Neutral Citation No. [2005] IEHC 141

THE HIGH COURT
JUDICIAL REVIEW

No. 2004 430 JR

IN THE MATTER OF THE ILLEGAL IMMIGRANTS TRAFFICKING ACT, 2000, AND IN THE MATTER OF ORDER 84 OF THE RULES OF THE SUPERIOR COURTS, 1996
AND IN THE MATTER OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN

ELENA NELA MOLDOVAN
V
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

Judgment of Gilligan J. delivered on the 29th day of April, 2005.

1. The applicant is a Romanian national who arrived in Ireland on 13th September, 2002. She was born on 8th March, 1975, and was married on 20th May, 1991. She has one son who was born in 1990 and who is currently residing in Romania. The applicant is an Orthodox Christian.

2. The applicant applied for asylum based on a fear of persecution due to her membership of the Roma community. She said that on 17th January, 1996, her house was burned down and that since that date, she and her husband had been without accommodation in Romania as the council refused to provide them with another house. The applicant says she believes the house may have been petrol bombed. She stated that she was unable to get work in Romania because of discrimination against members of the Roma community. The applicant was never gainfully employed. She also felt she had been discriminated against in the area of health.

3. The applicant's application for asylum failed at first instance and on appeal to the Refugee Appeals Tribunal. The Tribunal member applied s.2 of the Refugee Act, 1996 (as amended) and found that the applicant had failed to establish a "well founded fear" of persecution. The Tribunal member stated that the term "well founded fear" imports a subjective and an objective element, both of which must be taken into consideration, and in this instance, he found that the applicant had failed to establish the objective dimension of her alleged fear of persecution.

4. In relation to the subjective dimension of her alleged fear, the significant event is the house fire which occurred in 1996. Although the applicant stated her belief that the fire may have been started by a petrol bomb, the Tribunal member found that she had adduced no evidence whatsoever to substantiate this belief. Furthermore, a newspaper submitted by her husband as part of his application stated that the spokesperson for the local fire service believed the explosion was caused by a gas heater.

5. In relation to the applicant's claim that that she felt discriminated against in the areas of housing, employment and health, the Tribunal member acknowledged the unfortunate circumstances of the applicant's situation in Romania. However, he held that there was no evidence to suggest that they were the result of persecution on the basis of the applicant's membership of a particular ethnic group.

6. The Tribunal member then considered the US Department of State Country Reports on Human Practices in relation to Romania which was published on 31st March, 2003, and determined that there were sufficient structures and institutions in place in the applicant's country of origin to deal with the applicant's complaints.

7. Having examined all the evidence and submissions on behalf of the applicant, the Tribunal member was satisfied that her appeal must fail as she had failed to establish an objective dimension to her alleged fear. He determined therefore that she did not have a well founded fear of persecution and affirmed the recommendation of the Refugee Applications Commissioner.

2. Relief sought

8. The application is made pursuant to s.5 of the Illegal Immigrants (Trafficking) Act, 2000 for leave to proceed by way of judicial review to seek to quash the decision of the Tribunal member to refuse refugee status.

9. The applicant applies for leave to seek:

> (1) an order of *certiorari* quashing the recommendation of the Refugee Appeals Tribunal that the applicant be refused a declaration of refugee status and
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> (2) a declaration that the provisions of s.6(11)(a)(i) of the Refugee Act, 1996, (as amended) are repugnant to the provisions of Bunreacht na hÉireann, 1937.

3. Applicant's Submissions

10. The grounds on which the applicant applies for leave for judicial review are set out in the statement of grounds filed on the applicant's behalf on 18th May, 2002.

> (a) It is contended, on behalf of the applicant, that in arriving at his decision, the Tribunal member failed to have regard to the subjective element of persecution and consequently, failed to make a proper decision as to whether she has a well-founded fear in accordance with s.2 of the Refugee Act, 1996. In relation to this subjective element, counsel referred to the belief of the applicant that her house was petrol bombed. Counsel also contended that in making his determination, the Tribunal member drew his conclusion on the basis of evidence not in the applicant's file but in her husband's file.
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> (b) It is contended that the Tribunal member made an error of law in failing to evaluate the evidence of discrimination against the applicant in relation to housing. The applicant's evidence was that following the burning of her house, the council failed to provide her with another house.
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> (c) It is submitted that the Tribunal member selected objective evidence in a partial and biased manner.
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> (d) It is asserted that the Tribunal member wrongly failed to consider direct evidence of the suspected petrol bombing of the applicant's house.

(e) It is contended that the Tribunal member failed to have regard to the United Nations Handbook on Procedures and Criteria for determining Refugee Status.

(f) It is asserted that the Tribunal member failed to apply the benefit of the doubt to the applicant.

(g) It is submitted that the Tribunal member failed to consider the reasons for the fear of persecution that were set out in the applicant's ground of appeal. The applicant contended that in arriving at his decision, the Tribunal member only considered the fear of persecution on the ground of race but did not deal with the possibility of persecution on the basis of either nationality or membership of a particular social group.

(h) It is contended that the decision of the Tribunal member was unconstitutional as he failed summon a specified witness. To support this contention, the applicant relies on s.16(11)(a) of the Refugee Act, 1996 and s.9(3) of the Refugee Act 1996 (Appeals) Regulations, 2002.

11. Section16(11)(a) of the Refugee Act 1996 provides that:

"For the purposes of an oral hearing (if any) under this section, the Appeal Board may—

(i) direct in writing any person whose evidence is required by the Appeal Board to attend before the Appeal Board on a date and at a time and place specified in the direction and there to give evidence and to produce any document or thing in his or her possession or control specified in the direction,

(ii) direct any such person to produce any specified document or thing in his or her possession or control, or

(iii) give any other directions for the purpose of an appeal that appear to the Appeal Board reasonable and just.

12. Regulation 9(3) of the Refugee Act 1996 (Appeals) Regulations, 2002 provides that:

"(a) Where the notice of appeal includes a request to the Tribunal to direct the attendance of a witness before the Tribunal, the Tribunal shall in respect of each such witness determine whether he or she should in accordance with section 16(11) of the Act of 1996 be directed to attend before the Tribunal."

(b) In making a determination under subparagraph (a), the Tribunal shall have regard to the nature and purpose of the evidence proposed to be given by the witness as indicated in the notice of appeal.

(c) Where the Tribunal determines that a witness should attend before it, it shall direct the witness to attend in accordance with section 16(11) of the Act of 1996."

13. Counsel for the applicant asserted that when the applicant entered a Notice of Appeal to the decision to refuse her refugee status, she requested the Refugee Appeals Tribunal to direct the attendance of her husband at the hearing of her appeal. It is stated that the decision of the Tribunal member records no attendance by this witness.

14. The applicant contends that the Tribunal member should have permitted the attendance of the applicant's husband as a witness, generally, to allow evaluation of events in Romania and, specifically, to allow him to comment on the evidence from his file that was relied on by the Tribunal member.

15. It is contended by the applicant that the failure to direct the attendance of her husband as a witness breached the applicant's right to summon a witness to corroborate evidence which is founded on the constitutional principles of fair procedures and due process. In relation to this contention the applicant relies on the case of In *Re Haughey* [1971] I.R. 217, where the Supreme Court held that there was a constitutional right to cross-examine witnesses to an inquiry and the case of *Paul O'Regan v. D.P.P. and District Judge Uinsinn MacGruairc* [2000] 1 I.L.R.M. 68, where the Supreme Court held that there was a right in law for a party to call such witnesses as they considered material.

16. The applicant further relied on Article 6(3)(d) of the European Convention on Human Rights which provides that everyone charged with a criminal offence has the right:

"to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

17. The applicant relied on the decision of the European Court of Human Rights in *Vidal v. Belgium* (judgment of 22 April 1992, Series A no. 235-B, p. 32, § 33) and submits that the Court held that the right to examine witnesses under Article 6 of the European Convention on Human Rights is also applicable to non-criminal proceedings where basic rights are in issue.

(i) The applicant further seeks a declaration that s.16(11)(a)(i) of the Refugee Act 1996 (as amended) is repugnant to Bunreacht na hÉireann on the ground that it reserves to the Refugee Appeals Tribunal a discretion as to whether to direct the attendance of witnesses. It is submitted that this statutory provision removes the right to summon a witness to corroborate evidence or makes it conditional on the decision maker's consent and is thus repugnant to the Constitution.

4. Respondents' Submissions

18. In response, counsel for the respondents makes the general submission that the applicant has failed to reach the 'substantial grounds' standard for judicial review set out in s.5 of the Illegal Immigrants (Trafficking) Act 2000, which states:

"An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall - ….

(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

19. In relation to determining how the 'substantial grounds' standard for judicial review ought to be interpreted, the respondents rely on the decision of the Supreme Court in *Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, in particular at p. 394:

> "In *McNamara v. An Bord Pleanala (No.1)* [1995] 2 I.L.R.M. 125, Carroll J. interpreted the phrase "substantial grounds" in the provisions of the Planning Act of 1992 as being equivalent to "reasonable", "arguable" and "weighty" and held that such grounds must not be "trivial or tenuous". Although the meaning of the words "substantial grounds" may be expressed in various ways, the interpretation of them by Carroll J. is appropriate."

20. The respondents further refer to the recent observation of Finlay Geoghegan J in *Biti v. Ryan acting as the Refugee Appeals Tribunal* (unreported, Finlay Geoghegan J, 24 January 2005). In the context of judicial review under s.5 of the Illegal Immigrants (Trafficking) Act 2000, Finlay Geogeghan J observed that an application of the 'substantial grounds' standard in s.5 of the Act to the test in *G. v. D.P.P.* requires the applicant to establish, *inter alia*:

> "(i) that the facts averred to in the affidavits would be sufficient, if proved, to support substantial grounds for the form of relief sought by judicial review; and
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> (ii) that on those facts substantial grounds in law can be made out that the applicants are entitled to the relief which she seeks."

21. The respondents submit that the grounding affidavit of the applicant's solicitor, fails to set out matters of fact sufficient to establish substantial grounds for any of the grounds on which judicial review is sought. The respondents assert that the affidavit does not verify any issues of fact and that it cannot be said to formally verify the Statement of Grounds.

22. Counsel for the respondents makes further submissions:

> (a) In relation to the alleged failure to have regard to the subjective element of persecution, the respondents submit that the Tribunal member referred to both the subjective and objective elements of the test of persecution in his Decision. In relation to the subjective element, the respondents point out that the Tribunal member considered the incident in relation to the applicant's house and submit that this, together with the reference to the alleged discrimination in relation to employment and health, constitutes an assessment of a genuine subjective fear.
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> The respondents further refer to the U.N.H.C.R. Handbook on Procedures and Criteria for Determining Refugee Status which states at para.38:
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> > "To the element of fear – a state of mind and a subjective condition – is added the qualification 'well-founded.' This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded' therefore contains a subjective element and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration."
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> The respondents argue that this means that even if a subjective fear is established, it cannot by itself compensate for the absence of an objective dimension to the fear of persecution.
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> (b) In relation to the applicant's submission that the Tribunal member failed to evaluate the evidence of discrimination in relation to housing, the respondents state that the Decision clearly refers to the lack of evidence to suggest that the applicant's difficulties in relation to housing were "the result of persecution because of or for reasons of the applicant's alleged ethnicity". The respondents point out that a want of accommodation could only be evidence of persecution if it could be proved to be a consequence of discrimination. They further submit that there are sufficient structures and institutions in place in the applicant's country of origin to deal with her complaints.
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> (c) In relation to the applicant's submission that the Tribunal member selected objective evidence in an impartial and biased manner, counsel for the respondents stated that no evidence has been offered to support this extremely serious allegation. The respondents submit that it is open to the Tribunal member to choose data or information that he believes to be relevant. Furthermore, they assert that there was no evidence that there was any contradictory information in relation to the applicant's country of origin and that the affidavit of Niall Sheerin, the applicant's solicitor, makes no reference to there being alternative evidence in existence at the time the Decision was published.
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> (d) In relation to the alleged failure to consider evidence of the petrol-bombing of the applicant's house, the respondents submit that the Tribunal member clearly considered direct evidence of this event in the form of the applicant's own statement. However, the applicant was not definite about her alleged view that the house had been petrol bombed and in the absence of any independent evidence supporting this possibility, the Tribunal member was not convinced. Furthermore, in light of the fact that the Tribunal member had before him, evidence which suggested that a gas leak was the cause of the fire, he was entitled to come to the conclusion contained in his Decision.
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> (e) In relation to the alleged failure to have regard to the U.N.H.C.R Handbook, the respondents submit that no evidence has been provided to support this claim. The affidavit of the applicant is silent in this regard and this assertion is too vague to constitute a ground in itself.
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> (f) In relation to the applicant's submission that she is entitled to be given the benefit of the doubt, the respondents contend that this does not mean that every assertion made by the applicant must be accepted or even be given any greater weight than any other evidence. The respondents refer to para.204 of the Handbook which states that:
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> > "The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."
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> (g) In relation to the applicant's submission that the Tribunal member erred in confining himself to a consideration of

persecution on the ground of the applicant's ethnicity, the respondents submit that this is not an intelligible objection. The real issue to be decided is whether the applicant has a well-founded fear of persecution because she is a member of the Roma community and the Tribunal member had decided this issue.

(h) In relation to the alleged unconstitutional failure to summon a witness specified by the applicant, the respondents assert that there is no evidence to substantiate this submission. The applicant's signed Notice of Appeal, which is exhibited with the affidavit of her solicitor, lists her husband as a proposed witness but fails to request the Tribunal to direct his attendance.

Furthermore, although the Tribunal member has the discretion to decide whether or not to direct the attendance of a witness in accordance with s.16(11)(a) of the Refugee Act, 1996 and Regulation 9(3) of the Refugee Act 1996 (Appeals) Regulations, 2002, the respondents state that a witness may also attend voluntarily. However, although the applicant's husband could therefore have attended voluntarily, there is no evidence adduced to show whether an application was made at the hearing to have his evidence heard.

(i) In relation to the constitutional challenge to s.16(11)(a)(i) of the Refugee Act 1996, the respondents submit firstly that the applicant lacks the *locus standi* necessary to make a challenge to this section as there is no evidence to show that she has been adversely affected by the operation of this section.

The respondents further submit that it is not, in any event, appropriate to grant leave to challenge the constitutionality of this provision in these proceedings. They refer to a number of cases which support the proposition that a court will only pronounce on the validity of a statute if it is essential for the disposition of the case before it, including *Condon v. Minister for Labour* [1981] I.R. 62 in which the Supreme Court said at p.70:

> "As a general rule, the Court does not determine constitutional issues when some non-constitutional point makes it possible to dispose of the case…"

23. The respondents finally submit that there is no merit to the constitutional challenge sought to be made by the applicant. They submit that the cases cited by counsel for the applicant in support of the challenge deal with the constitutional requirements for an adversarial criminal trial. They contend that, being inquisitorial in nature, the decision-making procedure before the Tribunal is not comparable to a lis inter partes and consequently, that the discretion bestowed on the Tribunal under the statutory scheme is not unconstitutional.

5. Conclusion

24. The decision of the Tribunal member is a decision to which s.5 of the Illegal Immigrants (Trafficking Act), 2000, applies and hence the applicant must establish that she has "substantial" grounds for asserting that the decision of the Appeal Commissioner is invalid.

25. I am not satisfied that there is sufficient evidence before me to support the applicant's contention. No evidence has been adduced by the applicant and the grounding affidavit of the applicant's solicitor fails to verify the issues of fact raised on the applicant's behalf. The Tribunal member followed the proscriptions of the U.N.C.H.R Handbook and on the basis of the evidence before him, it seems reasonable for the member to have arrived at the conclusion contained in his Decision.

26. In relation to the contention that the Tribunal member failed to have regard to the subjective element of the applicant's alleged fear, both case-law and the U.N.C.H.R. Handbook support the proposition that this subjective element must be accompanied by an objective element. The relevance of referring to the Handbook as a guide in the determination of asylum applications has been confirmed by the Supreme Court in *VZ. v. Minister for Justice* [2002] 2 I.R. 135.

27. In *Rostas v. Tribunal member* (Unreported, High Court, 31st July 2003), Gilligan J.), it was concluded that the "the qualification "well founded" implies that the person's subjective fear must be supported by an objective situation." In his Decision, the Tribunal member referred to the subjective fear but determined after an evaluation of the country of origin information, that it was not supported by an objective situation.

28. In accordance with traditional judicial review principles established by the decisions in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, the Court will not substitute its own view for the view of the decision-maker unless it is established that the decision was clearly irrational or unreasonable. In the context of immigration law, the English Court of Appeal in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 stated:

> "Such decision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of the applicant and include in-country reports, expert testimony and-sometimes-specialised knowledge of their own (which must of course be disclosed). No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the convention issues."

29. The Decision of the Tribunal member clearly refers to both the direct evidence of the applicant and the country of origin information submitted. Given the paucity of evidence adduced by the applicant to support her claim that she had suffered discrimination and her alleged view that her house was petrol bombed, it could not be said that the Tribunal member's decision in relation to 'well-founded fear' was clearly irrational or unreasonable.

30. There is no evidence before me that the Tribunal member refused to summon the applicant's husband as a witness. The Notice of Appeal lists the applicant's husband as a proposed witness. As there is no specific evidence as to what actually occurred, it cannot be stated with any clarity that he refused to direct the attendance of the applicant's husband, or if he did, the basis of the exercise of his discretion in that regard.

31. No evidence has been adduced before me on the applicant's behalf to show the nature of the evidence that would have been given by the applicant's husband, or the manner in which it could have affected the determination of the issues that the Tribunal member had to decide, or whether an application was made at the hearing to have his evidence heard, or whether any objection was taken at the hearing to the fact that his attendance had not been directed, or whether any protest was made either orally or by way of correspondence, or whether any point was raised concerning the absence of the applicant's husband as a witness at the hearing

before the Tribunal member or whether any and if so what reasons were advanced at the hearing as to why the evidence of the applicant's husband was necessary or essential to the applicant's case.

32. The reality of the situation is that the applicant's husband was entitled in any event to attend voluntarily and to have made an application to have his evidence admitted. In my view in these circumstances there is no departure from the principles of constitutional justice.

33. In relation to the constitutional challenge to s. 16(11)(a)(i) of the Refugee Act, 1996, it is necessary for a moving party to adduce sufficient evidence to establish *locus standi*. In the particular circumstances of this case I am not satisfied that the applicant has made out a case that she was adversely affected by the operation of the relevant section.

34. The section is being challenged on the ground that it breaches an applicant's constitutional right to obtain the attendance and examination of witnesses on his behalf. However, the section merely vests a discretion in the Tribunal to direct the attendance of a witness. It does not propose to restrain a party from applying for a witness to be heard voluntarily.

35. Further, I take the view that there is not an unqualified constitutional right to obtain the attendance and examination of witnesses. The right contained in Article 6 of the European Convention on Human Rights and Fundamental Freedoms, 1950 is the right of a person on a criminal charge to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him*. Although the applicant has endeavoured to cite case law supporting the proposition that Article 6 is equally applicable in non-criminal proceedings, I take the view that the substance of the right derives from the principle of 'equality of arms' which is not appropriate to proceedings which are truly investigative or inquisitorial in nature. The substance of the decision of *Kiely v. Minister for Social Welfare* [1977] 1.R. 267, cited by counsel for the applicant, also derives from the principle of 'equality of arms'. The quotation cited refers to a hearing with two 'sides' and this cannot be said to be the nature of the procedure before the Refugee Appeals Tribunal. The circumstances of In *Re Haughey* [1971] I.R. 217 dealt with a Public Tribunal of Inquiry which in my view, can clearly be distinguished from the present situation.

36. I conclude that the applicant has not established substantial grounds for contending that the decision of the Tribunal member is invalid such as would entitle her to an order giving leave to seek an order of *certiorari*. I further conclude the applicant has not established either that she has the requisite '*locus standi*' or that she has in some way been adversely affected by the operation of s. 16(11)(a)(i) of the Refugee Act, 1996, so as to enable her sustain a constitutional challenge to the relevant section.

37. Accordingly I refuse the reliefs as sought.