Neutral Citation Number: [2009] IEHC 509

THE HIGH COURT

2008 1041 JR

BETWEEN

Z. T.

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice McCarthy delivered on the 31st day of July, 2009.

1. This is an application for leave to seek *inter alia* an order of *certiorari* sending forward to this Court for the purpose of being quashed a decision of the Refugee Appeals Tribunal of the 26th August, 2008, refusing Mr. T.'s appeal against a decision of the Refugee Applications Commissioner of the 31st August, 2006, recommending that the applicant's application for a declaration that he is a refugee, be refused.

2. In his decision Mr. Lenihan, the member of the Tribunal said that:-

> "To my mind, the central question to be determined here is whether or not the treatment afforded to this applicant whilst he was in Georgia would amount to 'persecution'. In his oral evidence, this man said that he was arrested at a meeting in February 2003 and detained for a period of two weeks. However in cross-examination by Mr. Fagan, he said that he was, initially, threatened in 2005 and thereafter assaulted in 2006. At most, there appears (*sic*) to have been three alleged instances of persecution against this gentleman between 1998 and 2006 when he left Georgia."

3. I do not propose to summarise the evidence before the Tribunal but the decision, so far as facts are concerned, was based upon the following (abstracted from the applicant's notice of appeal to the Tribunal and accepted by it) namely:

> (1) The applicant joined the Helsinki Union in March 1998. He claims that he was subjected to threats, beatings and harassment by the authorities in Georgia.
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> (2) As already stated, the applicant claims that he was arrested for the period of two weeks in February 2003.
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> (3) He received further threats in September 2005 and in December 2005. He went into hiding in December 2005 but was detected by the authorities in March 2006 and claims that he was seriously assaulted. Thereafter, he left Georgia and travelled to this country.

4. It appears, also that a demonstration being filmed by the applicant in August, 2004 was broken up by the police – this is not referred to in the summary of evidence or the summary of the applicant's case as set out in the grounds of appeal. There is no suggestion that evidence beyond that which was summarized as having been given by the applicant was so given, however.

5. In deciding what did or did not constitute persecution the Tribunal member made the point, based on a quotation from Professor Hathaway's work *The Law of Refugee Status* (at p. 102) (Ed., not referred to), that the term "persecution" was an ill-defined one. He relied upon a decision referred to as "the *Gladys Maribel Hernandez decision"* (referred to by Professor Hathaway) to the effect that:

> "The criterion to establish persecution is harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government by oppression."

6. He also further quoted from the same work (at p. 103) where the learned author said that:

> "Second, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a State to its own population."

7. Furthermore the tribunal was conscious of the fact that:-

> "It is generally acknowledged that the drafters of the Convention intentionally left the meaning of "persecution" undefined because they realised the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign State".

8. It was submitted that the Tribunal fell into error in failing to adopt the definition of "acts of persecution" in Regulation 9 of the European Communities (Eligibility for Protection) Regulations 2006 which, so far as material here, are as follows:-

> "9(1) – Acts of persecution for the purposes of s. 2 of the 1996 Act must
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> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
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> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in sub-paragraph (a)."

Derogation cannot be made under Article 15(2) of the Convention from Article 2 (with an exception not relevant) or Articles 3, 4 (paragraph 1) and 7. Article 2 concerns the right to life, Article 3 to prohibition on torture or inhuman or degrading treatment or punishment, Article 4 to a prohibition on slavery or forced labour and Article 7 is a prohibition of punishment without law.

9. At this stage I do not have to take anything in the nature of a final view as to the interpretation of these Regulations but it seems to me that where reference is made to rights from which a derogation cannot be made under the Convention the legislator is thereby particularising or defining acts which are "sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights", i.e. severe violations are violations of the Articles in respect of which derogation is not permitted. However, the Regulation goes further, to the extent of defining acts of persecution as an accumulation of measures which *include* violations of human rights which are "sufficiently severe as to affect an individual in a similar manner as mentioned in sub-paragraph (a)"; I read this as violations of the rights protected as aforesaid but which might not be limited thereto: it is hard, however, to see how any "accumulation of various measures" would be of sufficient significance to warrant a finding of refugee status if the acts of persecution alleged did not, at least, constitute breaches of the rights in question under the Convention.

10. It is accordingly argued that repetition or accumulation is not necessary but that one incident of sufficient seriousness might suffice to constitute what I will call a relevant violation of human rights. I cannot see how that is a novel proposition.

11. It is not contended here that Professor Hathaway's statement (as quoted with approval by Mr. Lenihan), concerning the intentional want of definition of the meaning of "persecution" is incorrect and, similarly, I do not think that one could doubt the proposition also advanced by Professor Hathaway and, again, relied upon by Mr. Lenihan, to the effect that the intention of the drafters was "not to protect persons against any and all forms of even serious harm …". The complaint made is of the explicit application of the test apparently based upon the Gladys Maribel Hernandez decision, *i.e.* a test requiring harassment that is so "constant and unrelenting that the victims feel deprived of all hope of success …": the key objection advanced for the use of that criterion is that it seems to contemplate repetition or, perhaps, to use the word of the Regulations, accumulation or, in the further alternative, some form of continuous misconduct.

12. It is argued that the differentiation between Regulation 9(1)(a) and what I might term the "Hernandez" criterion is that one only act is sufficient. If this be so, a Tribunal, where there was no multiplicity, would have to consider a free standing event. The logic of that interpretation of the Regulation is that an event which, on a free standing basis, constituted, say, torture or inhuman or degrading treatment (being the aspect of convention protection in question here) might be enough. It will be readily understood that an incident might constitute a breach of Convention rights even if it was isolated, and a person might be then entitled to refugee status. On that basis it would further follow, it is argued, the legislator departed from the test apparently approbated by Professor Hathaway, i.e. something which went beyond at least one incident (in the judgment, of course, as to what might or might not have constitute past persecution).

13. My attention has been drawn to Regulation 5(2) which is to the effect that:-

> "The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk or suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone, may nevertheless warrant a determination that the applicant is eligible for protection".

No one doubts that whether or not someone will be subject to persecution if returned to the State from which he has fled is usually judged by reference to past events i.e. whether there was past persecution on the facts as found.

14. I think that, it is necessary to stress principles elaborated in the well known decisions of *Tabbi v. Refugee Appeals Tribunal* (Unreported, 27th July, 2007) where Peart J. said:-

> "It is not desirable that a decision be parsed and analysed word for word in order to discern some possible invalidity in the choice of words and phrases… the whole of the decision must be read and considered in order to reach a view as to whether or not, when the decision is read in its entirety and considered as a whole, there is a reasonable basis for the decision maker reaching the conclusion and, further (and especially) *Imafu v. Refugee Appeals Tribunal,* (Unreported 9th December, 2005) where Peart J. said:-
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> "The court must have regard to the decision in the round, to the real capacity of the alleged error to have affected the correctness of the process by which the decision was reached, and also to the discretionary nature of judicial review. In respect of the latter, it seems to follow that even where the court may be satisfied that there was some error in the process it can refuse relief where it is also satisfied that such errors as did occur did not go to the heart of the decision, such as would render the decision unlawful".

15. It seems to be that it was perfectly rational for the tribunal member to take the view that the most serious aspect of

the alleged persecution was the serious assault of March, 2006, apparently in a cemetery at a place called Kukia. He found that it was "difficult to accept" that that incident "in particular" and the "other incidents" referred to in the appeal would equate with the attempted interpretation of persecution as contained in the *Gladys Maribel Hernandez decision*...".

16. It is perfectly plain in this case that the applicant is relying on a series of incidents rather than one only incident. Accordingly we are not dealing here with a case where the applicant is relying on, say, the single most serious incident (i.e. in March, 2006 – one would presume that if he was advancing a case based on one freestanding incident), this is the incident of which complaint could rationally be made. Hence, the provisions of the Regulations, contended to be regulations which afford a more extensive or wider definition of persecution than the traditional definition advanced by Professor Hathaway permitting or contemplating that one incident might be enough to allow a conclusion of past persecution, are arguably of no application on the facts. What is accordingly being done in this case is to say that on different facts, the conclusion here reached was irrational or erroneous because of the application of the incorrect legal test.

17. It seems to me that on the traditional principle that one could not establish *locus standi* to challenge a decision if one could not benefit, on the facts, from its quashing because one successfully contended an incorrect application of the law, no relief could be granted.

18. It seems to me that the tribunal member took into account the entirety of the complaints made by the applicant as to his maltreatment; even taking them cumulatively he did not think that they amounted to persecution as defined; if, even if cumulatively, the maltreatment did not amount to persecution, one cannot see how a freestanding incident could do so. On any application, accordingly, of what is said to be a correct test a tribunal would be rationally justified in taking the same view. Is it to be conceived that one only (albeit the most serious) incident could fall into the definition of an act of persecution if a multiplicity alleging forming what one might term of a chain of events, could not? I think not.

19. I turn then to the second issue which is raised, namely, that the decision maker did not only have regard to what had occurred in the past, (whether it be persecution or not) but was required to have regard to the import of those acts for the future of this asylum seeker, if returned but, in his decision, failed to do so. I have already made reference to Regulation 5(2) in this respect.

20. All that Article 5(2) does is provide that acts of past persecution is evidence (perhaps strong evidence) of a well-founded fear of future persecution, subject to certain qualifications which I do not see as being relevant here. It seems to me that this provision cannot be relevant if there were no acts of past persecution.

21. For the sake of completeness I note that the statement of grounds refers to an alleged failure to have regard to "specific incidents" which were identified in the context of the applicant's political activities and the County of Origin Information: I did not understand this to be pursued.

22. I am therefore of the view that substantial grounds have not been made out in the present case.