Neutral Citation: [2014] IEHC 534

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 1080 J.R.]

BEWEEN

E. S.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 13th day of November 2014

1. This is an application pursuant to s. 5, sub-section (3)(a) of the Illegal Immigrants (Trafficking) Act 2000, which provides that:

> "The determination of the High Court of an application for leave to apply for judicial review [pursuant s. 5 of the Act] shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court . . . except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

2. For ease of reference, I set out here my findings in the main proceedings:

> "14. The first and in my view the main reason (quoted at paragraph 3 above) given by the Tribunal Member for rejecting the asylum claim is terse. Nonetheless, it encapsulates the obstacle faced by the applicant in securing refugee status in Ireland. I have carefully read the completed Asylum Questionnaire and the account of the s.11 interview conducted by ORAC and the contents of the applicant's Notice of Appeal. The applicant is at pains to describe his objections to serving in the Georgian military and the trauma he suffered in South Ossetia during the military conflict between Georgia and Russia in August 2008.
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> 15. However, the applicant fails to establish by any objective means (even to the most minimal degree) what negative consequences might befall him should he return to Georgia by reason of his failure to answer the call to military service. The Tribunal Member's observations on this are correct though I would not conclude that the failure thereby undermines credibility. In my view the identified flaw is more associated with a failure to meet what is referred to as the forward looking test as to the likelihood of future persecution rather than a general credibility issue. However this is not a sufficient criticism of the approach of the Tribunal Member to warrant quashing the decision.
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> 16. It is of central importance in an asylum claim that an applicant establish a well founded fear of persecution. The requirement that the fear be well founded means that the applicant's fear must be shown to exist subjectively and in addition that there is some objective support for that fear. It is a matter for the applicant to make out both the subjective and the objective elements of the fear in order to persuade the decision makers that the applicant has a well founded fear of being persecuted. Incontestably, the applicant has failed to make out the second element of the claim and this failure has been identified by the Tribunal Member.
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> 17. Two other reasons are stated for refusing refugee status. I accept the argument made that the differences in the accounts of his travel to Ireland are probably peripheral and the resulting negative credibility finding a little harsh. In addition the Tribunal Member's remarks as to the applicant's failure to seek asylum in other countries en route in my view incorrectly state the law as a failure to make an asylum claim in a third country attracts negative consequences only if an asylum applicant claims that Ireland was the first safe country encountered in flight from country of origin (see *F.T. v. Refugee Appeals Tribunal* [2013] IEHC 167) and I accept that no such claim was made in this case.
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> 18. In my view the three reasons given for rejecting refugee status are severable inter se and even if some legal error infected the second and third reasons given, the first reason identifying the failure of the applicant to meet the forward looking element of the test is sufficiently robust to overcome the applicant's complaints and I therefore refuse leave to seek judicial review in this telescoped application. (As to severability of reasons see *Talbot v. An Bord Pleanála* [2008] IESC 46 and *A.A. [Pakistan] v. Refugee Appeals Tribunal* (Unreported, High Court, 18th September 2013, Mac Eochaidh J.)"

3. The principles governing the grant of a certificate of appeal pursuant to s. 5(3)(a) of the 2000 Act, have been described by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, and by Clarke J. in *Arklow Holidays v. An Bord Pleanála & Ors.* [2008] IEHC 2, and referred to by Cooke J. in *I.R. v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 501.

4. In particular, I refer to the *dicta* of MacMenamin J. in *Glancré Teoranta* who said as follows:

> "I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein:
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> 1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one

of *exceptional importance* being a clear and significant additional requirement.

2. The jurisdiction to certify such a case must be exercised sparingly.

3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.

4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).

5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (Raiu).

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'."

5. The principal matter sought to be appealed is to be found at para. 4.2 of the applicant's written submissions as follows:

> "The law requires that once the reasons for a decision have been identified as bad reasons, the decision must be quashed, unless the decision maker has himself identified a good reason and makes it clear that, even if the bad reasons are found to be bad reasons, he would have reached the same conclusion based on the good reason. The law makes the Tribunal responsible for the decision, not the High Court. If, however, the High Court can uphold a decision, for which there are no good reasons, because it can identify a good reason, then the High Court becomes the *de facto* decision maker."

6. The applicants suggest that one of the errors in my judgment is that I have reinterpreted the decision of the Tribunal Member and sought to characterise what the Tribunal Member described as a credibility matter, as something else. Such an error could not form the basis of a certificate of appeal pursuant to s. 5(3)(a) of the 2000 Act, because it raises no point of law of exceptional public importance. It is unquestionably the case that the High Court could not replace a reason in an administrative decision with one of its own authorship and then uphold an otherwise infirm decision. The reason given by the Tribunal Member for holding against the applicant for refugee status was that he had not established what negative consequences might befall him if he were returned to his home country. The Tribunal Member said such a failure undermined his credibility. My view was that this was not the appropriate way to describe that failure. Rather, I emphasised that the misdescription was "not a sufficient criticism of the approach of the Tribunal Member to warrant quashing the decision". This Court did not replace a reason given by the Tribunal Member with a reason of its own. The substantive deficiency in the applicant's claim was the failure to establish the likelihood of harm on his return home arising from his failure to answer a conscription call. I disagreed with the description of this failure as a credibility issue. I did not alter the reason for the refusal of refugee status. In my view, no point of law of exceptional public importance arises in my decision on this question.

7. This Court's judgment permitted a decision of the Refugee Appeals Tribunal to stand, notwithstanding a finding that one of the reasons for refusing asylum was "a little harsh" and that another was based on an incorrect statement of the law. I found that "the first reason identifying the failure of the applicant to meet the forward looking element of the test [for refugee status] is sufficiently robust to overcome the applicant's complaints".

8. Severability of lawful reasons from unlawful reasons in an administrative decisions is established practice (see *Talbot v. An Bord Pleanála* [2008] IESC 46, and *A.A. (Pakistan) v. Refugee Appeals Tribunal* (Unreported, High Court, 18th September 2013, Mac Eochaidh J.). The law is not in an uncertain state as to this proposition and the law does not become uncertain because of a submission during an application for a certificate of appeal that severance is only to be used where a decision maker indicates a hierarchy of reasons in a multiply-reasoned administrative decision.

9. The proposed appeal point does not suggest that in every decision where multiple reasons are given, a decision maker must indicate the weight that is to be attached to each reason. The applicant appears to be arguing that if such an indication is not given by the decision maker, then a Court, on a judicial review application, could not sever good reasons from bad reasons, because this would usurp the function of the decision maker and would presume that he/she would reach the same decision absent the severed reason.

10. As indicated in the decision of the Supreme Court in *Talbot*, severability is available when a Court is certain that reasons are entirely independent of each other and are in, what Fennelly J. referred to as a "watertight compartment". In my view, this approach to severability ensures that the Court, before deploying the severance tool, must be certain that the reason which survives severance is capable of sustaining the impugned decision. Once the Court is satisfied as to this, it could never be said that the removal of an unlawful reason somehow undermines the decision maker's role and usurps that function by Court action because the court can say with confidence that if the only reason given were the one that survives severance, the decision would be the same. By checking whether a lawful decision resides in a watertight compartment, the Court is engaging in an exercise which checks whether the reason is of sufficient weight to carry the decision. In other words, the proposition advanced by Mr. de Blacam S.C. that severance should not happen unless the weight of the surviving reason is expressed by the decision maker, is a matter which is indirectly required to be considered before severance is deployed. Severance will only happen when a court appreciates that sufficient weight attaches to a surviving reason or reasons. Thus, no useful purpose would be served by referring the proposed issue to the Supreme Court as that Court has already indicated the rules relating to severance and these rules reflect the argument in the proposed appeal point. In this sense the point of law sought to be addressed in the proposed appeal is not of exceptional public importance nor would it be in the public interest that the appeal be brought.

11. I refuse the application for the certificate of appeal.