Neutral Citation [2014] IEHC 428

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 717 J.R.]

BETWEEN

N.G. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND L.G.)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of September, 2014

1. This is an application seeking an order of *certiorari* in respect of the decision of the first named respondent ("the Tribunal") dated 30th April, 2009, and notified by letter of 16th June to the applicant.

Background

2. The applicant is a Ukrainian national born in Cork on 11th June, 2007. She has one brother born on 21st June, 1984, who also resides in Ireland. Both of the applicant's parents are Ukrainian nationals, the father having arrived in Ireland in 2000, and her mother in 2001.

3. Following his arrival in Ireland on 18th December, 2000, the applicant's father claimed asylum. His application was based on his experiences of alleged corruption in Ukraine. He claimed that he had his own business but that corruption was rampant. In particular, he claimed that he was incorrectly fined and threatened with imprisonment by taxation officials if he did not pay the fine, and that the maximum penalty for the offence with which he could be charged is five years imprisonment. This application was rejected by ORAC which formed the view that he was seeking to avoid prosecution and not persecution. No issues were raised in respect of the credibility of the father's claim or his account of what had occurred in Ukraine. A recommendation that asylum be refused was based on the fact that there was no Convention nexus to his fear of being imprisoned. This decision was appealed to the Refugee Appeals Tribunal. His claim was summarised by the Tribunal as follows:-

> "In January, 1999 the local tax authorities decided to audit his books. Some documents were taken for investigation including expense sheets. As a result of the investigation, the tax police instituted proceedings against him for non-payment of tax. A criminal case was initiated in January, 1999 and there was a charge that (he) had submitted tax returns that showed a significant under statement of gross income earned. It was also alleged that he increased the amount of his expenses by including fictitious documents relating to the purchase of certain equipment and that this resulted in a further reduction of income tax due for payment. There was an appeal to the courts. A court auditor was ordered to check the returns and the finding was favourable to the applicant. An amount was outstanding but was significantly lower than the figures produced by the tax police. Under Ukrainian legislation, the tax police were entitled to investigate the matter further and as a result of their second investigation they found that the amount owing was significantly greater than the original figure they had arrived at. This was due to the fact that they had compiled interest and had not allowed for any stay on interest during the course of the appeal. (He) felt that this decision was done out of spite as he had failed to make a contribution towards the building of a new police station in the town. He now faces the possibility of paying a very substantial sum of money and also there is a possibility of a five year prison sentence for failing to make the payments. A letter of complaint was written to the Leninsky District outlining a grievance against the tax police. The complaint was referred to Regional Public Prosecutor's Office and that office declined to accept the complaint and referred it back to the original local court in Leninsky. (He) decided that there was connivance between the police, prosecutors and court officials."

4. The Tribunal concluded in respect of this aspect of the father's claim that the Regional Public Prosecutors Office interpreted Ukrainian legislation as requiring the hearing of a complaint against the tax police to be heard in a local as opposed to a regional court. The applicant had the opportunity of pursuing the complaint and the possibility that he would get some further opportunity to contest what he regarded as a totally unfair and biased assessment by the local tax police. The Tribunal stated:-

> "If that is the case, and it would appear to be the case as made at the appeal, there is nothing to suggest that the appeal has any nexus with the Geneva Convention on the Status of Refugees."

5. The father also submitted, as part of his appeal, that as a person of Romanian origin, he had changed his surname to a Ukrainian name. He was of the opinion that the police were aware of his Romanian origins which may have given rise to a bias against him. The Tribunal concluded that there was nothing whatever in the evidence to support this claim.

6. The applicant's mother, L.G., remained in Ukraine for a period following her husband's departure. She complained that the tax police continued to pursue her and threaten her with imprisonment by reason of her husband's tax defaults. She arrived in the state in November, 2001 and applied for asylum. ORAC rejected the application which was substantially based on the same facts as those advanced by her husband. It concluded that L.G.'s reason for leaving the Ukraine was more closely related to a fear of prosecution than of persecution, though her recollection of events in Ukraine was found to be generally credible. This refusal was not appealed to the Tribunal.

7. The s. 13(1) report concerning L.G's case concludes that her claim is based on problems which she and her husband had in Ukraine concerning tax arrears which the tax police claimed were owed to the state. The report addresses the question whether the applicant suffered persecution on any of the 1951 Convention grounds. It was noted that though L.G. claimed to have been involved with the

local communist party prior to 1990 and that her husband was of Romanian origin, it did not appear that these reasons motivated the tax police to pursue L.G. and her husband. She was not targeted because of her race, religion, nationality, membership of a particular group or political opinion. The problems were solely related to dealings with the tax police. It was, therefore, concluded that she could not establish a Convention ground. In particular, it stated:-

> "There is no indication that the authorities were unwilling to offer the applicant protection though the means to secure it may have been discouraging due to the process and bureaucracy involved. The applicant failed to exhaust the domestic remedies that were available to her."

It was found that the applicant's departure from the Ukraine was motivated by a fear of prosecution and a desire to reunite with her husband. It was also concluded that her treatment by the law enforcement authorities in Ukraine would not be influenced by Convention grounds and that she could expect "to be treated fairly with regard to her circumstances vis-à-vis her dealings with the law". The report also states:-

> "The inspection of businesses in Ukraine is a regular occurrence. The applicant has failed to show that the tax police abused their position in law with regard to herself and her husband and that she has exhausted all available domestic remedies in her pursuit for protection. It would appear that she is fleeing prosecution…All documents submitted relate to her husband. The applicant is not referred to in any of them. She has failed to corroborate her claim that the police are pursuing her in relation to the tax arrears owed by her husband. She has no documentation from the tax police regarding her allegations of their treatment of her after her husband's departure."

8. The Minister declined to grant refugee status to either parent and these decisions were not challenged by way of judicial review.

9. Applications for leave to remain were made on behalf of the applicant's parents separately and considered in accordance with s. 3 of the Immigration Act 1999, as amended, and under s. 5 of the Refugee Act 1996. The prohibition on refoulement contained in s. 5 was considered in each of the file analyses dated 29th January, 2004, following which deportation orders were made in respect of each parent on 12th March, 2004. Separate applications for leave to apply for judicial review were made by the father (Record No. 2004/411JR.) and the mother (Record No. 2004/412JR) challenging these orders which were refused by this Court on 18th February, 2005.

10. Both parents subsequently made applications for subsidiary protection following the entry into force of the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) in October, 2006. These applications were made by letter dated 2nd March, 2007. They were refused by letter dated 27th March on the grounds that they were "invalid and must be refused". That refusal was also challenged by way of judicial review (Record No. 2007/727JR.), and these proceedings were compromised on agreed terms and struck out with no further order on 3rd March, 2008.

11. In the meantime, following the decision of this Court in *H & D v. the Minister for Justice, Equality and Law Reform* [2007] IEHC 277, [2011] I.R. 44, letters were issued to the parents by the Department on 5th November, 2007, inviting them to make representations as to why the Minister should exercise his discretion under Regulation 4(2) of the 2006 Regulations to consider their subsidiary protection applications. The parents' solicitors made representations as to why this discretion should be exercised in their favour. The application was refused by letter dated 13th March, 2008, based on an assessment dated 15th January. That decision was also challenged by way of judicial review which was refused on 14th October, 2008 [2008] IEHC 321.

12. Both parents appealed that judgment to the Supreme Court, but the appeals were withdrawn on 27th July, 2010.

The Applicant's Asylum Claim
13. The facts of the child applicant's claim submitted on her behalf by her mother on 1st April, 2008, are the same as those upon which her parents' claims were based. The child's application was made one month after the striking out of the parents judicial review challenges to the deportation orders in the High Court. The applicant has never been to the Ukraine. The persecution alleged is related entirely to her parents' experiences with Ukrainian tax officials and her father's Romanian ethnicity. This is plain from the questionnaire completed by her mother on her behalf. At the s. 11 interview the applicant's mother submitted the same documents previously submitted and considered in the father's appeal and all but one of which had been submitted in the course of her own application. She expressed the fear that if she and her husband were returned to Ukraine and imprisoned, the applicant would be left as an orphan. No other facts or issue were presented in the course of the application.

Section 13(1) Report
14. The s. 13(1) report states that the application had been considered in accordance with the provisions of the Refugee Act 1996, and the European Communities (Eligibility for Protection) Regulations 2006. It was noted that no claim was made that the child applicant would be directly targeted for a Convention related reason, and that the fears expressed related entirely to the possible imprisonment of her parents as a result of which there would be nobody to care for her. It was considered that, because both parents' cases had been rejected, the applicant's case must also fail because it was based on the same facts as her parents and she could not be deemed to be a refugee under the provisions of the Geneva Convention or section 2. Since the applicant had not been exposed to any threat, the issue of state protection did not arise. There was no discernible basis for a well founded fear of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion.

The Tribunal Decision
15. An oral hearing was held on 15th December, 2008, at which the applicant's mother gave evidence. This was substantially in accordance with the case previously made on behalf of the parents. Further country of origin information was supplied, together with two previous decisions of the Tribunal. The appeal clearly proceeded on the basis that the applicant belonged to a particular social group with a distinct identity, namely those in Ukraine "comprising of persons who refuse to give into state corruption". It was claimed that the child would be a victim of indirect state persecution as a result of the threat of imprisonment to her parents by reason of their membership of that group. Extensive submissions were made on this issue. The decision was delivered on 30th April, 2009, at a stage when the parents challenge to judicial review concerning the deportation orders and the subsidiary protection refusals had been dismissed and the parents appeal in respect of the latter were still pending and awaiting a hearing date before the Supreme Court. The mother's evidence was not accepted as establishing that the child could be classified as one whose claim came within the "traits, characteristics or identity of one who belonged to that category". In reaching that decision, the Tribunal noted the rejection of the parents' asylum applications on the same grounds and concluded that the child applicant had failed to establish a nexus to the Convention.

The Challenge
16. The decision is challenged on a number of grounds.

Ground (i)
17. It is submitted that the Tribunal erred in law in finding that the issue of indirect persecution was a matter for the Minister to consider and failed to adjudicate on this aspect of the case. I am satisfied that this is not so. The applicant focused upon an isolated sentence in the decision:-

> "Should it be determined by the Minister that the applicant's parents' are likely to suffer persecution the issue of indirect persecution could then be appropriate."

This sentence should be read in the context of the history of the case. The Minister had already rejected the claim for asylum following the determinations by the Tribunal in respect of the father and ORAC in respect of the mother. It was clearly accepted by the Tribunal that indirect persecution could be successfully claimed by an applicant where their close relatives suffered persecution, but no such evidence was established. It is sought to relate this sentence solely to a reference made by the Tribunal to the parents entitlement to seek leave to remain under s. 3 of the Immigration Act 2000, and it is, therefore, claimed that the matter was not properly considered in the asylum application. The Tribunal made reference to the inadequacies of the evidence concerning the alleged direct persecution of the father and mother and consequently, the issue of indirect persecution did not and could not arise on the facts of the case. This ground fails.

Ground (ii)
18. The applicant contends that the Tribunal made an error of fact in concluding that the applicant's parents were entitled to seek leave to remain in the state under s. 3 of the Immigration Act. At this time the Tribunal was aware that the deportation orders had been made against the applicant's parents and that their judicial review applications had failed. It is clear, therefore, that this was a misstatement of fact, but was it a material error such as to vitiate the decision? I am not satisfied that it was. I do not accept that it was relevant to the Tribunal's decision in respect of indirect persecution which I am satisfied was properly considered on the facts and history of the case. I am not satisfied that this error may be regarded as significant in respect of the determination ultimately reached. The further reference to the fact that the European Convention on Human Rights could be considered under a s. 3 application is, of course, correct in law. It may be that circumstances or treatment sufficient to qualify an applicant for relief under the Convention may also amount to a breach of the European Convention on Human Rights, but a claim based simpliciter on the Convention is clearly not a matter in respect of which the Tribunal had jurisdiction. I am not satisfied that this reference formed any, much less an important aspect of, the Tribunal's decision which was rooted in the evidence of the case. They are not matters which vitiate the decision.

Ground (iii)
19. The applicant submits that due to the coming into force of the 2006 Regulations and, in particular, Regulation 10 following the determination of her parents applications for asylum by the Tribunal and ORAC respectively, the findings made in respect of the parents' cases were irrelevant to her application for refugee status. In particular, it was submitted that she and her parents would now qualify on the basis of the facts of the case as "members of a particular social group" or on the basis of political opinion, for refugee status. I am not satisfied that the suggested changes in Regulation 10 have any consequences for the decision. The claim that the applicant was at risk of indirect persecution by reason of her parents membership of the particular social group of those who refuse to give in to state corruption, or who may be regarded as having a political opinion to that effect, was specifically considered by the Tribunal based upon the facts and history of the case. I am not satisfied that the introduction of the 2006 Regulation resulted in such a marked change in the criteria for refugee status to those set out in s. 2 of the Refugee Act 1996, as to render the decision in the parents case irrelevant. The Tribunal in this case considered these decisions in their proper context and in essence applying the criteria set out in the Regulations.

Ground (iv)
20. This is a general ground which asserts that the Tribunal erred in law in determining that the applicant's claim did not have a Convention nexus. For the reasons set out above, I am satisfied that this ground too must fail and it is in any event, too general and imprecise to give rise to a ground for relief.

Conclusion
21. This is a telescoped hearing whereby the applicant seeks leave to apply for judicial review and if the court were to grant such leave, it was accepted that the court could then proceed to determine the substantive case on the grounds permitted. The applicant is out of time by a number of days but having regard to the fact that the applicant is a minor and the averments in the grounding affidavit, I am satisfied that there is good and sufficient reason to extend the time for the bringing of the application. However, I am not satisfied that the applicant has established substantial grounds upon which to grant leave to apply for judicial review for the reasons set out above. I, therefore, refuse this application.