Neutral Citation: [2014] IEHC 125

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 326 J.R.]

BETWEEN

R. P.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered the 14th day of March, 2014

1. This is an application seeking leave to apply for judicial review by way of *certiorari* for an order quashing the decision of the respondent dated 10th April, 2008, refusing an application for subsidiary protection.

Background

2. The applicant is a 36 year old Albanian citizen born on the 17th March, 1977, in Tropoje, Northern Albania. He is single and has no children. He attended school in Albania from 1983 to 1995 and worked as a taxi driver from 1998 to 2003.

3. The applicant claims that on 2nd July, 2003, while driving his taxi containing a passenger he was approached by members of a well known criminal family known as the Haklight family, and directed to remove his passenger from the taxi and take them on board as passengers instead. When he explained that he was engaged with another fare, he claims that they pulled him from his car, beat him and produced revolvers and discharged shots. The following day he went with his brother into the city centre where they met these men because he wanted "to clarify" what had happened the previous day. An incident developed during which his brother punched one of the Haklight clan who then shot his brother dead. The following day this death was reported to the police who took no action.

4. The applicant claims that he remained in Tropoje until after his brother's funeral before moving to his uncle's house in Tirana on 10th August, 2003, where he remained indoors until 6th May, 2004. He claims that the uncle with whom he was staying was threatened and kidnapped by the Haklight family for assisting him. His father has also received threatening letters from these people saying that they were going to kill his sons.

5. On 6th May, 2004, the applicant claims that he left for Durres on the Adriatic coast where he stayed in a hotel for one week before finding a truck driver who would take him abroad. He claims that he was unaware of the countries through which they drove, but he arrived in Ireland on 18th May, 2004.

6. The applicant claims that his father, mother, two sisters and younger brother continued to live in Albania, but his brother can no longer attend school because of the fear of being shot and his sisters are unable to go out on their own.

Procedural History

7. The applicant applied for refugee status in Ireland on 19th May, 2004, and claimed a fear of persecution based on a "blood feud" with the family based criminal gang (the Haklight family). A favourable recommendation was refused by the Refugee Applications Commissioner following which he appealed to the Refugee Appeals Tribunal which rejected his appeal. Thereafter, the respondent was informed of the decision and a letter indicating a proposal to deport him (the three options letter) was issued on 29th December, 2005. An application for humanitarian leave to remain in the State was made on his behalf on 10th January, 2006. The respondent then made a deportation order against the applicant on 5th October, 2006. This was five days before the European Communities (Eligibility Protection) Regulation 2006, came into force on 10th October, 2006. However, the applicant was not notified of the making of the deportation order until 17th November, 2006, some five weeks after the subsidiary protection application system had been introduced.

8. The applicant at this stage fell within a category of persons who had not received or been notified of deportation orders made against them prior to the introduction of the new subsidiary protection regulations and system. Such persons were treated in the same way as persons who had not been the subject of deportation orders and were permitted to make subsidiary protection applications. Those who had been served with or notified of deportation orders made against them prior to 10th October, 2006, were not permitted to make subsidiary protection applications. The respondent indicated in the letter of notification that he was prepared to give an undertaking not to execute the deportation order against the applicant before a decision was made on any subsidiary protection application that the applicant might make, but that this undertaking would lapse if an application was not received within fourteen workings days. He received this letter of notification on 20th November, 2006.

9. The applicant then consulted with the Refugee Legal Service in Cork, but they were unable to assist him with an application as at the time, subsidiary protection was not considered to be part of their "refugee" remit. He was advised to retain private solicitors. He did so at the beginning of December, 2006.

10. His new solicitors wrote to the respondent on 5th December, 2006, making an initial formal application for subsidiary protection, but indicating that they would need a short time to assemble country of origin information and supporting documentation. No response was received and country of origin information and supporting materials were submitted on 21st December, 2006. On the same date the respondent, by letter, decided to terminate the suspension of the deportation order. No consideration was given to the application for subsidiary protection. The applicant issued judicial review proceedings as a result which were compromised on 23rd March, 2007, on the basis that the subsidiary protection application would be considered and determined and in particular, that the respondent would consider the detailed submissions made on 21st December, 2006. The applicant was informed in writing that the

subsidiary protection application had been accepted and would be considered in the normal way.

11. The applicant's solicitors made further submissions on 4th May, 2007, which were accepted and acknowledged.

12. On 4th March, 2008, some fifteen months after submitting his application, the applicant was informed that it had been rejected. However, the letter stated that the Minister had decided not to exercise his discretion to accept and consider the subsidiary protection application as follows:-

> "Following consideration of the information submitted on your behalf, it has been concluded that there are no grounds which would enable the Minister to exercise discretion under Regulation 4(2). Consequently, the Minister has decided not to exercise his discretion to accept and consider a subsidiary protection application."

A determination which clearly contained a full consideration of the substantive application for subsidiary protection and setting out reasons for its refusal was enclosed with the letter.

13. On 8th April, 2008, an application was made ex parte for leave to apply for judicial review. Finlay Geoghegan J. directed that the solicitor for the applicant write to the respondent highlighting what the court considered likely to be an error in the letter of 4th March and provide the respondent with seven days to reconsider and withdraw it. The leave application was adjourned to 21st April. In a letter dated 10th April, the respondent replied stating clearly that the letter of 4th March was sent in error and that it should have referred to the applicant's substantive subsidiary protection application as having been refused "in accordance with the regulations" and not on the basis that the Minister had decided not to accept and consider it. After a further adjournment of one week, the court (Birmingham J.) ordered on 28th April, that the Minister be put on notice of the leave application owing to the unusual circumstances of the case. Subsequently, the matter was assigned to the pre leave list to fix dates in August 2009, and thereafter it was indicated that the matter could be dealt with by way of a telescoped hearing.

14. The initial challenge was made to the decision contained in the letter of the 4th March. An amended statement of grounds was furnished dated 9th May, 2008, challenging the decision of 10th April, the letter of 4th March having been withdrawn by the respondent and acknowledged as issued in error. The decision now challenged is that of 10th April, 2008.

The Challenge

15. The amended statement of grounds dated 9th May, 2008, contains seven grounds, six of which (1 to 6) are those upon which the applicant moves this application. Grounds 1 to 3 concern the alleged failure to consider the substantive application and the manner in which the initial application was processed. Grounds 4 to 6 become relevant if the court accepts that the decision of 10th April was a substantive decision and are largely concerned with alleged failures to consider the evidence and material submitted by the applicant and/or all relevant facts relating to the country of origin. A further claim is made that the country of origin information relied upon by the applicant was not disclosed to the respondent. The written submissions and oral argument by counsel ranged over a far wider area than the grounds pleaded.

Grounds 1 to 3

16. By letter dated 5th December, 2006, the applicant solicitors informed the respondent that they had been instructed to apply for subsidiary protection in accordance with the European Community (Eligibility for Protection) Regulations 2006. The respondent had earlier indicated to the applicant that the application for subsidiary protection must be received by 8th December, 2006. Pending receipt of certain information and other instructions from the applicant the solicitors asked the respondent to consider the letter as a "formal application" on behalf of the applicant for subsidiary protection and gave an undertaking to furnish detailed submissions as soon as the relevant information became available and in any event no later than close of business on 12th January, 2007.

17. On 21st December, 2006, a subsidiary protection application was submitted together with country of origin information and the completed form.

18. The documentation included the following country of origin information

(i) Amnesty International Report by Sian Jones dated 23rd June, 2006.

(ii) Letter from Valerie Hughes to the Minister for Justice in respect of the applicant dated February, 2006.

(iii) Report of Research Directorate, Immigration and Refugee Board, Ottawa, Canada dated 20th July, 2004.

(iv) Report of the Guardian newspaper dated 21st September, 2004.

(v) Report from Agence France Presse dated 6th May, 2005.

(vi) Report from Research Directorate, Immigration and Refugee Board, Ottawa, dated March, 2004.

(vii) UK Home Office Report, Albania, April, 2004.

(viii) Extract from UK Home Office Report, Albania, April, 2003.

(ix) A report of the Refugee Documentation Centre in Ireland dated 28th November, 2006, summarising information on Albania from a number of sources including the United States Department of State, Asylum Aid, the BBC, University of Buffalo, New York, United Kingdom Home Office and the Canadian Immigration and Refugee Board.

(x) A report on Albania by the Bureau of Democracy, Human Rights and Labour of the United States Department of State of 8th March, 2006.

(xi) A BBC News Service Report of 23rd September, 2005.

(xii) Extract from Albanian Archive University of Buffalo/State University of New York, April, 2003.

19. This letter crossed with a letter from the respondent noting that no application for subsidiary protection had been made and indicating that an undertaking not to deport the applicant following the making of a deportation order had now lapsed. The applicant commenced judicial review proceedings in relation to this decision (Record No. 2007/26 J.R.) which were compromised on the basis

that the letter of 21st December would be withdrawn, the deportation order suspended and the subsidiary protection application considered in the normal way.

20. In accordance with the settlement terms the applicant's solicitors furnished further country of origin information to the respondent concerning blood feuds in Albania. The applicant furnished the following materials:-

(a) 1st May, 2007,

(1) A report from the Research Directorate, Immigration and Refugee Board of Canada dated the 22nd September, 2006.

(2) Amnesty International report dated 23rd June, 2006.

(b) 18th September, 2007

(1) A police report and translation alleged to concern the death of the applicant's brother and the risk of serious harm which he faced on return to Albania dated 29th December, 2006.

(2) A further copy of the Research Directorate, Immigration and Refugee Board, Ottawa, Canada Report of 22nd September, 2006.

(3) A further copy of the Amnesty International Report dated 23rd June, 2006.

(4) A commentary on a United Kingdom Home Office Republic of Albania Country Report to April 2004, dated 9th August, 2004.

(5) An article by a freelance journalist Agim Kanani based in Tirana dated 25th October, 2001.

(c) 21st September, 2007,

(1) An article from the Wall Street Journal dated 24th August, 2007.

21. By letter dated 4th March, 2008, signed by Mr. Eamon Bennett, the applicant was informed that the Minister had decided not to exercise a discretion to accept or consider the subsidiary protection application under the European Communities (Eligibility for Protection) Regulations 2006, (Statutory Instrument No. 518/2006) which came into effect on 10th October, 2006. The reason was set out in the letter as follows:-

> "The above regulations came into effect on 10th October, 2006, and the deportation order in question was signed by the Minister on 5th October, 2006, and was notified to you by letter dated 17th November, 2006. Consequently, the position is that you are not automatically entitled to apply for subsidiary protection under the above regulation.
>
> Following the decision of in the *Hila* and *Djolo* judgment recently handed down in the High Court, Mr. Justice Feeney held that the Minister had a discretion under Regulation 4(2) of the European Communities (Eligibility for Protection) Regulations 2006 . . . to accept and consider an application for subsidiary protection from an applicant who (a) does not have an automatic right to apply (*i.e.* whose deportation order is dated prior to 10th October, 2006) and (b) has identified new facts or circumstances which demonstrated a change of position from that at the time the deportation order was made.
>
> Following consideration of the information submitted on your behalf it has been concluded that there are no grounds which would enable the Minister to exercise his discretion under Regulation 4(2). Consequently the Minister had decided not to exercise his discretion to accept and consider the subsidiary protection application."

The letter further advised that the Garda National Immigration Bureau had been requested to proceed with the enforcement of the deportation order in respect of the applicant and he was requested to present himself to make arrangements for his removal from the State on a named date.

22. The applicant was not notified of the making of the deportation order until 17th November, 2006, five weeks after the new subsidiary protection application system was introduced. Persons notified of the making of a deportation order after the coming into force of the subsidiary protection regulations were treated in the same way as persons who did not have deportation orders made against them. The notification letter informed him that he had fourteen days to make a subsidiary protection application which gave rise to the correspondence outlined above commencing on 5th December, 2006.

23. A determination of the subsidiary protection application signed by Mr. Gareth Hargadon, Executive Officer on 1st February, 2008, Mr. Sean A. Montgomery a Higher Executive Officer on 18th February, 2008, and Ms. Lorena M. Gradwell, Assistant Principal Officer on 26th February, 2008 was enclosed with the letter of 4th March.

24. This document was headed "Determination of application pursuant to the European Communities (Eligibility for Protection) Regulations 2006, S.I. No. 518/2006". It outlined accurately, the serious harm claimed and contained an assessment of facts and circumstances under Regulations 4 and 5. It contained various extracts from country of origin information and conclusions reached in respect thereof, and under a heading "Exclusion from subsidiary protection (delete if not appropriate)" it stated "not applicable in this case". Mr. Hargadon stated that he had considered the papers on file in respect of the application and concluded that the applicant had not shown substantial grounds for believing that he was at risk of suffering serious harm if returned to Albania. Similarly, Mr. Montgomery stated that he had considered the papers in the case and recommended that subsidiary protection be refused. Ms. Lorena Gradwell agreed with these recommendations and accordingly, determined that the applicant was not eligible for subsidiary protection.

25. It was clear at that stage having regard to the settlement of the previous judicial review proceedings, the furnishing of extensive submissions and materials in support of the application, the course of correspondence between the parties and the content of the

determination accompanying the letter of 4th March, that the letter was drafted in error. This possibility was abundantly clear to Finlay Geoghegan J. to whom the *ex parte* application was made seeking leave to apply for judicial review in respect of the letter and who adjourned the application to enable a letter to be written to the respondent querying whether the letter of 4th March was, in fact, an error. This was rapidly confirmed. A substantive determination had been made by the respondent, but an incorrect covering letter had been drafted and issued to the applicant which misstated the nature of the decision. On 21st April, the solicitors for the applicant received a letter from the Chief State Solicitors Office which explained the error and enclosed a further copy of the substantive determination in the case. The letter stated:-

> "We refer to the application in the above matter and your correspondence of 8th April last.
>
> Enclosed herewith please find a copy of correspondence that issued to your client from the Irish Naturalisation and Immigration Service on 10th April last. As you will note the INIS has withdrawn the letter of 4th March, 2008. In addition the INIS has informed your client that the Minister has considered your client's application for subsidiary protection and has determined that your client is not eligible for subsidiary protection.
>
> As we advised your office of the telephone last week, we have been instructed that the Minister has denied your request for an undertaking not to deport your client."

26. The letter sent to the applicant on 10th April was also signed by Mr. Eamon Bennett and stated:-

> "The letter of 4th March, 2008 refers to Regulation 4(2) of the European Communities (Eligibility for Protection) Regulations 2006 . . . whereas it should have referred to your application for subsidiary protection. Please find attached considerations in relation to your application for subsidiary protection.
>
> I am directed by the Minister for Justice, Equality and Law Reform to refer to your letter dated 23rd January, 2008, concerning your application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 S.I. No. 518/2006 (the regulations).
>
> Your application was considered in accordance with above regulations and the Minister has determined that you are not a person eligible for subsidiary protection. The outcome of the consideration is that the Minister's earlier decision to make a deportation order in respect of you remains unchanged. A copy of the report setting out the Minister's determination is enclosed for your information."

The enclosed determination was identical to that furnished in the previous letter of 4th March.

27. I am satisfied that Mr. Bennett's letter of 4th March was drafted and issued in error. A determination on the substantive merits of the subsidiary protection application was made and, therefore, it was clear to the applicant's solicitor, notwithstanding the covering letter of 4th March, that the subsidiary protection application had been received and considered and that a determination had been reached. At that stage a simple letter seeking clarification in relation to this error as indicated by the High Court on the *ex parte* application would have ensured a correction of this error. This was done. The error was regrettable but the appropriate notification of the decision was then issued.

28. I am not satisfied that the respondent decided not to exercise his discretion to accept and consider the subsidiary protection application as stated in the letter of 4th March. It is clear that the analysis accompanying the letter of 10th April, 2008, was the same as that which accompanied the letter of 4th March. The contention that this analysis was originally prepared for what was considered to be an application to the Minister to exercise discretion to admit and process the subsidiary protection application takes no account of and is at variance with the contents of the determination. I am entirely satisfied that the respondent considered and determined the applicant's substantive application for subsidiary protection and that there is no stateable or arguable ground upon which to grant leave to apply for judicial review of the respondent's decision in respect of Grounds 1 to 3.

Grounds 4 to 6

29. The applicant claims that the respondent has failed to consider any of the evidence submitted by the applicant accompanying the application. In particular he complains that there is no reference in the determination to any of the up to date Canadian Immigration Refugee Board country of origin information (September 2006) submitted twice by the applicant which indicated that a European Commission delegation to Albania had stated that the "very fragile Albanian State had failed to control the blood feud phenomenon" and that an expert history professor had told the Research Directorate that the Albanian government "had not taken any effective measures to combat blood feuds". It was alleged that there was no reference to the police report from Albania about the death of the applicant's brother in the blood feud which had been submitted by the applicant's legal representatives.

30. The determination states that due consideration had been given to all documents on file. A decision maker is not obliged to cite or quote each and every report or article submitted on behalf of the applicant. However, the court is satisfied that extracts from the Immigration and Refugee Board of Canada reports were quoted in the determination. It is entirely a matter for the decision maker to consider the reports and their contents and to assess the information submitted. That information may contain some negative components, but it is for the decision maker to assess the broad thrust of the information as was clearly done in this case.

31. It was further submitted that the respondent had failed in his obligations to consider the relevant statements made and documentation presented by the protection applicant in accordance with the mandatory requirements of Regulation 5(2)(b) of the European Communities (Eligibility for Protection) Regulations 2006, and that he had failed to consider all relevant facts as they related to the country of origin at the time of taking the decision in accordance with the mandatory requirements of Regulation 5(2)(a) of the same Regulations. In addition, it was argued that country of origin information relied upon by the respondent was not disclosed to the applicant.

32. Regulation 5 of the 2006 Regulations requires that certain matters be taken into account by a protection decision maker and these include:-

> "(a) All relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;
>
> (b) The relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) The individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

…"

33. The eight page determination in respect of the application for subsidiary protection outlines the claim accurately and in accordance with the documents submitted on behalf of the applicant. The submissions made on behalf of the applicant were accompanied by reports referred to earlier. The determination commences with a quotation from country of origin information submitted by the applicant which indicated that:-

"Regarding the level of protection available to victims since 2003 reports stated that Albanian authorities failed to halt vengeance killings."

The determination then quoted from the European Commission 2006 Progress Report on Albania which stated that there had been new amendments to the criminal code which specifically provided for the punishment of instigators of blood feuds. It acknowledged, however, that there had been no progress on the establishment of a coordination council to develop a national strategy against blood feuds and to coordinate the activities of relevant government agencies. It was noted that lack of reliable data on the extent of the problem hindered appropriate action.

34. The determination then quoted from Operation Guidance Notes on Albania from the UK Home Office (April, 2007) which provided a further commentary on legal developments and the level of state protection available to victims and potential victims of blood feuds. It noted that Albanian criminal law provided for sentences of twenty years to life imprisonment for killings linked to a blood feud. There was no evidence to indicate that individual Albanians fearing the actions of those seeking to carry out a blood feud could not access protection from the Albanian police and avail of other legal protections. The notes contain a conclusion that the Albanian government was able and willing to offer effective protection for its citizens who are the victims of a blood feud, but there may be individual cases where the level of protection offered is, in practice, insufficient. It was noted that the level of protection should be assessed on a case by case basis taking into account what the applicant did to seek protection and what response was received. It was also considered that internal relocation may be appropriate in some cases.

35. In addition, the determination quoted from the report of the Immigration and Refugee Board of Canada which cited a number of other reports from 2006 concerning the availability of police protection and the effectiveness of the judiciary. The extracts quoted from this report included conclusions reached by the United Kingdom Home Office (12th January, 2006) concerning police protection (already cited) and a BBC report of 23rd September, 2005. It was noted that the information supplied by the history professor supported information available that police officers, though known to assist in a reconciliation process between feuding parties, were discouraged from intervening by the fact that their involvement tended to aggravate the situation and could put their lives at risk. It was also noted that in some cases the police advised targeted persons to temporarily leave an area, although further information on the effectiveness of this procedure could not be found amongst the sources consulted.

36. On the basis of the quoted material, a conclusion was reached that although blood feuds remained a serious problem in Albania, there were avenues of complaint and recourse was available to persons who felt threatened by blood feuds.

37. The determination also notes (again quoting from the report from the Immigration and Refugee Board of Canada) that there were non-government organisations available for people to contact for assistance. A number of groups engaged in mediation in feud related conflicts. There were numerous mediation centres located in a number of cities and districts of Albania.

38. The determination quotes liberally from and relies heavily upon the contents of the materials submitted by the applicant. There is no substance to the specific allegations contained in Ground 4. It is clear that the material cited in Ground 4 was cited and quoted in the determination.

39. A complaint is made that a police report concerning the applicant's brother's death was not referred to in the determination. It is dated 29th December, 2006, some 21 months after the Refugee Appeals Tribunal decision. The determination notes that the applicant never sought state protection following his brother's death and concluded on the basis of the country of origin information supplied that state protection was available to those who were potential victims of blood feuds.

40. The applicant also complains that a conclusion was reached that his credibility was "weakened by the inconsistencies present in his account" as given previously to the office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. Four inconsistencies were highlighted. One of the inconsistencies referred to the applicant's initial claim in his asylum questionnaire that he, himself, reported the incident of his brother's death to the police. At his appeal hearing he stated that he did not report the incident, but that his mother had and that he had written his own name on the questionnaire in error. It was claimed that the determination should have taken into account the report submitted from the police in Albania supporting the proposition that his mother reported the matter.

41. I am satisfied that all documents (including the police report) were considered appropriately by the officials and that the issue of the applicant's credibility in respect of the inconsistency must be viewed in the context of the overall conclusions reached in this case. It is not appropriate to deconstruct a decision by subjecting its individual elements to isolated examination. The court is satisfied that this was not a case in which the decision maker simply adopted conclusions on credibility reached by the Refugee Appeals Tribunal. Insofar as it considered the issue of credibility, it did so by reference to the inconsistencies apparent from the papers in the case. This matter was a relatively minor element of the overall assessment made. The court is satisfied that the substance of this decision lies in its consideration of the country of origin information in respect of state protection for those said to be in fear from a blood feud. I am not satisfied that the applicant is entitled to relief on this basis.

42. A further claim is made of a more general nature that the respondent failed to consider the country of origin information adequately and, in particular, failed to have proper regard to those aspects that favoured the applicant's case. I am satisfied that there is no basis for this submission. It is a matter entirely for the decision maker to consider the country of origin information available and to assess it appropriately. In this case there is nothing to suggest that the decision maker arbitrarily preferred one piece of country or origin information over another and, indeed, there is no major conflict in all of the material submitted as to the incremental if slow improvements in the functioning of the police and judiciary and other arms of the Albanian State since in or about 2001.

43. Furthermore, I am not satisfied that there is any substance in the complaint made that the respondent failed to put the most

recent Home Office Report to the applicant which is cited and relied upon in the determination. It is a report which consolidates much of the information which had been submitted by the applicant up to 2006. It was readily available from a source that is well known, to the applicant's legal advisers and to others involved in the immigration and asylum systems. It was readily accessible and I am satisfied that the respondent was under an obligation to ensure that the country of origin information relied upon was up to date. I do not consider this process involved any unfairness to the applicant (see *F.N. v. Minister for Justice* [2009] 1 I.R. 88 at paras. 54 – 55).

44. A number of submissions were made concerning issues which are outside the scope of the grounds relied upon in this case complaining that there is no appeal against a refusal of subsidiary protection. These matters were dealt with comprehensively by Cooke J. in *V.N. (Cameroon) v. Minister for Justice and Law Reform & Refugee Appeals Tribunal* [2012] IEHC 62 and could not, therefore, have been successfully advanced as a ground in this case.

45. I am not satisfied that the applicant is entitled to any of the relief claimed on the basis of Grounds 4 to 6.

46. I am, therefore, not satisfied that the applicant has established an arguable case in respect of any of the grounds advanced, and I refuse the application.