Neutral Citation No. [2005] IEHC 45

THE HIGH COURT
Record Number: 2004 No. 439 JR

Between:
Ilija Pasic
Applicant

And

The Minister for Justice, Equality and Law Reform, and
The Refugee Appeals Tribunal

Respondents

Judgment of Mr Justice Michael Peart delivered on the 23rd day of February 2005:

The Applicant seeks leave to commence proceedings by way of Judicial Review for an order of Certiorari to quash an Order of the The Refugee Appeals Tribunal dated 23rd March 2004 not to recommend to The Minister for Justice, Equality and Law Reform that the Applicant be granted a declaration of refugee status, and notified to the Applicant by letter dated 27th April 2004. In addition certain Declaratory reliefs are sought, such as that The Refugee Appeals Tribunal misdirected itself in law having regard to the provisions of the Refugee Act, 1996, as amended, acted ultra vires, in breach of natural and constitutional justice, unreasonably, and irrationally. The Applicant seeks also an order of mandamus compelling The Refugee Appeals Tribunal to hear the Applicant's appeal against the decision not to grant a declaration.

Before setting out the Grounds on which these reliefs are sought I will set out the factual background to the Applicant's arrival in this State in order to put those grounds in the proper context.

Factual Background:

The Applicant is single and is a Croatian national , but of Serbian ethnicity. On arrival here he presented a Croatian passport. His claim for refugee status is based on what he claims was persecution at the hands of Croatians as an ethnic Serb living in Croatia. When he completed his Questionnaire on arrival he stated at Q.26 that he feared persecution "because of nationalist aims of the Croats to ethnically cleanse Croatia of Serbs". In this Questionnaire he described the persecution as "psychological pressure supported by physical threats and assaults". He did not report his fears to the authorities because, as he stated in the Questionnaire *"The authorities know well about everything, but they are not doing anything as this is part of their politics".*

From July 1994 to August 1995 he was a member of the Serb army of the "Autonomous Region of Krajina". He explained that this was an organisation which was formed in the areas of Croatia inhabited by Serb majority and whose aim was to protect the Serbs who were living in Croatia.

At Q. 31 of the Questionnaire he was asked if he had ever been mistreated or threatened by any group or groups which the Government was unable or unwilling to control, and he replied that he was and that this was in the winter of 2002 when hunters with rifles stopped in front of the house he was in and shouted "Come out you Serb". He also stated that some railroad workers regularly enter the orchard and take fruit, saying "this is Croatian not Serbian." He also stated that his dog was killed by them in Spring of 2001.

He stated that military service was compulsory and he had been conscripted into the Croatian armed forces and spent ten months in that army, but he was unable to recall his unit. At Q. 50 he stated as follows:

"When doing this military service I went through psychological and physical harassment and because of this I spent the last period of my military service at home. If someone would raise their tone, even the slightest bit, I would get panic attacks.

I was adamant to go and visit a psychiatrist and once I went, I spent the end of my military service at home. I used to take tranquilisers and I continued to take them even later on. For a long time I didn't even leave the house at all. On any pressure or provocation, I reacted with panic attacks.

The strongest political party is the nationalist party which was in power during the war and they carried out ethnic cleansing on over 300,000 Serbs from Croatia. According to polls which are carried out and results shown on the TV about 75% of Croats do not want Serbs in Croatia. The documents contain a personal number. Based by it they know the nationality of a person. There is a great difference between the politics and media on one side, and reality on the other."

Following the completion of this Questionnaire, the Applicant was interviewed on the 5th November 2003. Some further detail was elicited during the interview. For example he went to the north of Italy on three occasions in 2000, 2001 and 2002. On each of these occasions he stated that he had spent five days sleeping in an articulated truck. He was naturally asked what was the purpose of these visits and he replied at p. 6 of the interview notes:

"I was in a very poor state healthwise and the driver tried to get me away from the [illegible] environment I was in. The driver was from my village and his wife is in Bosnia so he lives there."

He stated that he did not claim asylum in Italy, as he did not know anything about asylum, and did not know that he could apply for asylum there. He was asked why when he arrived in Ireland on the 19th March 2003 he did not apply for asylum until the 24th March 2003. He stated that it took him a day to relax – he was under stress – and that he had to find out where to go to ask for asylum. He stated that he had not applied at the airport in Dublin, to which he responded that he knew a family in Dublin for about one and a half years who had told him that there was a risk that he would be returned to Croatia from the airport. It appears that he came to Ireland via Frankfurt, Germany and the reason why he did not apply for asylum there is that the same family had told him that Ireland is a safe country and that people here would understand. He was asked why he was seeking asylum, to which he responded:

"For different reasons:
(1) because of my health – it was deteriorating all the time since the war started – 94/95 – Serbian Krajina Army;
(2) because of my security – I had to leave Croatia because I didn't feel safe there."

He was asked how his health was affected by the war. He stated that in 1994 he went into the army and finished his training. He was sent to the fighting and that his first fighting was in March 1995, and that he was sent to the front in Bihac just over the border in Bosnia. He stated that mortars fell around him and that Bosnian Muslims were crawling towards them. He described this occasion as the beginning of his stress. They had to retreat, and that while retreating a friend of his was killed by a sniper. The applicant became upset at this point of the interview, but was able to continue and stated that the retreat continued and he was not sent back.

The stress he experienced at the front, he states, hit him very badly, and he felt fear all of the time. Because of this psychological stress he was not sent back to the front. Instead he was given the job of loading and unloading trucks.

He also stated that he left the Serbian Krajina Army because it ceased to exist in August 1995 with the arrival of 'Operation Storm'. His parents returned to his home town in 1998. He stated that in August 1995 he went to Serbia and met with his parents. He apparently had the status of a displaced person. He says that he sought hospital treatment as an outpatient at this time because he could not sleep, was nervous and had stomach problems. He cannot recall the name of the medication he received, but that they were tranquilizers, or the name of the doctor who attended him.

He stated that in 1998 he returned home with his parents with the help of the Red Cross. He stated that when he returned to his village his stress returned because the memory of the war returned – his village was devastated, his neighbour had been killed and buried in his own yard. He continued to take his tablets because he was still under stress, but was afraid to go to the doctor there, and that there were Bosnian Croats there who were walking around two of whom pushed him against a wall and having asked him what he was doing there told him that he should go back to Serbia where he came from. He thinks this happened in October 1998. He says that he just left but was frightened and just tried to avoid people in case that sort of thing happened again. He went on to explain that sometimes Croats would come to the village and shoot into the air. He said that he last saw them shooting into the air in 2002 when he was looking out of his window. He says that he heard the shooting and a car passing the house. He went on to describe the arrival of "hunters" to which reference was made in his Questionnaire, and the shooting of his dog, and which I have already referred. He explained that where he lived was a forestry region where they shoot birds and wild boars. He also stated that these people would occupy abandoned Serb houses if it was raining while they were hunting and light fires and have a good time, but they would not burn down the houses.

He also recalled a time when these hunters came to steal fruit from their orchard and his father went out to stop them, whereupon they said *"why don't you send your son to stop us?"*

Later in the interview he was asked whether he had ever reported the hunters to the police but he said he had not because he was afraid to because some of the hunters were police and soldiers.

He stated that when he returned home in 1998 he had to join the Croatian Army and he was in that army for ten months. He says that when others in the army found out that he was Serbian trouble started. They would not let him sleep, would pour water over him, would strike out at him, and on one occasion had to clean a toilet with a toothbrush. It was not the officers who made him do this, but he did not report it to the officers because it would have been worse for him if he did. He went on to say that they once ganged up on him, and that one of these had a knife and *said "let's kill the Chetnik"*. He asked to go to the doctor and apparently the Croatian army doctor sent him to see "an outside civilian psychiatrist" who recommended to the army that he be sent home because of his psychiatric state.

He finished in the Croatian army in 2000 and did not continue to see the psychiatrist even though his army medical record states that it was recommended that he continue to do so. He states that there was not one close by. He next saw a psychiatrist when he came to Ireland where he was prescribed tranquilizers.

Based on this information, a report was prepared pursuant to s. 13(1) of the Refugee Act, 1996, as amended. In that report the persecution claimed by the applicant was stated to be as follows:

1. In October 1998 he claims he was threatened by two Croats.
2. Hunters allegedly shooting in the air to intimidate local Serbs.
3. Around March 2000 his dog was allegedly shot by unknown persons.
4. Apples, he claims, were taken from the family apple tree.
5. He claims alleged mistreatment while doing military service (1999-2000).

The author of this report states that if the applicant's statements are to be accepted and believed, his fears may be considered as being persecutory in nature and as such could satisfy this element of the refugee definition by reference to Article 7 and Article 27 of the International Covenant on Civil and Political Rights. But that it would be subject to an assessment of the well-foundedness of the claim, including an analysis of all the circumstances, the availability of State protection, credibility and/or Convention grounds.

The author reviews the evidence given by the applicant and notes a number of matters including that the applicant did not continue with psychiatric help until coming to Ireland, and that he did not report his complaints to the authorities. Certain country of origin information is referred to dealing with what is considered to be an improved police situation in Croatia by 2002. A conclusion is reached that because he did not exhaust all the available avenues of assistance open to him prior to leaving Croatia, his fear is not well-founded. A similar view is expressed because the applicant did not report these matters either to the Ombudsman for human rights, and that the applicant's belief that the Ombudsman is biased was purely speculative on his part.

The applicant's credibility is called into question in the report in relation to his stated reasons for visiting Italy in January 2001. He was found to be "implausible" when he stated that on the occasions in 2000, 2001 and 2002 when he went to Italy he did not know anything about asylum.

The author also noted that he stated that his reasons for claiming asylum in Ireland were given as his state of health and his sense of security, and that if health is a reason it is not a Convention reason. The overall conclusion reached is that the applicant has not demonstrated a well-founded fear of persecution and that none of his fundamental rights had been violated. A recommendation was made that he should not be declared a refugee.

On appeal, the Tribunal member concluded that the applicant's conduct in not reporting his complaints to the authorities, either governmental or NGO "negates a well-founded fear of persecution." A similar conclusion was reached on the basis of the three trips which the applicant made to Italy, after each of which he returned to Croatia. The Tribunal Member in this regard states the following:

"Paragraph 28 of the Handbook on Procedures on Criteria for Determining Refugee Status states:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee."

He goes on to state that applying these precepts to this case *"it can be said that his continued return to his country of origin is a denial by him of a fear of persecution for a convention reason, and thus of his sense of identification as a refugee."*

The Tribunal Member also stated that he found the applicant's account unsatisfactory in terms of credibility and substance, and affirmed the findings of the Commissioner and rejected the appeal.

The applicant now submits that the Tribunal Member has erred in a number of respects in the manner in which the Decision has been reached.

Firstly, it is submitted that he is in error when he regards the **failure to report** his complaints to the authorities **negates a well-founded fear** of persecution, and also that the **Member did not assess o**r inquire whether the Croatian authorities were able to grant the applicant **an effective and practical degree of protection**, and that he was obliged to carry out that exercise.

Counsel has submitted that the applicant gave an explanation for this, namely that he believed that it would be worse for him if he reported the matters to the police, and in relation to the incident involving the hunters, he believed that some of them were in fact in the army and police force, and that it would therefore be pointless. It is submitted that there should have been an assessment by the Tribunal of the situation in this regard in Croatia, and that instead the Member has simply stated that the applicant's behaviour in not reporting the matters to the police has negated a well-founded fear. The Court has been referred to an extract from **Symes: Caselaw on the Refugee Convention** paragraphs 8.8.3 where the author refers to the protection test as expounded in the Horvath case:

"*...the State may be unwilling to afford protection to a certain class of its citizens if there is widespread and systemic indifference to their plight on the part of law enforcement agencies such as the police and courts……...No state can guarantee the safety of its citizens. And to say that the protection must be effective suggests that it must succeed in preventing attacks, which is something which cannot be achieved. Equally to say that the protection must be sufficient begs the question sufficient for what? In my judgment there must be in force in the country in question a criminal law which the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and the courts, to detect, prosecute and punish offenders. It must be remembered that inefficiency and incompetence is not the same as unwillingness, unless it is extreme and widespread. There may be many reasons why criminals are not brought to justice including lack of admissible evidence even where the best endeavours are made; they are not always convicted because of the high standard of proof required, and the desire to protect the rights of accused persons. Moreover the existence of some policemen who are corrupt or sympathetic to the criminals, or some judges who are weak in the control of the court or in sentencing does not mean that the state is unwilling to afford protection. <u>It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy...</u>"* (my emphasis)

Counsel also referred to a passage from the judgment of La Forest J. in the Canadian case of Ward as follows:

"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 be forthcoming will the claimant's failure to approach the state for protection defeat his claim."

The Court was also referred to another passage from Symes (op. cit.) at para 8.14 where the author states:

"The situation will occasionally arise where the protection of the country of origin has not been investigated. In such circumstances, it is not possible to judge whether there would have been, in the circumstances of the individual, a sufficiency of protection available; so it will then be necessary to gauge whether the system in place was theoretically adequate."

Counsel for the respondent in this case has referred the Court to the s.13 report to which I have referred and to the documentation appended to same I relation to country of origin information regarding the state of the police force and their efforts to deal with protection of minorities and so on. It has been pointed out that in the appeal process the Tribunal is required by statute to have regard to this report, and the fact that he has not gone into the matter of the availability of sufficient state protection is not critical, in circumstances where the question has been considered in the s.13 report and he has had regard to that in the appeal. Some of this documentation refers to the arrest of former Bosnian Croat intelligence officers who were suspected of having participated in mass killings, and that two local Croatian police officers had been charged with providing them with false identity papers, but were acquitted through insufficiency of evidence. There is also documentation form Amnesty International where it is noted that police carried out arrests of persons accused of killing local Serbs, as well as from Organization for Security and Co-operation in Europe (OSCE) Counsel for the respondent has submitted that this documentation certainly would not have been such as to cause the Tribunal or the RAC to be on inquiry as to the position regarding the police in Croatia, and that the applicant has failed to discharge the onus on him to demonstrate to any extent beyond mere assertion that the police would not provide sufficient protection if he had reported the incidents complained of to them.

As far as this ground of argument is concerned, this Court is concerned to ensure that the Tribunal's decision was arrived at in accordance with law - in other words that the process by which the Decision was arrived at was a proper one. The fact that another Tribunal or decision-maker may have reached a different conclusion on the merits is not the point.

It seems to me that in the face of the applicant's statement merely that he did not go to the police because there was no point in doing so since he believed that some of the 'hunters' were police or army personnel, or that he did not report matters to the police because he felt they were not going to do anything because "it was part of their politics", is not putting that aspect of the case very strongly. It is true of course that the onus of proof in these cases is one which is shared between the applicant and the authorities, but that cannot be transformed into saying that once an applicant makes the baldest assertion of a belief, without any hard facts to back it up, that the entire balance of the shared burden of proof shifts over to the authorities. I do not believe that such is what is intended by stating that the burden is a sheared one. The applicant for asylum is obliged in the first instance to make his/her case as best he/she can, and every reasonable allowance must be made for the difficulties in which such a person will find himself in such cases, i.e. in a foreign country, often with a language difficulty, often with no travel or identity papers, often also without the means to prove by documentation the story he/she has to tell as to how and why he/she left their country of origin. The authorities in the host country must be understanding of these difficulties when assessing the application, and a good measure of allowance must be extended to the applicant as far as the benefit of any doubt is concerned, and indeed, the level of literacy and education of the applicant may have to be taken into account. Those persons engaged in the interviewing process, or at any oral hearing of an appeal which may take place are ideally situated to assess to what extent these factors are to be taken into account. But that is a far cry from saying that all an applicant has to do is turn up at an interview and say that he did not feel there was any point in reporting his complaints to the authorities because he does not think that there would be any point in so doing because they would do nothing about it, and that from this point onwards, the burden of proof is thereafter shifted entirely onto the authorities in the host country to disprove that assertion beyond any reasonable doubt. There must be a balance to be struck. In practical terms, if the more the case by the applicant is made in a way which is detailed, cogent, and is rationally based, and not on mere supposition or conjecture, then the greater the burden or onus which shifts to the host authority not to reject what is put forward without having good reason based upon country of origin material and information of substance and beyond real doubt. The benefit of any real doubt must always be given to the applicant. To demand less of such an authority would be to cast too light a share of the shared burden upon such an authority, and by way of corollary, too heavy a share of the burden upon the applicant.

But on the other hand, where the applicant does not put forward any rationally or factually based evidence for a mere statement that he did not feel comfortable in making a report of incidents to the police because he did not think that there would have been any point and that nothing would be done about it, the burden cast upon the host authority to refute such a statement must be lighter, or commensurate with the weight of the assertion made by the applicant. In such a case, surely the host authority can look at country of origin information from recognised sources, such as in the present case Amnesty International or the OSCE, sources often relied upon by applicants themselves, and be satisfied, as in this case, that while the applicant may have genuinely felt that it was pointless to report, there is in fact little or no objective basis for such a fear or reluctance to report.

This seems to be an approach which is entirely consistent with the views of Lord Lloyd in Horvath when he states, as already quoted above, that:
"It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy..."

That suggests to me that the applicant has the burden in the first instance to demonstrate by more than mere assertion of a personal fear or reluctance, and by cogent evidence, that what he states to be the situation is objectively factually based. I am not to be taken by stating matters thus that the host state does not have to share the task of seeking out the country of origin information that might support the applicant's statement. The host authority cannot close its eyes to country of origin information which might tend to lend some support to the applicant's fear as expressed by him/her, and merely look at and avail of for the purpose of a decision only information which favours or points to a rejection of the applicant's fear as well-founded. But a balance must be struck in the search for a fair balance in order to establish reasonably what is the actual situation in the country of origin.

In the present case, the applicant stated what he stated, but did not seek to back his statement by any cogent evidence of any kind. The Refugee Appeals Commissioner's office looked at certain country of origin information which, while recognising that there was in the past some difficulties of the kind which might have lent support to the applicant's fears of reporting, tended in the main to indicate that sufficient progress had been made by 2002 to be a reassurance to local Serbs that their situation was capable of being protected. It seems to me that this consideration by the RAC office was something which the Tribunal was entitled, indeed bound to have regard to. It was certainly material which the Tribunal could take into account in its assessment of the country of origin situation, and provided that the Tribunal considered this aspect of the applicant's case, this Court cannot interfere with its findings, simply because it might have reached a different conclusion on

the same material. That is the essence of judicial review - it is the process of decision-making which is under examination, and not the merits.

The second submission made on behalf of the applicant is against the conclusion reached by the Tribunal that by leaving Croatia for Italy in 2000, 2001 and 2002 and on each occasion returning to Croatia nullified any persecutory fears the applicant may have had. In effect the Tribunal member is saying in this regard that if the applicant had a well-founded fear, both subjectively and objectively justified, he would have applied for asylum in Italy on any of these occasions. What the applicant states in this regard is that he went to Italy on these three occasions for a period of five days to get a break from the stresses and strains of living in his native village, and that he was unaware at that time of the concept of asylum. The RAC found this story not to be credible. That was a conclusion open to the officer in my view given the circumstances of the se visits to Italy as expounded by the applicant, namely that he was taken to Italy in an articulated truck by a man from his village who worked for an Italian company, and that he slept in that truck for the five days. It was open to the RAC and the Tribunal to reach a conclusion that if this applicant was genuinely suffering well-founded persecution during that time, that he would have made an application for asylum in Italy. This finding in relation to credibility is one which was reasonably open to be made.

Thirdly, it is also submitted that the Tribunal was wrong in that it failed to take account of the cumulative effects of all the matters complained of, such as the name-calling by Croats, the hunters shooting in the air, his dog being shot, and the theft of apples, as well as the treatment at the hands of other soldiers while in the army. It is true certainly, and it is recognised in the UNHCR Handbook to be so, that consideration must be given to the cumulative effect of perhaps several or many different incidents complained of in order to assess whether a fear is well-founded.

It is quite possible that one act which could be considered to be persecutory in nature, but when taken in isolation may not be sufficient to give rise to a well-founded fear that if returned to his country of origin he will be the victim of persecution. Similarly, there may have been many incidents, none of which when taken individually or in isolation, could give rise to a well-founded fear of persecution for a Convention reason, but when looked at in a holistic way, or cumulatively, become sufficient to give rise to a well-founded fear if the applicant was to be returned.

But even in such a situation as that, I am of the view that in respect of each such incident, there must be some element of serious discrimination at least in order to include it in the basket of incidents of to be weighed in order to consider the cumulative weight thereof. Otherwise, the exercise becomes the victim of the mathematical inevitability that four times nought is nought. In the present case none of the claims made by the applicant in themselves is of sufficient substance, and when taken together still amount to nought. In effect that is what the Tribunal has found in effect when carrying out its assessment of the subjective fear in the light of the objective information available. In my view that is an exercise which the Tribunal carried out (assessing the cumulative weight) and it was open to them to conclude as they did.

Other submissions made on behalf of the applicant against the decision of the Tribunal are that the Tribunal member erred in finding that the abuse and ill treatment of which the applicant experienced during his time of conscription in the Croatian army was not persecutory in nature; that he failed to take into account the applicant's psychological condition in assessing whether he was persecuted, thereby failing to take into account a material consideration; that he erred in a number of respects in the manner in which he assessed the incidents with the Croatian hunters.

As far as the treatment in the army is concerned, any matters complained of were actions by other soldiers at the level of the applicant, and was nothing of a systematic nature perpetrated against him by the superior officers such as might be capable of supporting a view that there was state sponsored discrimination/persecution of soldiers of Serbian ethnic origin in the armed forces. These matters were considered appropriately by the Tribunal. Individual acts even though they have amounted to bullying by other soldiers, do not automatically amount to Convention persecution. Neither did the applicant make complaint about it to his superior officers. I do not see any error on the part of the Tribunal in its consideration of these matters. It would of course be different if the Tribunal had failed to consider them at all.

Similarly the complaint made against the decision arising out of the manner in which the Tribunal dealt with complaints about the hunters in the forest is not made out. The Tribunal found that these acts, while being no doubt distressing, did not amount to persecution. Complaint is made about the Tribunal member stating that the "applicant was not singled out individually by the hunters", and it is, quite correctly submitted that it is not a precondition of a finding of persecution that the applicant be singled out. Nevertheless the finding in relation to the incidents of the hunters must be read as a whole, and when that is done, it is quite clear that the Tribunal appropriately took into account these incidents both individually as well as in relation to a cumulative assessment of the case, and was entitled to conclude as it did.

I find none of the applicant's submissions made out. The burden on the applicant is to show that there are substantial grounds made out before leave should be granted in this case. That has not been done despite the arguments which have been very ably and forcibly made by the applicant's Counsel.

I therefore refuse leave to seek relief by way of judicial review.