Neutral Citation Number: [2009] IEHC 326

THE HIGH COURT

JUDICIAL REVIEW

2007 1728 JR

BETWEEN

A. A. A. A. D.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT delivered by Mr. Justice McMahon on the 17th day of July, 2009

The applicant was born in 1978. He is a member of the Bidoon ethnic group from Kuwait and has resided in Kuwait all his life. He came to Ireland on the 29th October, 2006, and applied for refugee status on the 27th November, 2006. A recommendation was issued by the Office of the Refugee Applications Commissioner (O.R.A.C.) that he be refused refugee status and he appealed to the Refugee Appeals Tribunal (hereinafter R.A.T.). By a decision issued on the 29th November, 2007, the R.A.T. refused his appeal.

The ethnic group of Bidoon has been severely discriminated against in Kuwait, and are denied basic rights. The applicant was unable to obtain Kuwaiti citizenship, and has no status there. He was arrested and imprisoned on two occasions.

The applicant now seeks leave to issue judicial review proceedings to challenge the decision of the R.A.T.

The applicant appears to be five days out of time in commencing these proceedings, but the reasons for such a delay are set out in an affidavit filed on his behalf. Counsel for the respondent, while not consenting to such an extension of time, did not strongly oppose such an extension in the circumstances of the case, saying that it was a matter for the court. In the circumstances and for the reasons set out in the supporting affidavit of the applicant's solicitor, I grant the extension of time to bring these proceedings.

The two primary legal issues agreed by the parties in this case are:-

> (a) Whether a stateless person, who is outside his country of habitual residence and is not permitted re-entry to that country, qualifies as a "refugee" under s. 2 of the Refugee Act 1996 (as amended by the Immigration Act 2003); and
>
> (b) Whether the R.A.T. erred in failing to consider whether the applicant, as a Bidoon from Kuwait who is without resident status in Kuwait, and so cannot return to Kuwait, is a refugee by reason of his membership of a particular group.

Section 5 of the Illegal Immigrants (Trafficking) Act 2000, indicates that in such a case the applicant must show "substantial grounds" to succeed in obtaining an order for leave. In *Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.L.R.M. 215 at 222, it was held that leave should only be refused where the court is satisfied that the applicant's case could not succeed or where the grounds relied on are not reasonable or are "trivial or tenuous".

The R.A.T. made four core findings (see p. 23 of the decision of the 29th November, 2007):-

> "(i) That the applicant had not shown that he was refused Kuwaiti citizenship unfairly;
>
> (ii) That whilst he was arrested for working illegally this was not improper given that he was not a Kuwaiti citizen;
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> (iii)That he cannot return to Kuwait – 'the appellant is not returnable to Kuwait, given that he has never obtained an Article 17 passport. There is no reasonable likelihood, or indeed even a remote possibility given the evidence outlined above, that the appellant would be accepted for return by the Kuwait authorities in the circumstances'. (At p. 25 of the R.A.T. decision);
>
> (iv)That, whilst it was accepted that the applicant will be imprisoned if returned to Kuwait, he nevertheless cannot fear future imprisonment there because he cannot return to Kuwait."

In respect of the latter two findings, the R.A.T. identified the following legal issue:-

> "A live issue…is whether it can be concluded that someone is at risk of persecution in their country of origin or former habitual residence in circumstances where they will be refused entry to that country. The argument that needs to be resolved is how someone who will not be accepted back by the Kuwaiti authorities would face a real

risk of serious harm in that country." (At p. 23 of the R.A.T.'s decision)

Accordingly, the R.A.T. held that the applicant could not be a refugee simply because there was not a well founded fear of persecution where the admission to the country of former habitual residence was not a possibility.

The applicant's case may be summarised under three headings:-

(i) The Refugee Appeals Tribunal should have applied a literal interpretation to s. 2 of the Refugee Act 1996 (as amended). Had it done so, the applicant could be classified as a refugee.

(ii) A person who is outside his country of former habitual residence and who is categorised as stateless is a refugee only if the reason he cannot return to his country of formal habitual residence is a Convention reason.

(iii)The Refugee Appeals Tribunal failed to determine whether the applicant could not return because of a Convention (i.e. the United Nations Convention and Protocol Relating to the Status of Refugees 1951) reason (i.e. (ii) above) and/or whether the inability to return was itself "persecution" within the meaning of s. 2 of the Act.

The Law

The issue of whether s. 2 (or Article 1A(2) of the Geneva Convention 1951 relating to the Status of Refugees which is the Convention provision transposed into Irish law by s. 2 of the Refugee Act 1996) should be read literally in the case of a stateless person or whether the section must be construed in a purposive way, has been the matter of some controversy in recent years in several jurisdictions. The leading English case is *Revenko v. Secretary of State for the Home Department* [2001] Q.B. 601, where it was held that the purposive approach is the proper approach in such cases. Clark J. subsequently followed this case in this jurisdiction in *S.H.M. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 12th March, 2009).

The Court of Appeal decision in the case of *Revenko i*s neatly summarised in the head note to the case:-

"*Held*, dismissing the appeal, that article 1A(2) should be read as a whole and in the context of the object and purposes of the Convention as a whole; that it set a single test of refugee status for both persons having nationality and stateless persons; that the entire paragraph was governed by the need to show a well-founded fear of persecution on Convention grounds; that such a fear was the prerequisite of refugee status; and that, accordingly, mere statelessness or inability to return to one's country of former habitual residence was insufficient of itself to confer refugee status under the Convention."

From this, it is clear that the preferred approach of the court was that the definition of refugee should be interpreted in the context of the object and purpose of the Convention rather than in a narrow literal way which would mean that stateless persons also would not have to show a well founded fear of persecution on Convention grounds.

Counsel for the applicant urges this Court to depart from this decision (in spite of Clark J.'s espousal of it in *S.H.M.*) because it is not open to the court to adopt a purposive or teleological approach in preference to the literal approach when the latter does not lead to an ambiguity or an absurdity. The applicant cites a dictum of my own in *S.M v. Mental Health Commission* (Unreported, High Court, 31st October, 2008) in support of this argument.

I reject the applicant's argument for two reasons. First, if one were to accept the applicant's argument as to what s. 2 of the Refugee Act 1996 (as amended) means, it would indicate that stateless persons would be treated more favourably than nationals under such a construction. The drafting history, as well as the majority of academics and the comparative jurisprudence does not support this approach. Further, the *Revenko* approach has been adopted by Clark J. in this jurisdiction. Second, even if the applicant is correct and a literal interpretation of s. 2 should be applied, in my view, a proper literal interpretation of the provision would not yield the result advocated on behalf of the applicant (or indeed conceded by the R.A.T. member). Having carefully read the judgments in *Revenko* and the different authorities submitted to the court, I favour the reasoning of Katz J. (referred to at length in *Revenko*) in the Federal Court of Australia in the case of *Savvin v. Minister for Immigration and Multicultural Affairs* (2000) 171 A.L.R. 483 as to what a literal interpretation means. In a closely reasoned judgment, which I will not attempt to paraphrase, Katz J. came to the same conclusion reached by the court in *Revenko*, but by applying a literal interpretation to Article 1A(2) of the Convention. His carefully detailed analysis of the article which is in the very same terms as s. 2 of the Refugee Act 1996, leads him to the conclusion that for stateless persons to fall within the definition of refugee they must also show a well founded fear of persecution for a Convention reason.

Pill L.J. in *Revenko* sets out *in extenso*, Katz J.'s analysis on the issue, which to do justice to Katz's close examination, I must set out in full:-

"75. However, it appears to me that a real question arises whether article 1A(2) does in fact have the natural or literal meaning which has thus far been attributed to it in the cases. As to that question, for reasons which I will now give, I do not attribute to the presence in article 1A(2) of the semicolon the significance which has thus far been attributed to it. Further, giving to the semicolon that significance which I consider appropriate and construing article 1A(2) accordingly, it appears to me that the preferable view is that, on the natural or literal meaning of article 1A(2), it does include the disputed condition.

76. I begin by pointing out that, in the construction of legal instruments, there existed in earlier times a hesitant attitude on the part of the judiciary to the use of punctuation marks as a constructional aid.

I do not find it necessary to set out the illuminating analysis by Katz J of the use of the semicolon, save to refer to his conclusion by reference to a statement of Lord Lowry in Hanlon v. The Law Society [1981] AC 124, 198, that judges may look at the punctuation in order to interpret the meaning of legislation accepted by Parliament. Katz J continued, 177 ALR 483, 500-501:-

82. It is therefore not because I take the view that one should ignore the existence of the semicolon in construing article 1A(2) of the Convention that I reject the correctness of the view earlier expressed in the cases as to the natural or literal meaning of that definition. It is because, even giving the semicolon its full weight as a constructional aid, I take the view that, in accordance with accepted grammatical principles, the semicolon does not do the work of dividing the definition into two independent parts, as has thus far been concluded.

83. The use of semicolons is discussed by Quirk and others in their authoritative work, A Comprehensive Grammar of the English Language (1985) (note the work's use by Mason CJ and Brennan, Gaudron and McHugh JJ in Chew v R (1992) 173 CLR 626, 630-631; 107 ALR 171 and its use by Gaudron J in In re Dingjan; Ex p Wagner (1995) 183 CLR 323, 362; 128 ALR 81). The authors point out (at p 1622) that, typically, the semicolon is used as a replacement for the word 'and', in order to show that 'two independent clauses are regarded as being sufficiently related to belong to one sentence'. They further point out, however (at p 1623), that the use of a semicolon may sometimes be followed by the use of the word 'and', 'but' or 'or'. As to the use of the semicolon in the latter circumstances, they say (emphasis added): 'Such a use (in effect, replacing a comma) is chiefly found in rather formal writing and in sentences whose complexity already involves the use of one or more commas and whose major divisions call for a hierarchically superior punctuation mark if the reader is not to be momentarily puzzled or misled.'

84. Once it is recognised that the semicolon in article 1A(2), preceding, as it does, the use of the word 'or', has the effect, according to accepted grammatical principles, merely of a comma, rather than that of showing that what follows it is an independent clause, then it appears to me that: 'the problem of construction which emerges from the location of the words relating to stateless persons after the semicolon and the absence of any repetition of the reference to persecution as a necessary cause of such a person being outside of the country of former habitual residence …' (to quote (again) something said by the primary judge in the present matter), is to be resolved in a manner different from that in which it has thus far been resolved in the cases.

85. When one reads the words which relate to stateless persons in the later part of article 1A(2) as being part of one complete clause, rather than as comprising in themselves an independent clause, then I consider that the appropriate way to approach their construction is as follows: it is apparent that those words describe a person whose circumstances are to be contrasted with those of the person described in the earlier part of the clause. So much is apparent from the first six of those words, 'or who, not having a nationality'. However, not only do the words in the later part of article 1A(2) describe a person of contrasting circumstances to the person described in the earlier part of the clause. They also suggest naturally a particular point in the description of the first person's circumstances at which the reader is to begin to mark that contrast of circumstances. That point in the description of the first person's circumstances is at the words, 'is outside the country of his nationality' and not earlier . That that is the particular point in the description of the first person's circumstances at which the reader is to begin to mark the contrast of circumstances is demonstrated by the use in the later part of article 1A(2) of the words, 'or who, not having a nationality and being outside the country of his former habitual residence, is …' The form of words which I have just quoted, beginning the contrast of circumstances between the two classes of person part way through the description of the first person's circumstances, avoids the necessity, in what is already a very long clause, to repeat, so far as a stateless person is concerned, the phrase, 'Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', which opens the clause. That opening phrase is instead taken to be impliedly applicable to a stateless person simply by reason of the form of words used in relation to such a person in the later part of the clause.

86. I find the reading which I have just given to article 1A(2) to be an entirely satisfying one linguistically and I therefore consider that that reading, rather than the reading given to the provision both by Cooper J and by the primary judge in the present matter (heavily influenced as that reading appears to have been in both cases by an erroneous view as to the effect of the presence in the provision of the semicolon), represents its true 'natural' meaning."(At pp. 620-621)

I accept the reasoning of Katz J. as being the proper analysis from the literal approach to the article and section and in particular his conclusion that such a literal analysis does not lead to a different result as that arrived at by the majority in *Revenko*. For this reason, I reject the applicant's argument that a literal interpretation of s. 2 would have led to a different conclusion from that arrived at *Revenko* and followed in this jurisdiction by Clark J. in *S.H.B.* In my view, both the literal interpretation as adopted by Katz J. in *Savvin* or the purposive interpretation in *Revenko* defeats the interpretation advanced on behalf of the applicant.

The applicant's submissions, however, do not end here. The more nuanced argument advanced on his behalf, even if the *Revenko* position prevails, is to the following effect: Even if the applicant cannot show a well founded fear of persecution for a Convention reason within the State of Kuwait, because he will not be allowed back there, nevertheless the applicant argues that the reason he is outside Kuwait is because he is being refused entry for a Convention reason, and this refusal itself amounts to "persecution". It has been accepted by the R.A.T. member that the applicant will not be accepted back into Kuwait because he is a Bidoon and this according to the applicant's argument amounts to persecution for a Convention reason.

It seems to me that the very thorough analysis and the ultimate decision of the R.A.T. did not focus on this last point and for this reason I grant leave to bring judicial review proceedings on that single issue only.