Neutral Citation: [2013] IEHC 349

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009/1292 JR

Between:

G.K. (Georgia)

Applicant

-AND-

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

Respondents

JUDGMENT OF MS JUSTICE M.H. CLARK, delivered on the 23rd July 2013

1. The applicant seeks to quash the decision of the Refugee Appeals Tribunal on the basis of a flawed determination of her asylum claim. That claim was based upon a fear of persecution at the hands of the Georgian State authorities due to her membership and support of *Samartlianoba* or the Justice Party; a pro-Russian opposition party in Georgia. Her core claim was that in the six months since she and her brother joined the party, she has been targeted as a member of an opposition party and she fears that she will be arrested and detained in a Georgian jail where conditions are known to be inhuman. In particular, she claims that her fear derives from the fact that her house and shop had been broken into and thrashed four times; items of value had been stolen, computers were destroyed or removed and documents taken. Her complaints to the police were ignored and treated with cynicism. She attributes these break-ins to intimidation of the anti-Soros political grouping and particularly the Justice Party. She claims that acts of such intimidation were occurring on a nationwide basis and that by September 2006, 90% of the membership was under arrest and that this persecution was motivated by the government's fear of the Justice Party's rising popularity.

2. She claimed that on one occasion she was attacked when participating in anti-government demonstrations and required two weeks inpatient care in a hospital. Then on the 3rd September, 2006, her brother and 49 party members including the regional leader were arrested and held in detention. Her parents warned her not to come home as she too would be arrested on that date and they made arrangements for her to contact a trafficker immediately and to leave on the 5th September, 2006. After travelling on two different ships she arrived in Ireland.

3. This claim was investigated by the ORAC who consulted Country of Origin Information (COI) from Georgia to establish the objective likelihood of the truth of this claim. Such information is inclined to be partisan as the country divides into pro-Western (Mikeil Saakashvili) or pro-Russian (Eduard Shevardnadze) ideology. Notwithstanding the political divisions, COI relied upon by the Commissioner which came from the two divides was unequivocal in ascribing the 6th September, 2006, as the date when there was an orchestrated swoop on leaders of the Justice Party which involved several hundred members of the police. The arrests were said to have been necessary to prevent a planned overthrow of the government and the intended installation of a replacement government with Igor Giorgadze and the Justice Party, or else were simply another example of the President's abuse of power and removal of opposition parties, depending on the politics of the source.

4. Whatever the truth of those coup allegations, COI shows that 29 leading members of the Justice Party were arrested; 13 of whom were charged with State treason contrary to Article 315 and the others were released. While some commentary suggests more people were arrested and detained under intense security in the Ministry of the Interior, there is no reference to a series of arrests of 49 activists and one regional leader from the same party in Batumi on the 3rd September, 2006, as claimed by the applicant.

5. The applicant's claim was rejected mainly on the absence of support for the applicant's version of events of the 3rd September, which was the impetus for her flight from Georgia leaving her twelve year old daughter in her mother's care. The Section 13 report observes that she "*left Georgia on the 5th September which meant that she had left before the nationwide arrests took place*" and further that COI "*contradicts her claim that 90% of the members were arrested since it appears that the government were only looking for the leaders*".

6. While no support was found for the claim that she as an ordinary member of the party would face arrest and persecution, it was not disputed that the applicant was a member of an opposition party and it was also accepted that State protection was unavailable to her. The key finding was that because she was not a leader she would not be at risk of arrest were she to return to Georgia, especially if she returned to a new address.

7. The applicant appealed the Commissioner's findings, laying emphasis in her appeal submissions on the fact of her brother's arrest on the 3rd September, 2006, even though he had the status of an ordinary member. His arrest was stated to support the reasonableness of her feared arrest on the same date (the 3rd September, 2006,) and motivated her flight. In support of that contention, she furnished a quantity of documents attesting to her educational qualifications and to her brother's arrest and detention in prison. They include a letter from his Solicitor dated the 25th January, 2007, certifying that her brother who was a "*member of the Samartlainoba was imprisoned on the 3rd September 2006 at Batumi detention centre No 3 and is still an inmate up to date*"; a letter from the Ministry of Justice of Georgia referring to her brother but with photocopying too faint to discern the meaning of the document; a handwritten letter from her brother's solicitor to the Director of the detention facility requesting a medical examination for his client and a letter seeking visitation rights to the brother. Other letters from family members which related to the imprisonment of her brother were included in the bundle. The applicant also furnished documents relating to her own identity and her university qualifications.

8. Insofar as those documents relate to her brother, they do not disclose the charges brought against him, the offence for which he was alleged to have been convicted and sentenced to 7 years or the reduction of his sentence on appeal to 3 years. Taken at face value, they establish that the applicant's brother was in jail in Batumi in 2006. Insofar as the documents relate to the applicant's

identity and that of her family, they do not advance her claim that if she were to return to Georgia she would be arrested and detained.

9. The Tribunal decision upheld the Section 13 negative recommendation. The decision fully outlined her evidence which appeared to mirror her s.11 interview and included her evidence relating to her brother's arrest on the 3rd September for public disorder, her questioning and responses relating to the discrepancy between her narrative of events of the 3rd September and COI which indicated that the arrests of the 6th September were confined to leaders of the Justice party, her travel arrangements, the break-ins and robberies, the history of the delivery/loss of documents and the submissions made by both parties. There was again no dispute as to her membership of an opposition party. There is no finding that her brother was not arrested.

10. When analysing her evidence, the Tribunal found that even if the break-ins were established as fact, they did not give rise to a well founded fear of persecution. The circumstances of her leaving Georgia on the advice of her parents to avoid arrest was similarly not found to be indicative of a well founded fear of persecution. Thereafter, the Tribunal member recited a number of findings and discrepancies which he found "*individually might not be of fatal significance*", but "*taken together…undermine her credibility*". The key finding was that it was "*improbable that the Applicant would be arrested with the leaders of her party when on her own evidence she was only a member for approximately six months*".

11. The decision is challenged on three major grounds. The first involves the failure to make any reference to the documents furnished for the appeal hearing, which it is asserted establish the applicant's credibility in relation to her brother's arrest and dispute the contention that only party leaders were at risk of arrest. The applicant relies on the decision of Cooke J. in ***I.R. v. Minister for Justice Equality and Law Reform*** [2009] IEHC 353, where he found that;

"*Where, as here, documentary evidence of manifest relevance and of potential probative force is adduced and relied upon, the Tribunal member is under a duty in law to consider it and if it is discounted or rejected as unauthentic or unreliable or otherwise lacking probative value, there is a duty to state the reason for that finding*."

12. The Court is of the view that the Tribunal decision can indeed be criticised for this omission, but whether on the facts of this case the omission is fatal to the legality of the determination that the applicant is unlikely to be at risk of persecution remains to be weighed against the other findings. The obvious distinction between the I.R. decision and this case is that the issue of the brother's arrest and detention and therefore any documents relating to those events are not – contrary to the applicant's submissions - the key to establishing that the applicant has an objective well founded fear of persecution. The decision is not grounded on whether the brother was in fact arrested but on country of origin information which points unequivocally to organised arrests of leaders of the Justice Party for an alleged planned coup d'état on the 6th September, 2006, and not on the 3rd September, 2006, in Batumi as claimed. Further, no finding was made rejecting the applicant's narrative of her brother's arrest on the 3rd September, 2006.

13. The second challenge is the failure on the part of the Tribunal to assess credibility and future risk on the basis of Country of Origin Information. This was not an argument which was further developed as it was obvious that the applicant was unable to establish that any relevant COI had been ignored or disregarded or misunderstood. No COI had been presented which confirmed or supported the applicant's core claim of a nationwide clamp down on low level activists in the month before the 3rd of September or that a swoop on 48 activists occurred in Ozurgeti on that date or even that low level activists were arrested and detained on the 6th September, 2006.

14. The third challenge was that the Tribunal relied on peripheral findings to reject her claim. Those findings were enumerated and particular attention was drawn to the Tribunal's negative assessment of the applicant's demeanour and reticence to answer questions on the topic of her journey by ship to Ireland and also on how documents were lost in Holland when the courier was arrested by the Dutch authorities. The Tribunal also commented adversely on the applicant's short delay in applying for asylum after her arrival while she made contact with other Georgians and on her parents' desire to protect her from harm by arranging for her to leave Georgia. He was not satisfied that this was indicative of departure from a country because of a well founded fear of persecution or that applying for asylum was her priority. It was submitted that these matters determined the appeal rather than her core claim of a fear of arrest and detention due to membership of the Justice Party – as had occurred to her ordinary member brother.

15. The Court is satisfied that the many findings relating to peripheral matters are all matters properly within the remit and jurisdiction of the Tribunal and any criticism of their validity do not reach the threshold of substantial grounds. While the applicant may not have wanted to expose her trafficker or named friend who attempted to deliver documents to her before he was detained by the Dutch authorities for reasons of loyalty, and while this loyalty may have caused her reluctance to answer questions, the fact remains that she was reticent and the Tribunal remarks and subsequent findings were not unfounded. The Court cannot agree that these matters which were of cumulative importance and formed a backdrop to the facts at issue were determinative of her appeal. The essence of the decision was that it was "*rather improbable*" that she would be arrested with leaders of her party and therefore her fear was not objectively a real one.

16. Essentially, the applicant told the Tribunal that she left Georgia as she feared she would be arrested and that her brother's arrest as an ordinary member established the legitimacy of her fear. However, as noted by the respondent, undisputed COI established that the arrests on the 6th September, 2006, were extensive and high profile, targeting leaders and using significant police resources. The Tribunal member correctly noted that she was not a leader of the party or any of its satellite groups and it was improbable that she would have been arrested during this operation.

17. In the Court's view the Respondent is correct. It is difficult to see how even if the brother's arrest for public order offences is accepted to have been effected on September 3rd as was the applicant's evidence and even if the contents of the documents furnished to the Tribunal were totally accepted, that this could establish that the s.13 report and the Tribunal decision were made in error as was argued by the applicant. Leaving aside that the brother's arrest and imprisonment were not referred to in any COI and there was nothing in the applicant's evidence or in the documents to connect his arrest with the alleged coup, there is absolutely no support for the applicant's claim of a crackdown of members of the Justice party in the two weeks leading up to the 3rd September. In other words, the fact of his arrest does not establish a well founded fear on the part of the applicant.

18. The Court is satisfied that the decision is not really a credibility decision in the truest sense as it was accepted that "*clearly the Applicant and other members of her family were members of a different political party from that of the governing party in Georgia*". This information relating to members of her family could only have been obtained from the documents before the Tribunal relating to her father's activities in the Abkhazia war and her sister's candidacy in local elections and to some extent, her brother's membership of the Justice party. None of this information was disputed by the Tribunal. It is at its heart, a case where there was no credible evidence that ordinary Justice Party members like the applicant were arrested or detained on the 3rd or the 6th September 2006. After an analysis of the information provided by the applicant in her oral testimony, the Tribunal ultimately found that it was "*rather*

improbable that the Applicant would be arrested with the leaders of her party when on her own evidence she was only a member for 6 months". What was not accepted was that her political affiliation would be likely to lead to a valid fear of persecution as she asserted.

19. Returning to the challenge to the lawfulness of the decision on the basis of the Tribunal's omission to evaluate documents furnished by the applicant: certainly, it would be preferable for the decision to include some finding on the probative value, if any, of the many certificates and letters put before him. It was for him rather than this Court to address the relevance of the documents which were not previously available to the primary decision maker. The Court is not however prepared to quash the decision on this issue as it is clear that the documents were directed to accepted facts. They could not be described as documents which on their face were "*evidence of potentially significant probative weight in corroborating key facts and events*". Even if accepted as totally authentic, they cannot suggest, infer or establish that the applicant has suffered persecution for her membership and support of the Justice Party. They are not documents which are capable of putting a different gloss on the applicant's version of events and cause a decision maker to review his findings. Taken at their height, they do no more than establish the applicant's identity and qualifications, her family's opposition leanings and her brother's presence in a detention facility. None of these issues were disputed. While it may be the case that the applicant perceives that establishing her brother's arrest and detention determines her claim that even ordinary members were arrested and she therefore was in legitimate fear of persecution when she left Georgia, this perception would ignore the reality which is that the case she made for flight was that her brother was arrested in a crackdown on 90% of the membership of the party and that he was one of 50 activists arrested that day. The documents do not advance that case and the Court is therefore prepared to exercise its discretion to overlook the Tribunal's omission to mention the documents.

20. It is appropriate to reiterate that it is only when documents of manifest relevance are discounted or rejected as unauthentic or of no probative value that a decision maker is bound to provide reasons for that finding. When documents are not relevant to the issue in hand or as occurs in many other cases, they are so indisputably false that they are ignored, the duty to give reasons must logically be minimal.

21. It is now almost 7 years since the applicant first sought refugee status. She is undoubtedly a member of a family with pro-Russian leanings which may be the cause of difficulty and discrimination in a polarised state situated at the crossroads between two large power blocs. Political positions may have hardened in that 7 year period and it is possible that opposition parties may suffer increased marginalisation or increased intolerance in that period. It is possible that the applicant can make a different case for subsidiary protection based on new information or she can present new evidence in a Section 17(7) claim. The Court has enormous sympathy for any applicant who leaves her home and family believing that she will be able to claim asylum only to find that her fears are considered objectively not well based and that before refugee status is granted, an applicant must meet minimum thresholds of evidence. That sympathy for a young woman who very likely suffered exclusion and discrimination when there was a change of regime in Georgia cannot be the reason to unmake a sound decision. For the reasons listed above the application is refused.