Neutral Citation Number [2006] IEHC 218

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 717 JR]

BETWEEN

LANZIRA DARJANIA

APPLICANT

AND
ELIZABETH O'BRIEN (SITTING AS THE REFUGEE APPEALS TRIBUNAL)
AND THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr. Justice McGovern delivered on the 7th day of July, 2006

1. This is an application for judicial review pursuant to an order of the High Court made on the 7th November, 2005, giving the Applicant leave to apply for judicial review for the reliefs set forth at paragraph D 1, 2, 3, 4, 8 and 9 in the statement required to ground an application for judicial review and on the grounds set forth in paragraph E of the said statement. The Applicant was born in Abkhazia in 1971. Abkhazia is a region within the state of Georgia, formally a part of the Soviet Union. In 1992, the Georgian government sent troops into Abkhazia and in fighting between the two states the Abkhazian's defeated the Georgian troops. As a result of this all Georgian's living within Abkhazia were forced to leave. In 1990 the applicant married a Georgian man and they had a son who was born in Abkhazia. She says that as a result of the war between Abkhazia and Georgia there was much hatred between the two peoples and she found herself hated by both sides since she was an Abkhazian married to a Georgian. She fled with her husband and son into Georgia but was only able to stay there for two months before being forced to return to Abkhazia with her son. Her husband remained in Georgia and she sent her child to see him there on several occasions and she also travelled to Georgia approximately twice a year but says she was too fearful to remain given the hatred between the two people. She says that herself and her son were subjected to persecution in Abkhazia because of the fact that she had married a Georgian man and her son was Georgian. She gave evidence that she was beaten while pregnant in 1997 and lost her unborn child and she also says that she was raped on numerous occasions and that her son was beaten and was tortured on one occasion and that threats of rape were made against her son.

2. The Applicant arrived in Ireland on 21st May, 2004 having left Georgia on 30th April, 2004. On 22nd June, 2004, she applied for asylum. In doing so she completed a questionnaire. She was interviewed in relation to her asylum application on 16th December, 2004. In response to her question as to what motivated her to return to Abkhazia she stated that "we felt hatred." People used bad language towards us. My son was beaten up a few times. It was just the attitude in general – it felt like they looked at you with hatred in their eyes. It was other children and teenagers who beat up my son. In response to one question in a questionnaire she said that she had stayed in Georgia for seven years but when questioned at interview said that there were periods she spent in Georgia and sometimes she sent her son to her husband there and returned roughly twice a year for maybe a week or two. In response to other questions she said that her son would stay in Georgia with her husband sometimes for a week or two and sometimes for a month.

3. The Refugee Applications Commissioner found that the Applicant had not established that she had a well founded fear of prosecution as defined under s. 2 of the Refugee Act 1996, as amended, and further decided that s. 13(6)(c) of the Act applied by reason of the Applicants failure, without reasonable cause to make an application as soon as reasonably practicable after arrival in the State. As a result of that finding the Applicant's subsequent appeal to the Refugee Appeal Tribunal was one without an oral hearing.

4. Having heard submissions on behalf of both parties and read the affidavits of the statement required to ground an application for judicial review it seems to me that the issues which arise in this application are as follows:

> "(i) the issue of internal relocation and whether the first named respondent failed to correctly apply the tests set out in both case law and the U.N.H.C.R. guidelines concerning the option of internal relocation. The applicants submits that the first named respondent failed to take into account the evidence given by the applicant of subjective difficulties which are personal to her as an Abkhazian woman married to a Georgian man, with a son who is viewed by Georgians as a Abkhazian and that her decision that for the applicant to relocate to another part of Georgia would be neither unreasonable nor unduly harsh cannot be allowed to stand;
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> *(ii) The first named respondent did not give any consideration or proper consideration to the effect of internal relocation on the applicants dependent son given the difficulties he had experienced in another part of Georgia and given the fact that his claim was to be decided on foot of the applicants claim;*
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> *(iii) The first named respondent acted ultra vires and in excess of her jurisdiction in that she failed to consider the appeal within the jurisdiction given to her and in particular in dealing with the case on papers only under s. 13(5) because the Refugee Applications Commissioner had included in his recommendation a finding "that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State".*

5. The Applicant was therefore deprived of an oral hearing.

6. It seems to me that I should deal with the last of the above issues first. My decision on that issue may have a bearing on the other matters.

Section 13(6)(c) Issue

7. The Refugee Applications Commissioner in making his report made a finding under s. 13(6)(c) namely "*that the applicant, without reasonable cause, failed to make any application as soon as reasonably practicable after arrival in the State*". This finding was appealed to the Refugee Appeals Tribunal on the basis that the Applicant was ill and due to medical difficulties was unable to make her application upon arrival. She stated that she had been held in the store room of a ship for the duration of her journey to Ireland and that on arrival she was in a poor medical condition. Medical evidence was produced which indicated that she was suffering significant symptoms of post traumatic stress disorder including flashbacks nightmares depression, insomnia and feeling that someone is going to attack her from behind. She would lock herself in her room wanting to be alone and she was constantly anxious. There was also medical evidence that she had other problems such as a rash all over her body and was suffering from recurrent infections, heartburn, dry mouth and abdominal pain. The medical opinion furnished by Dr. Julie McMahon states "*this lady displayed symptoms of severe P.T.S.D. plus anxiety and depression as quoted by Oxford Handbook of general practice."* She referred her on to other medical

experts including a psychiatrist and an expert in infectious disease. A doctor indicated that the Applicant's son had suffered similarly and would need referral to other experts.

8. I am satisfied that the first named Respondent did not consider the issue of delay and whether in fact the application was made "*….as soon as reasonably practicable*" after the Applicant arrived in the State. The Respondents have submitted that the Refugee Appeals Tribunal's jurisdiction to make decisions is confined by s. 16(2) to either (a) affirming recommendation of the Commissioner, or (b) setting aside the recommendation of the Commissioner and recommending that the Applicant should be declared a refugee. The Respondents argue that there is no intermediate option to set aside part of the recommendation of the Commissioner such as the part denying the applicant an oral hearing under s. 13(6) of the Act and to permit an oral hearing. This issue was discussed to some extent in the case of M*oyosola v. Refugee Appeals Commissioner and Ors.* (Clarke J.) 23rd June, 2005. At page 8 of his judgment Clarke J. stated:

> *"It would appear that where the RAT hears an appeal in a case to which s. 13(6) applies the only options open to the Tribunal are to allow the appeal or affirm the decision of the RAC. It does not appear that the case can be referred back to the RAC. This raises difficult questions as to the jurisdiction of the RAT in a case where there is a s. 13(6) finding which is based in material part on a view as to credibility. If the RAT feels, for example, that such a finding (i.e. a s. 13(6) finding) was not justified but nonetheless has doubts as to the credibility of the applicant the RAT cannot, apparently, conduct an oral hearing to satisfy itself on credibility. How should it then act. I would leave a consideration of this question to a case where it directly arises."*

9. At page 15 of his judgment he said:

> *"I therefore express no view on the question as to whether the procedures now mandated by s. 13 (as amended) would be inconsistent with the principles of constitutional justice in a case where the report of the RAC made no finding in respect of any of the matters specified in s. 13(6) so that the applicant concerned would have the opportunity to have a full oral hearing before the RAT at a time subsequent to the receipt by them of all of the relevant materials which were likely to be relied on at such a hearing. Nor does it necessarily follow from the view which I have expressed above that the relevant procedures would be inconsistent with the principles of constitutional justice in cases where the view taken by the RAC so as to bring the application within the ambit of s. 13(6) was not one based upon the credibility of the applicant but rather was based on, for example, a finding under s. 13(6)(d) that the applicant had lodged a prior application in a Geneva Convention country or that the factual grounds put forward by the applicant concerned were not such that even if accepted same would give rise to a finding consistent with the granting of refugee status."*

10. The scheme for challenging decisions made in the asylum process is to be found in s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Section 5 provides that a person shall not question the validity of a number of matters specified in the section:

> *"…otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereinafter in this section referred to as "the Order")."*

11. Among the matters listed in s. 5 are:

> *(h) a recommendation of the Refugee Applications Commissioner under section 13 (as amended by section 11(1)(i) of the Immigration Act, 1999) of the Refugee Act, 1996,*
>
> *(i) a decision of the Refugee Appeals Tribunal under section 16 (as amended by section 11(1)(k) of the Immigration Act, 1999) of the Refugee Act, 1996."*

12. It seems clear therefore that the legislature intended that persons seeking asylum could challenge both a recommendation of the Refugee Applications Commissioner under s. 13 of the Act and a decision of the Refugee Appeal Tribunal under s. 16 of the Act (and also s. 22 as referred to elsewhere). This is hardly surprising since the process is one dealing with fundamental human rights and humanitarian issues. The Applicant in her submissions says that the finding under s. 13(6)(c) was appealed on the basis *inter alia* that the applicant was ill and due to medical difficulties was unable to make her application upon arrival.

13. This specific issue does not appear to have been dealt with by the first respondent although it is clear that she had regard to the medical evidence and gave the applicant the benefit of the doubt in relation to the allegations of rape and assault and she also accepted that the applicant had been traumatised as a result. She reached this conclusion on the basis of the medical evidence provided on behalf of the Applicant. See page 20 of her report.

14. I accept the contention made on behalf of the Respondent that under the Refugee Act 1996, as amended the jurisdiction of the Refugee Appeals Tribunal to make decisions is confined by s. 16(2) to either (a) affirming a recommendation of the Commissioner or (b) setting aside a recommendation of the Commissioner and recommending that the Applicant should be declared a refugee. The wording of s. 13(5) and s. 13(6) is unambiguous and once the commissioner made one of the findings specified in s. 13(6), as he did, it followed that the appeal would be determined without oral hearing and the first named Respondent did not in my view have power to permit an oral hearing. The issue could have been determined if the decision of the Refugee Applications Commissioner had been challenged in addition to or independently of the challenge to the Respondents in this application. I therefore hold that the first named Respondent was not acting *ultra vires* in dealing with this case without an oral hearing.

15. The applicant submits that the first named Respondent failed to take into account the evidence given by the Applicant of subjective difficulties which are personal to her as an Abkhazian woman married to a Georgian man with a son who is viewed by Georgians as Abkhazian. She claims that the first Respondent's decision to the effect that for the Applicant to relocate to another part of Georgia would be neither unreasonable nor unduly harsh cannot be allowed to stand. In the case of *Imoh and Ors. v. Refugee Appeals Tribunal and Ors.* (Unreported judgment 24th June, 2005) Clarke J. stated:

> *"…that a decision maker within the refugee process contemplating whether it might be appropriate to recommend refusal of refugee status on the basis of the so called "internal flight or relocation alternative" must, in order to properly reach such a conclusion, comply with the guidelines in that regard issued by the United Nations High Commissioner on Refugees. As those guidelines point out the concept of internal flight or relocation alternative is not explicitly referred to in the criteria set out in Article 1 A(2) of the 1951 Convention. It is, however, the case that the question of whether a claimant has an internal flight or relocation alternative may arise as part of the holistic determination of refugee status. Amongst other things the guidelines require that a decision maker who is contemplating the possibility that internal flight or relocation might be considered in the assessment of refugee status must apply what is called "the reasonableness*

test". That is to say the decision maker must consider whether it would be reasonable in all the circumstances of the case for the claimant to relocate in a manner suggested."

16. The Applicant complains that the first Respondent erred in law by reaching a decision on the issue of internal relocation before determining whether or not the Applicant had a well founded fear of persecution. Having considered the authorities which have been opened it seems to me that the observations made by Sedley L.J. in *Karanakaran v. Secretary of State* [2000] 3 All E.R. 449 on the issue of internal flight alternative have not been followed by more recent decisions in the English courts. I refer to *E. v. Secretary of State* [2004] Q.B. 531 and *Januzi v. Secretary of State* [2006] 2 W.L.R. 397. It appears that in English law when addressing whether a person has a well founded fear of persecution for a convention reason and whether that person is outside his or her country of nationality, a consideration of the internal relocation alternative is a proper exercise. The position in Ireland is somewhat uncertain. Undoubtedly there have been obiter dicta which suggest that the Refugee Appeals Tribunal can only consider the issue of relocation after it found that there was a fear of persecution. But in the case of *Okeke v. Minister for Justice* (Unreported judgment 17th February, 2006) Peart J. quoted the same passage from Hathaway as is quoted in the tribunal members decision in the case before him:-

"A person cannot be said to be at risk of persecution if she can assess effective protection in some part of her State of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection primary recourse should always be to one's own State."

17. There are also the observations of Clarke J. in Imoh v. Refugee Appeals Tribunal (supra) where the learned judge stated:

"…the question of whether a claimant has an internal flight or relocation alternative may arise as part of the holistic determination of refugee status."

18. In this case the first named Respondent gave the Applicant the benefit of the doubt in relation to the allegations of rape and assault and accepted that she had been traumatised as a result. The first Respondent dealt with the issue of well founded fear of persecution and the burden and standard of proof and went on to carry out an analysis and assessment of the Applicants case. At page 18 of the report the first named Respondent stated:

"The appellant's evidence shows that she was able to travel freely from Abkhazia and visited her husband on a relatively regular basis, I conclude that the safe part of the country was reasonably accessible and that she would not be required to encounter great physical danger in travelling to or staying there as she had done on so many occasions before. I am satisfied for the same reason that she would not be required to undergo undue hardship in travelling or staying there. I do not consider that hatred in people's eyes and verbal abuse constitutes undue hardship. I am also satisfied that the quality of internal protection meets basic norms of civil political and socio economic human rights and I refer in particular to the country of origin evidence sources outlined above in this regard."

19. The first Respondent had regard to *Butler v. the Attorney General* [1999] N.Z.A.R. 205 where the court held that the relocation element is inherent in the definition of "*refugee*" it is not distinct. The overall question is whether having regard to those principles, it is unreasonable in a relocation case to require the claimant to avail himself/herself of the available protection in the country of nationality. If one is to apply the holistic approach which, in my view, is appropriate, it is evident that the first Respondent considered all aspects of the Applicants claim for refugee status and accepted the allegations of rape and assault having given her the benefit of the doubt. The tribunal member also refers to the fact that the applicant was detained by the Georgian authorities at the border in 1998 because she had been smuggling cigarettes. She claimed that they took the cigarettes and detained her. She said that she was charged with smuggling but that she did not pay any fine as they simply took the cigarettes from her. It would appear from this that even in circumstances where the applicant was involved in wrongdoing and had been detained by the police in Georgian she was not mistreated. The first respondent took these matters into account and concluded that given the availability of an internal flight alternative and further information on the country of origin she did not feel that it would be unduly harsh that she should return to Georgia. There was in my view sufficient evidence for the first respondent to reach that conclusion. Accordingly I reject the Applicant's claim that the first named Respondent erred in law in holding that the Applicant did not suffer from a well founded fear of persecution in view of the option of internal relocation.

20. In considering the position of the Applicants son there was evidence that he had been ill treated by Abkhazian criminals, as had his mother. There was also evidence that he was assaulted on a number of occasions by teenagers in Georgia. The Refugee Applications Commissioner held that the assaults in Georgia did not meet the level of seriousness to constitute persecution. Evidence was furnished to the court that the Applicant travelled frequently to Georgia and left her son there with his father and this information was before the Respondent. The applicant had furnished evidence to the Refugee Applications Commissioner that she fled to Rustavi in Georgia with her husband and son in 1999 and they were given accommodation there in a hostel. This accommodation was provided by the Georgian authorities. I accept that additional consideration has to be given to the position of the child where his case is being treated as part of his mother's application. Having regard to the facts before the first Respondent on the matters taken into account in the Respondents report, I do not consider that the first named Respondent erred in law in finding that internal relocation was an option having regard to the position of the Applicant's son.

21. I refuse the reliefs sought by the Applicant in this matter.