hearing of this application for judicial review, that the first named Respondent, the member of the Refugee Appeals Tribunal, erred in law in finding:-

> (a) That there was a presumption in favour of state of origin protection in refugee applications or alternatively that the matters referred to by the first named Respondent were sufficient to give rise to such a presumption in the instant case.
>
> (b) That the fact that the applicant did not seek state protection in Georgia from homophobic abuse and assaults was sufficient to render irrelevant any country of origin evidence of a failure on the part of the Georgian state authorities to provide protection to homosexual men.

9. It was further contended, that the learned member of the Refugee Appeals Tribunal failed to have any proper regard to the country of origin information, to the evidence of complaints made by the Applicant and, to the instances of persecution suffered by the Applicant as establishing the non availability of a system for the protection of the citizen or a reasonable willingness by the state authorities to operate such a system.

10. Counsel for the Respondents submitted that the first named Respondent had properly relied upon the dicta of La Forest J., at pp. 725 and 726 of the decision in *Canada (Attorney General) v. Ward* (1993) 2 R.C.S. 689 where that learned Judge in giving the decision of the Canadian Supreme Court stated as follows:-

> "Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognised in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.

The Federal Court of Appeal's decision in Satiacum may best

be explained as exemplifying such a case of presumption of a state's ability to protect and of objective unreasonability in the claimant's failure to avail himself of this protection. In that case an American Indian chief who was convicted of federal criminal charges fled to Canada before sentencing. Arrested in Canada a year later, he claimed refugee status. The persecution he alleged to have feared was a risk to his life if incarcerated in a federal prison. The Federal Court of Appeal found that Satiacum's fear did not meet the objective component of the test for fear of persecution as it must be presumed that the United States judicial system is effective in affording a citizen just treatment. The court stated, at p. 176:-

> "in the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing as in an extradition hearing, Canadian Tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a nondemocratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself."

Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already.

In summary, I find that state complicity is not a necessary component of persecution either under the "unwilling" or under the "unable" branch of the definition. A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced. I recognise that these conclusions broaden the range of potentially successful refugee claims beyond those involving feared persecution at the hands of the claimant's nominal government. As long as this persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of the persecution removes these cases from the scope of Canada's international obligations in this area. On this note, I now turn to a consideration of these enumerated grounds."

11. Counsel for the Respondents submitted that what was held by La Forest, J. in these passages is representative of the Law in this State also and, that the first named Respondent had additionally pointed to the reported statement by President Saakashvili and, to the decriminalizing legislation as evidence in support of the presumption.

12. I find the reasoning and conclusions of La Forest, J. in the passages above cited, both persuasive and compatible with the jurisprudence of this State in considering applications for refugee status. The Supreme Court in this State has already enunciated the principle that the onus is on the Applicant for refugee status to establish both a subjective fear of persecution for one, at least, of the reasons specified in s. 2 of the Refugee Act, 1996 and, an objective basis for that fear.

13. Apart from those calamitous cases where the total failure or repressive subversion of all state institutions has become so notorious that the fact that a particular state is no longer capable or willing to vindicate the human rights of all of its nationals must be accepted without the need for actual evidence, it would in my judgment be contrary to reason to require a requested state to approach every application for refugee status from the premise that the state of origin is or may be unable or unwilling to provide protection from persecution to the claimant.

14. I agree with La Forest, J., that subject to such exceptional cases, the fact that the power of the state to provide protection to its nationals is a fundamental feature of sovereignty and, the fact that the protection afforded by refugee status is "a surrogate coming into play where no alternative remains to the claimant", renders it both rational and just for a requested state to presume, unless the contrary is demonstrated by "clear and convincing proof", on the part of the Applicant for refugee status, that the state of origin is able and willing to provide protection to the Applicant from persecution, even if at a lesser level than the requested state. I find therefore that the first named Respondent did not err in law in applying the presumption that state of origin protection is available in Georgia to someone in the position of this Applicant. I am satisfied in the context of the Decision of the first named Respondent read as a whole and, in particular the part headed, "Analysis and Assessment of the Appellant's Case", that the first named Respondent is in fact pointing to the reported statement by President Saakashvili and to the legislation decriminalizing homosexuality in Georgia, merely as evidence supporting the presumption that state protection is available to homosexual persons in Georgia.

15. It was accepted by the Applicant at the hearing of this application for judicial review that he did not, either directly or through an agent, seek assistance from the police or any other state authority in Georgia, other than, he claims, from the Public Defender (Ombudsman), in relation to the persecution which he claims to have suffered because of his homosexuality.

16. It was submitted by Counsel for the Applicant that even if the first named Respondent acted *intra vires* in concluding that the Applicant had not sought protection from any state authority, including the Public Defender (Ombudsman), she failed to consider whether, if such an application had been made by him, state protection might reasonably be forthcoming. Counsel for the Applicant relied upon the judgment of La Forest, J. in *Canada (Attorney General) v. Ward* (above cited)

17. p. 724 where the learned Judge said:

> "like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection 'might reasonably have been forthcoming' will the claimant's failure to approach the state for protection defeat his claim."

18. Counsel for the Applicant also relied upon the case of *Skenderaj v. Secretary of State for the Home Department* [2002] E.W.C.A. Civ. 567, where Auld, L. J., held as follows:-

> "Thus, if the State cannot or will not provide a sufficiency of protection, if sought, the failure to seek it is irrelevant, and that is so whether the failure results from a fear of persecution or simply an acceptance that to do so would be futile."

19. Counsel for the Respondents submitted that the first named Respondent had expressly concluded, (at page 18 of her Decision), that the Applicant had not shown by "clear and convincing proof" that he suffers or would suffer from a failure of state protection as it relates to his claim. Counsel pointed to the further finding by the first named Respondent that the Applicant's evidence did not displace the presumption that his state of origin was capable of protecting him in circumstances where state assistance had not been sought by him.

20. At page 15 of her Decision the first named Respondent holds as follows:-

> "As conceded by the Appellant's legal representative this Appellant's claim rests effectively upon his evidence of a fear of persecution on the ground of his sexual orientation. There is no doubt that the situation in Georgia as regards the treatment of homosexuals is somewhat ambiguous."

21. Over the following two pages of her Decision the first named Respondent then refers to and quotes from a considerable number of national and international reports, from November 2002 to November 2004 inclusive, dealing with the human rights position of homosexual people in Georgia. At page 17 of her Decision the first named Respondent then concludes that:-

> "given the societal attitude in Georgia it is likely that the Appellant would indeed be subject to ridicule, harassment and indeed violence, and in that respect I believe there is a genuine risk of serious harm."

22. Having so found the first named respondent then continues as follows… "however the persecution requirement is a construct of two components, namely serious harm and a failure of state protection. As Professor Hathaway explains in The Law of Refugee Status at 57, it is an underlying assumption of Refugee Law that wherever available, national protection takes precedence over international protection. At op cit 104 he adds that the drafters of the Convention were not concerned to respond to certain forms of harm per se, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection.

23. Refugee Law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible. Because it is fundamentally a form of surrogate or substitute protection, the beneficiaries of Refugee Law have always been defined to exclude those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their basic human rights against their own state. Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those human rights. Their position within the home community is not just precarious, there is also an element of fundamental marginalization which distinguishes them from other persons at risk of serious harm. In Ward at 724-726 the Supreme Court of Canada addressed the issue how, in a practical sense, a refugee claimant proves a state's inability to protect its nationals. The view taken was that "clear and convincing" confirmation of a state's inability to protect must be provided as absent some evidence, nations should be presumed capable of protecting their citizens.

24. At p. 130 of The Law of Refugee Status, Hathaway states:

> "obviously there cannot be said to be failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming."

25. The first named Respondent then concludes that, "the Appellant in this case has not shown by 'clear and convincing' evidence that he suffers or would suffer from a failure of state protection as it relates to his claim".

26. Given what immediately follows thereafter, the only inference reasonably capable of being drawn is that this conclusion of the first named Respondent is based on her finding that the Applicant had not sought the assistance of the state authorities in Georgia and could not therefore rebut the presumption that those state authorities were capable of protecting him from persecution by reason of his membership of a particular Social Group. In my judgment no other construction could in the particular context be placed upon the conclusion of the first named Respondent that:-

> "The Appellant's evidence does not displace this presumption in circumstances where assistance was not sought.
>
> Where, in Professor Hathaway's words, the refugee claimant ought reasonably to vindicate his or her basic human rights against the home state, refugee status is inappropriate."

27. Unfortunately, it appears to me that the first named Respondent has not addressed at all the question of whether, having regard to the Applicant's own evidence and to the country of origin information submitted with his appeal to the Refugee Appeals Tribunal, state protection "might reasonably have been forthcoming" from the state authorities of Georgia had the Applicant sought it. In my judgment, the first named Respondent misdirected herself in law in concluding wrongly that the failure of the Applicant to seek protection from the state authorities of Georgia was sufficient in itself to defeat his claim for refugee status.

28. The first named Respondent has not considered at all whether the evidence of the Applicant and the country of origin information furnished by him with his appeal to the Refugee Appeals Tribunal was sufficient to rebut the presumption of state of origin protection in this case. In my judgment the legal position as stated by La Forest, J., in *Canada (Attorney General) v. Ward* (above cited) and Auld L.J., in *Skenderaj v. Secretary of State for the Home Department,* (above cited), is entirely compatible with the jurisprudence of this State. Unfortunately, the first named Respondent appears to have overlooked or lost sight of this statement by La Forest, J., which appears on p. 724 of the judgment immediately prior to the passage referred to by the first named Respondent at p. 18 of her Decision.

29. Excluding all reference to any commentaries which might possibly exhibit a partisan slant, there is still a great deal of *prima facie* independent and unbiased country of origin information furnished with the Applicant's appeal to the Refugee Appeals Tribunal. I find that this information is relevant to the question of the degree to which the protection of basic human rights as guaranteed by the Constitution of Georgia and reflected in its Laws, is actually provided by the police force in general or as an organisation, the civil administration and the judicial system in that country. A careful reading and analysis of these *prima facie* unbiased commentaries by undoubtedly reputable Georgian and International Agencies, is in my judgment essential if the Refugee Appeals Tribunal is to properly and judicially arrive at an answer to the question of whether the state authorities in Georgia would be reasonably likely to afford protection to the Applicant if he sought it and, to give reasons for its conclusion in that regard. In my judgment it is simply not sufficient for the first named Respondent, while accepting that the Applicant may have felt apprehensive about seeking assistance from the state authorities to go on to conclude that if he had been the victim of "assaults upon his person." - criminal offences, - he

should have at least reported these incidents.

30. Having carefully scrutinised these reports and commentaries,- which took a very considerable amount of time,- I must accept that this material is addressed mostly to issues other than whether or not there is persecution of homosexual persons in Georgia and whether or not state protection is available to such persons if so persecuted. As appears from this country of origin information and, is reflected in the Decision of the first named Respondent, accurate and up to date information on these topics is difficult to obtain. The furnished country of origin information mostly addresses issues such as the position of evangelical religious minorities, the position of persons suspected of involvement in criminal activities and held in police detention and, the position of persons in custody on charges of anti-state activities. However, the fact that most of the *prima facie* authorative, independent an unbiased commentaries and reports are not specifically directed to the issue of the degree of protection or non-protection from persecution provided by the state authorities in Georgia to homosexual persons, does not in my judgment necessarily render them entirely irrelevant to that issue.

31. The first named Respondent by her conclusions accepted that homosexuality, though not a criminal offence in Georgia, is still considered to be unacceptable behaviour and anti-social conduct by a large section, or even by the majority of Georgian Nationals. The first named Respondent found that the Applicant by reason of his sexual orientation, "may be at genuine risk of serious harm". If the Refugee Appeals Tribunal were to conclude, on a careful consideration and analysis of the country of origin information, that there has been a consistent failure on the part of the relevant Government Ministries, on the part of the Police Force either generally or as an organisation and, even on the part of the Judicial System to protect evangelical religious minorities, such as Jehovah's Witnesses and Baptists from persecution, because their activities were regarded as proselytising and, therefore as anti-social, by an extreme section of Georgian Orthodox believers with, at least, the passive support of a wider section of the populace, it seems to me that a proper inference might be drawn as to whether or not the state authorities in Georgia would be reasonably likely to provide protection to persons engaged in other perceived anti-social activities.

32. It is the function of the Refugee Appeals Tribunal and, not of this Court in a judicial review application, to determine the weight, (if any), to be attached to this country of origin information and other evidence offered by and on behalf of the Applicant in this case. But in my judgment what it was not open to the Refugee Appeals Tribunal to do and, where the first named Respondent erred in law, is to reach a conclusion that the Applicant's failure to seek state protection defeated his claim while entirely ignoring the issue of whether the state authorities of Georgia would be reasonably likely to have provided that protection from persecution to the Applicant had he sought it,- (which the first named Respondent found as a fact he had not, though this is disputed by the Applicant who claims that he sought protection from the Public Defender (Ombudsman) and received none).

33. In the circumstances the court will grant the relief sought at paragraph 4(a) of the Statement Required to Ground the Application for Judicial Review, that is an --Order of *Certiorari*, quashing the decision of the first named Respondent dated 11th February, 2005, as notified to the Applicant by letter dated 24th February, 2005, upholding the decision of the Refugee Appeals Commissioner that the Applicant's claim for asylum in this State be refused.