Neutral Citation Number: [2008] IEHC 400

THE HIGH COURT

2006 991 JR

BETWEEN

E. G. AND D. G.

APPLICANTS

AND

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

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 27th day of November, 2008.

1. The applicants are seeking leave to apply for judicial review of the decisions of the Refugee Appeals Tribunal ("RAT"), dated 29th and 30th June, 2006, to affirm the earlier recommendations of the Office of the Refugee Applications Commissioner ("ORAC") that they should not be declared refugees.

Factual Background

2. The applicants, who are married, are nationals of both Croatia and Serbia. The first named applicant is of Croat ethnicity and is a Catholic. The second named applicant is of Serb ethnicity and belongs to the Serb Orthodox church. Until 1991, the applicants lived prosperously in Croatia with their son, who was born in 1979 and is of mixed ethnicity. They claim that after the outbreak of war in 1991, the family suffered physical and verbal harassment and discrimination as a result of the ethnicity and religion of the second named applicant. They moved to Serbia in August, 1991 and remained there for ten years. It is claimed that they were also harassed and persecuted in Serbia; in particular, during the bombing of Belgrade in 1999, they were refused entry to an air raid shelter. At that point, they became citizens of Serbia.

3. The applicants and their son have each made a number of applications for asylum. In 1998, they applied unsuccessfully through the UNHCR for refugee status in a third country; UNHCR was then only accepting applications from persons from Kosovo and Macedonia. They applied to the Canadian and Australian Embassies in 2000. They obtained Croatian passports in December, 2001, and thereafter made unsuccessful applications for asylum in Sweden and The Netherlands. They were returned to Belgrade for short periods following each unsuccessful application and it is claimed that they were, again, harassed and persecuted. Medical evidence appears to support the claim that the first named applicant became mentally ill at that time. The applicants and their son made a third unsuccessful application in Switzerland and, after staying in that country for one year, they travelled to Ireland.

Procedural Background

4. The applicants and their son made individual applications for asylum upon arrival in Ireland on 16th November, 2004. Individual reports were compiled in June, 2005 in compliance with section 13 of the Refugee Act 1996. In each report the ORAC officer made a negative recommendation, and in each the officer made findings under section 13(6) of the Act of 1996, with the result that they would not be entitled to an oral hearing before the RAT. That notwithstanding, the applicants and their son each lodged a Form 2 Notice of Appeal to the RAT, appending an amount of country of origin information ("COI"). The decisions that emanated from the RAT in respect of the first and second named applicants were the subject of judicial review proceedings which settled and their appeals were remitted to the RAT. Those judicial review proceedings did not relate to their son, whose appeal was decided separately and by a different Tribunal Member. Two medical reports (including a SPIRASI report) were forwarded to the RAT in support of his appeal, which was allowed on 15th September, 2005; he has since been granted refugee status in Ireland.

5. The first and second named applicants' appeals were re-assigned to a new Tribunal Member. In support of the first named applicant's appeal, the applicants' solicitors forwarded, on 24th and 27th April, 2006, respectively, a psychiatric report by a SPIRASI doctor and a medical report by a Consultant Psychiatrist. On 4th May, 2006, the Tribunal Member disclosed to the applicants the COI upon which she proposed to rely; submissions were made on behalf of the applicants in respect thereof by letter dated 15th May, 2006. Individual decisions were issued on 29th and 30th June, 2006 and in each case, the appeal was rejected. On 19th July, 2006, the Minister informed the applicants that he was refusing their asylum applications and that he was proposing to deport them.

Decision in respect of the First Named Applicant

6. The decision of the Tribunal Member in respect of the first named applicant is very detailed, running to 20 pages in length. At the outset, the Tribunal Member set out the grounds of appeal, the appellant's claim, her questionnaire and section 11 interview, and her "submissions"; in the latter section, the Tribunal Member noted the contents of the SPIRASI report. Having set out the relevant law, she turned to analyse the appeal. In brief, she found that there is no objective basis for the apparent fear of persecution if returned to Croatia, and that a sufficient level of State protection is available to ethnic Serbs in Croatia. She did acknowledge that the family may experience "some harassment and possibly even discrimination" if returned, but she found that it would not reach the standard of persecutory treatment required to fulfil the 'refugee' definition. Finally, she noted that emphasis had been placed on the first named applicant's mental condition, but she dismissed the same as being relevant only to the grant of leave to remain. In her decision, the Tribunal Member referred to (and dismissed) the first named applicant's fear that her son might be conscripted for military service, but she made no reference at all to his mental health, medical evidence in this regard, or the fact that he had obtained refugee status.

Decision in respect of the Second Named Applicant

7. The structure and contents of the RAT decision made in respect of the second named applicant are much the same as those contained in the decision made in respect of his wife the previous day; many passages and conclusions are, in fact, repeated verbatim. One difference is noteworthy, however. Having referred to the applicants' son on several occasions, the Tribunal Member concluded her analysis as follows:-

> "I have taken into account his family's position and circumstances, the fact that his son may have been granted refugee status is for the most part irrelevant, as I must assess each case on its own merits and facts."

Decision in respect of the Applicants' Son

8. As noted above, the son's appeal was decided roughly six months before his parents' appeals were re-considered, and by a different Tribunal Member. In her decision, that Tribunal Member found that COI confirms that although the situation is not yet perfect, there has been significant change in the situation in Croatia since the son left in 1991. She also found that the ORAC officer was "correct" in recommending that the son should not be declared a refugee. She noted, however, that medical reports had been furnished to the RAT that had not been before ORAC, and she set out the contents thereof. The Tribunal Member found that the fears of the son and his parents were surprising, as they had not lived in Croatia for 13 years, but she recognised that "some people are more vulnerable than others and less equipped to deal with the situation in which the Applicant found himself." She observed that

the applicant had not demonstrated that his expected suffering upon return would be "exceptionally severe" but she accepted his evidence and credibility and concluded:-

> "In view of the Applicant's medical vulnerability and exaggerated subjective fears, the Tribunal is apprehensive that returning him to Croatia might possibly cause him harm and therefore in the premises is inclined to give him the benefit of the doubt."

Extension of Time
9. The RAT decisions were notified to the applicants by letters dated 14th July, 2006. The within proceedings were commenced one week outside of the 14-day time-limit imposed by section 5(2) of the Illegal Immigrants (Trafficking) Act 2000. A plausible explanation has been offered for the delay, and the respondents have taken no issue on time. In the circumstances, I am satisfied that there is good and sufficient reason to extend time and I propose to do so.

The Applicants' Submissions
10. The applicants' primary complaints in respect of the RAT decisions are:-

a. Flawed assessment of State Protection;

b. Failure to consider the position in Serbia;

c. Factual error;

d. Failure to provide a reason for inconsistency in decisions.

(a) Assessment of COI / State Protection
11. The applicants contend that the Tribunal Member erred by failing to assess the ability as opposed to the willingness of the Croatian State to provide State protection to persons such as the applicants. It is accepted that there is no objective basis for the contention that the Croatian State is unwilling to provide State protection but it is contended that there are substantial grounds for the contention that the Croatian State is unable to provide such protection. Reliance is placed on *G.S. (a minor) v The Refugee Applications Commissioner* (unreported, Irvine J., High Court, 21st November, 2008), where it was claimed that the applicant would be subjected to persecution if deported to Croatia, owing to his Serb ethnicity. Leave was granted on the basis of the Tribunal Member's apparent failure to consider up-to-date and authoritative COI adequately or at all.

(b) Consideration of the Position in Serbia
12. In each of the impugned decisions, having found that a sufficient level of State protection is available to ethnic Serbs in Croatia, the Tribunal Member stated that it was not necessary for her to consider the situation of the applicant if returned to Serbia. The applicants complain that this finding was irrational because the applicants have not lived in Croatia since 1991 and are also nationals of Serbia; it is contended that there is no guarantee that they would not be deported to Serbia instead of Croatia. Reliance is placed on the judgment of the Federal Court of Australia in *Jong v Minister for Immigration and Multicultural Affairs* (1997) 143 ALR 695 and that of the Supreme Court of Canada in *Canada (AG) v Ward* [1993] SCR 689.

(c) Error of Fact
13. As something of a subsidiary point, it is contended that the Tribunal Member made a fundamental and jurisdictional error of fact in that she stated as follows:-

> "The bulk of the complaints that the [first named Applicant] makes refer to the experiences in Serbia in the period prior to 1991."

14. Reliance is placed on *A B-M v The Minister for Justice, Equality and Law Reform* [2001] IEHC 110, where it was repeatedly stated in a decision made under the Hope Hanlon procedures that the applicant came from what was Zaire and is now the DR Congo, whereas the applicant actually came from the Republic of Congo. O'Donovan J. held that the implications of that error was that the recommendation and the later decision to withhold the same proceeded "on an entirely wrong basis", in which event the decision-makers could not have been acting within jurisdiction when arriving at their respective conclusions.

(d) Inconsistent Decisions
15. It is argued that the facts, circumstances and medical evidence that were before the Tribunal Member in respect of the first named applicant were substantially the same as those which were before her colleague in respect of the applicants' son. It is contended that the Tribunal Member should, therefore, have had regard to the reasoning of her colleague with respect to the grant of refugee status to the son, and that she should have given proper grounds for distinguishing the two decisions.

16. Although it is accepted that each case is to be decided on its merits, it is submitted that where two applications derive from identical circumstances and where the differences between them are negligible, different considerations arise; in particular, it is contended that there is an obligation to treat like cases alike and that some reason must be given or some discrete difference identified to justify the treatment of like claims differently. It is said that no such difference was shown in this case.

17. Reliance is placed on the judgment of the Supreme Court in *McMahon v Leahy* [1984] IR 525, where O'Higgins CJ found that it is the duty of the Courts to see that the obligation to provide equal treatment for citizens of the State is discharged. O'Higgins CJ also found (at p. 537) that if the Courts issue contradictory declarations in relation to similar proceedings, and on similar facts, "respect for the administration of justice in Courts would surely suffer, and the Courts' process would certainly have been abused." It is accepted that the persons concerned in that case were Irish citizens, but it is submitted that the same principle of equality applies as between non-nationals who are identically situated. Reliance is also placed on *Dikilu v The Minister for Justice, Equality and Law Reform* [2003] IEHC 140 and *C.O.I. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 180.

The Respondents' Submissions
18. The respondents submit that the applicants' claim ought to be dismissed.

(a) Assessment of COI / State Protection
19. The respondents submit that the Tribunal Member engaged in a well-rounded consideration of the COI as a whole. It is submitted

that it is unclear whether such a reasonable consideration of COI was carried out in the RAT decision that was at issue in *G.S. (a minor)* (cited above).

(b) Consideration of the Position in Serbia
20. The respondents submit that the applicants' argument in this regard is based on a fundamental misunderstanding of the law. They seek to distinguish the factual matrix of *Jong* (cited above) from that of the present case; in *Jong*, the applicant was found to have a well-founded fear of persecution in Indonesia, if returned. He was, it seemed, also a national of Portugal. In those circumstances, the Federal Court of Australia deemed it necessary to assess whether the applicant could avail of State protection in Portugal. This is, it is contended, at variance with the facts of the present case, where the applicants have not been found to have a well-founded fear of persecution in Croatia and it was found that State protection is available in Croatia.

(c) Error of Fact
21. The respondents submit that the error in respect of which the applicants complain is merely a typographical error.

(d) Inconsistent Decisions
22. The respondents submit that as a matter of law, the fact that one person's appeal is allowed by one Tribunal Member does not bind another Tribunal Member to allow the appeals of the first person's parents. Reliance is placed on *Fasakin v The Refugee Appeals Tribunal* [2005] IEHC 423, where it was alleged that the Tribunal Member failed to consider the terms of the decision of another Tribunal Member in the case of the applicant's daughter. O'Leary J. held as follows:-

> "Evidence from family members other than the applicant could be relevant in the event that a particular family was the subject of persecution. Similarly evidence of ethnic persecution can be persuasive though not yet personal to the applicant. However, the decision of a body in a particular case is neither evidence in an other case nor does it create a binding authority for future cases. Each case must be considered on its own merits. Imagine the outrage there would be if an application was refused because the applicant's daughter had previously been refused." (emphasis in original).

23. It is also contended that the position of the applicants' son may be distinguished from that of his parents on the basis that the conclusions reached in the decision in respect of the son with respect to the situation in Croatia are analogous to the conclusions reached in his parents' cases: both Tribunal Members accepted that State protection was available in Croatia. It is argued that where the RAT decisions differ is in the conclusions reached in respect of the subjective fears of the applicants when compared to those of their son. Thus, while the same conclusion was reached with respect to the objective element of their fears of persecution, the Tribunal Members differed in their assessment of the subjective element of those fears.

24. It is asserted that the cases relied on by the applicants, in which the Court has criticised differing RAT decisions relating to similarly-situated persons (i.e. *Dikilu* and *C.O.I.*, cited above), the differences that were criticised related to analysis carried out by different Tribunal Members in respect of the same country of origin information, i.e. the objective element of the fear of persecution. It is contended that none of these cases related to the analysis carried out by Tribunal Members with respect to the subjective element of that fear. It is contended that Tribunal Members are entitled, and indeed obliged, to give individual analysis to the subjective fears of each applicant, albeit that a level of coherence is required with respect to the analysis of the objective evidence that is submitted in corroboration of those fears.

The Court's Assessment
25. This being a leave application to which section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies, it is incumbent on the applicants to establish substantial grounds for the contention that the RAT decisions should be quashed. As is now well established, this means that grounds must be shown that are arguable, reasonable and weighty, as opposed to trivial or tenuous.

(a) Assessment of COI / State Protection
26. I am satisfied that the Tribunal Member did not err when assessing the COI that was before her with respect to State protection and that she gave appropriate consideration to the question of whether the Croatian State was capable of providing protection to ethnic Serbs returning to Croatia. The question is whether the asylum seeker is unable or unwilling, owing to his or her fear of persecution, to avail of the protection of his or her country of origin.

27. In each decision, the Tribunal Member quoted extensively from the COI that was before her, acknowledging inter alia that many problems remain for ethnic Serbs in Croatia but that the Croatian Government is committed to promoting sustainable return and reintegration, that a Constitutional Law on Minority Rights was enacted in 2002, that recent COI indicates an overall improvement in the general situation, and that Croatia has ratified various regional and international instruments including the European Convention on Human Rights. In both decisions, she concluded that although there was societal discrimination and continuing violence against ethnic Serbs, it may be said in general that the Government has put in place a system for the protection of ethnic Serbs, and there is "a reasonable willingness" to operate that system. She noted that certain members of the police force would undoubtedly drag their heels in investigating cases of violence against ethnic Serbs, but that such incidents are not "of such a nature or degree" as to suggest that police inaction is condoned by the State.

28. For the same reasons as were set out in the recent decision of this Court in *D.L. v The Refugee Appeals Tribunal* [2008] IEHC 351, I am of the view that it was open to the Tribunal Member to reach the conclusions that she did. It cannot be said that her conclusion is perverse or unreasonable in the light of the evidence; on the contrary, her conclusion was grounded on a clear, rational and logical understanding of the COI that was before her, when considered as a whole.

(b) Consideration of the Position of Serbia
29. I am satisfied that the decision of *Jong* (cited above) may be distinguished from the present case on the basis that the applicant in *Jong* had been found to have a well-founded fear of persecution in Indonesia, and it was in those circumstances that the position in Portugal arose for consideration. The present case is different because the applicants have not been found to have a well-founded fear of persecution in Croatia; there was, therefore, no obligation to also consider the position of Serbia.

(c) Error of Fact
30. I am satisfied that the reference to "Serbia" in the Tribunal Member's decision was merely a typographical error and had no impact on the overall logic, rationality or reasonableness of the decision, or on the jurisdiction of the Tribunal Member.

(d) Inconsistent Decisions
31. Although I do not consider it necessary for the purpose of the present decision to cite the contents of the SPIRASI reports compiled with respect to mother and son, suffice it to say that the conclusions reached in each report are strikingly similar.

32. Whilst it is undoubtedly the case that deciding officers may make different decisions in relation to individual applications arising from all but identical facts, it would appear at least arguable that in circumstances where the deciding offer was or ought to have been aware of another decision in respect of a family member, as was here the case, she ought to have considered that decision and given reasons for a decision which on its face appears inconsistent.

33. In the circumstances, I am satisfied that the applicants have shown substantial grounds for their contention that the impugned decision should be quashed on the basis of the Tribunal Member's failure to address her mind to and / or give reasons for her decision to decide the first named applicant's appeal in a manner inconsistent with that in which her son's appeal had been decided, in circumstances where it was grounded on an identical or analogous fear of persecution supported by identical or analogous medical evidence and in the absence of any apparent distinctions.

Conclusion
34. I will refuse leave in respect of all but the following contention:- that where the evidence (both medical and factual) in respect of mother and son appears to have been strikingly similar, and where the son's appeal was allowed, the principles of equality and fair procedures require that the Tribunal Member should have expressly addressed her mind to and/or provided reasons for reaching a different conclusion with respect to the mother.