Neutral Citation Number: [2011] IEHC 354

THE HIGH COURT

JUDICIAL REVIEW

2009 955 JR

BETWEEN

E. D. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND G. D.)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Ms. Justice Elizabeth Dunne delivered on the 31st day of May 2011

1. This is an application for leave to apply for judicial review in respect of the decision of the Refugee Appeals Tribunal, notified to the applicant by letter dated 25 August 2009. The relief sought is primarily an order of *certiorari* quashing the decision of the Tribunal recommending that the applicant be refused a declaration of refugee status.

Background

2. The applicant was born in the State on 6 June 2006. His parents are Albanian-speakers from Serbia and are members of the Ashkali ethnic group, regarded as Roma in their country of origin. An application for refugee status was made on behalf of the minor applicant on 1 May 2008. The Refugee Applications Commissioner (RAC) recommended that the application should be rejected on 12 June 2008. This recommendation was appealed to the Refugee Appeals Tribunal. At the appeal stage before the Tribunal, extensive extracts of country of origin information were submitted on behalf of the applicant which it was claimed, evidenced extremely severe discrimination against members of the applicant's ethnic group in Serbia, in addition to a systemic failing on the part of the Serbian government to eradicate such discrimination. The effect of the discrimination was submitted to include a high mortality rate amongst Roma children, lack of protection against physical attacks, exposure to ethnically-motivated attacks and abuse, inhuman and degrading living conditions, abject poverty, an inability to obtain identification documents leading to a deprivation of access to all services, lack of access to schools, deprivation of healthcare and lack of access to housing and employment.

3. By letter dated 25 August 2009, the Refugee Appeals Tribunal upheld the negative recommendation made by the RAC in the decision that is the subject-matter of these proceedings, as the Tribunal member was not persuaded that the discrimination the applicant may suffer if returned to Serbia "will rise to the level of persecution". The proceedings were instituted on 18 September 2009; approximately one week outside of the statutory time-limit provided for by section 5 of the Illegal Immigrants (Trafficking) Act, 2000. At hearing, it was agreed that in the circumstance where the court is satisfied that substantial grounds for leave have been established, the respondent would not take issue with a grant of an extension of time.

Summary of Submissions

4. Counsel on behalf of the applicant first submitted that the Tribunal member erred in law in respect of the concept of persecution and, in particular, that she failed to recognise that discrimination can amount to persecution. It was submitted that paragraphs 53-55 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* hold that various discriminatory measures can reasonably justify a well-founded fear of persecution on cumulative grounds, that it may constitute persecution when discrimination leads to consequences of a substantially prejudicial nature for a person concerned such as imposing restrictions on access to educational facilities, or where discriminatory measures of a non-serious character nevertheless produce a feeling of apprehension and insecurity in the mind of the person concerned as regards his future existence. The applicant submitted that the Tribunal member erred therefore, in stating that the fact that the applicant may not receive a basic education does not satisfy the requirement of the presence of persecution and erred in not providing a reasoned analysis as to why the discrimination faced by the applicant did not constitute persecution in accordance with the UNHCR Handbook.

5. The applicant further argued that the Tribunal member's purported reliance on *The Law of Refugee Status*, Butterworths, 1991, by Professor James Hathaway, failed to apply properly or fairly the principles developed therein, particularly, that a well-founded fear of persecution could include "an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear." It was submitted that Professor Hathaway stated that exclusion of a minority from enjoyment of rights to education, healthcare, housing and work due to discrimination could constitute persecution. The applicant argued that the Tribunal member erred in law in holding that the possible discrimination faced by the applicant in Serbia does not amount to the denial of human dignity in any key way as it was submitted that much of the discrimination complained of breached international law, law of the EU and the provisions of the European Convention on Human Rights.

6. The applicant further argued that the Tribunal member made a material error of fact in her decision to the effect that the UNHCR had stated that Ashkali could be returned to the applicant's country of origin. In the course of the decision, the Tribunal member stated that "the UNHCR has ceased, some years ago, recommending that this ethnic grouping not be returned." In fact, the UNHCR had issued guidance in respect of the return of members of the applicant's ethnic group to Kosovo, and did not refer to Serbia, the country of origin of the applicant's parents. It was submitted that this was a significant error in that the position of the UNCHR in relation to Kosovo was based on the presence of a UN peace-keeping force in Kosovo and a UN administration in place. In addition, Kosovo is Albanian-speaking. It was submitted that a material error of fact could lead to a grant of certiorari (*M.L. v Minister for Justice, Equality and Law Reform,* Unreported, High Court, Hogan J., 19 January 2011).

7. The respondent submitted that it is a well-established principle that the weight to be attached to country of origin information or

other evidence is one to be determined by the decision-making body. The respondent further submitted that the Tribunal member accepted that the applicant may be subject to discrimination and that her view, that this discrimination did not suffice to amount to persecution, was a matter solely within the jurisdiction of the Tribunal. It was argued that as there was a clear basis for the decision, it should not be interfered with.

8. Finally, the respondent submitted that the reference to a UNHCR report relating to Kosovo did not form the basis of any aspect of the impugned decision and that it was clear the decision was made on the basis of considering the situation of Roma in Serbia, not Kosovo.

Decision
9. Essentially, there are three separate grounds on which the applicant seeks to challenge the decision of the Tribunal member. The first of these relates to the concept of discrimination and the argument that discrimination can amount to persecution. The second grand relates to the apparent reliance by the Tribunal member on Hathaway, The Law of Refugee Status, given that the Tribunal member having relied on the principles set out therein, failed to apply those principles properly. In essence, this ground of challenge relates to the view expressed in Hathaway that a well founded fear of persecution could include "an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear."

10. It is not necessary for me to reiterate at this point the submissions made as to the cumulative effect of discrimination and the argument that such cumulative effect can amount to a well founded fear of persecution. Suffice it to say that I think that the applicant has raised substantial grounds to challenge the decision of the Tribunal member in relation to the question whether and in what circumstances the cumulative effect of discrimination can amount to a well founded fear of persecution.

11. The final ground relates to what is described as an error of fact on the part of the Tribunal member. This relates to the reliance on a UNHCR statement giving guidance on the return of members of the Ashkali ethnic group to Kosovo. The applicant in this case has a country of origin of Serbia and the position in relation to Serbia is not the same as that in relation to Kosovo, it was submitted. It appears that the Tribunal member did place reliance on the UNHCR statement and therefore, it seems to me that a substantial ground has been raised as to whether or not that was a material error on the part of the Tribunal member going to the heart of the decision.

12. Accordingly, I propose to grant leave on the grounds relied on by the applicant herein.