Neutral Citation Number: [2008] IEHC 365

THE HIGH COURT

JUDICIAL REVIEW

2006 No. 1076 J.R.

BETWEEN

G.S.
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND Y.S.)

APPLICANT

AND
THE REFUGEE APPLICATIONS COMMISSIONER,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
ATTORNEY GENERAL,
IRELAND

RESPONDENTS

Judgment of Ms. Justice Irvine delivered on the 21st day of November, 2008.

The Facts
1. G.S., the applicant in this case, was born in the Rotunda Hospital on the 2nd January, 2006. He is a citizen of Croatia although he has never resided there. His mother and father are both ethnic Serbs and citizens of Croatia.

2. On the 4th September, 2006, the applicant's mother, Y.S., instituted the within proceedings on the applicant's behalf. The present application for leave to apply for judicial review is grounded upon her affidavit which was sworn on the 4th September, 2006. In that affidavit the applicant's mother asserts, on his behalf, that he will be persecuted and severely discriminated against should he be required to live in Croatia by reason of his ethnicity. Y.S and the applicant's father are awaiting a determination of their applications for refugee status. They have appeals pending before the Refugee Appeals Tribunal. Y.S states in her affidavit that both she and the applicant's father were forced to flee to Ireland from Croatia in June 2005 in the face of persecution based on their ethnicity and in respect of which persecution neither she nor her family received adequate police protection.

3. Arising from her own experience as a member of an minority ethnic community and also upon the experience of her husband and other family members of similar ethnic origin, Y.S has contended on the applicant's behalf that he has a well founded fear of being persecuted by reason of his race and religion should he be forced to live in Croatia.

4. Croatia had been designated as a safe country of origin pursuant to s. 12(4)(a) of the Refugee Act 1996 ("the Act"). Accordingly, the applicant does not enjoy, by reason of the provisions of s. 13(5) thereof the right to an oral hearing in the event of the first named respondent concluding that he should not be declared to be a refugee.

Procedural Background
5. An application for refugee status was made on the applicant's behalf to the office of the first named respondent in June, 2006. Following the normal procedure, which includes the completion of an application form, an initial interview, the receipt by the applicant of informative documentation regarding the procedure, the receipt of advice as to the availability of legal assistance from the Refugee Legal Service and a right to consult with the United Nations High Commissioner for Refugees, Y.S. attended for interview on the applicant's behalf at the office of the Refugee Applications Commissioner on the 1st August, 2006.

6. The interview was conducted by Ms. Catriona Kirwan on behalf of the first named respondent. The notes referable to that interview are exhibited in the grounding affidavit. These demonstrate that Y. S. described two major concerns in the course of the interview. Firstly, she complained of potential discrimination within the education system for Serbian children. She felt the applicant would not be able to learn his own Serbian language and that if he did that he would be persecuted and isolated by other children. Secondly, she referred to her belief that Croatian nationalists would verbally and physically abuse the applicant if he lived in Croatia and that he would not enjoy equal rights to other children. When asked about the possibility of the State protecting her son from persecution she advised Ms. Kirwan that neither she nor her family had received adequate protection from persecution. When they complained about persecution to the police their complaints were not investigated. She advised her interviewer that people were afraid to report persecution and that the applicant was likely to be subjected to the same verbal and physical abuse that she and her family had received if he was obliged to reside in Croatia.

7. The interview notes confirm that in the course of the interview several country of origin documents were furnished to the investigating officer by Y.S's solicitor. It is common case that selected extracts from these documents were underlined presumably for the purpose of drawing the attention of the investigating officer to the relevant entries which advised (*inter alia*) that there had been a serious deterioration in the course of 2005 in areas pertaining to human rights in Croatia.

8. Prior to the preparation of the report pursuant to s. 13(1) of the Act, the applicant's solicitor wrote to the office of the first named respondent complaining that Y.S. had not been permitted, in the course of her interview, to describe how she and her family had been persecuted by reason of their ethnicity whilst residing in Croatia. She complained that she had been told to confine her answers to her son's circumstances. The applicant's solicitor took exception to the interview being confined in this manner given that the persecution of Y.S. and her family and the unwillingness or inability of the police to protect them from persecution whilst living in Croatia was directly relevant to the assessment to be made by the first named respondent as to whether the applicant could be protected from persecution as a member of the Serb minority community if he was obliged to live in Croatia.

9. By letter dated the 11th August, 2006, the applicant's solicitor was advised that the first named respondent was privy to the applicant's parents' application for refugee status and that their experiences, as recounted in the course of those applications, would be taken into account.

Section 13 Report
10. The s. 13 Report is dated the 15th August, 2006 and it was received by the applicant on the 18th August, 2006. In that report the findings made by the authorised officer of the first named respondent pursuant to s. 13(6) were as follows:-

> "As the applicant is a national of or has the right of residence in Croatia, which was designated a safe country in accordance with s. 12(4) of the Refugee Act 1996 (as amended), it is deemed that s. 13(6)(3) applies in this case".

11. The recommendation was in the following terms:-

> "I have considered the information in relation to this application. I am satisfied that the applicant has failed to establish a well founded fear of persecution in the course of s. 2 of the Refugee Act 1996 (as amended), and I recommend that the applicant should not be declared a refugee. I recommend that s. 13(6)(e) of the Refugee Act 1996 (as amended) applies to this application".

The Leave Application

12. The applicant maintains that the first named respondent has erred in law and has acted in breach of natural justice and fair procedures. He further asserts that the statutory framework within which his application for refugee status was determined is unlawful for the reasons set out in the statement of grounds and the reliefs claimed are as set out at para. 4. The grounds upon which those reliefs are sought are set out at paras 5A(i)(iii)(iv)(vi)(vii) and 5B(iii)(iv)(v) of the amended statement of grounds delivered in the course of the hearing.

13. The first of the reliefs sought by the applicant relates to the decision of the first named respondent dated the 18th August, 2006. Leave is sought to maintain a claim for an order of *certiorari* in respect of that decision or alternatively a declaration that the authorised officer of the first named respondent, in reaching her decision, erred in law.

14. The remaining reliefs are directed to seeking leave to challenge the constitutionality and lawfulness of the statutory framework relevant to the applicant's application for refugee status. In this respect the applicant argued in the course of this hearing that s. 12(4) of the Act is unconstitutional. The principal complaint made in this regard was the continuing designation of Croatia as a safe country. The applicant complained that when the Minister designated a country as being a safe country of origin pursuant to its powers under s. 12(4)(a) that there were no guidelines, benchmarks or criteria specifying how the Minister might revoke a designation in accordance with the powers afforded by him under s. 12(4)(c). Counsel for the applicant relied upon the decision in *Laurentiu v. Minister for Justice*, *Equality and Law Reform* [1994] Volume 4 I.R. p. 26. He complained that s. 12(4) offended Article 15 of the Constitution pursuant to which the sole and exclusive power of making laws in the State is vested in the Oireachtas. Counsel for the applicant maintains that the legislature divested itself of or abdicated its legislative function in an impermissible manner without setting out relevant principles or policies pursuant to which the Minister might have regard.

15. Counsel for the applicant also made submissions that s.13(5) of the Act was unconstitutional insofar as it provided for an absolute prohibition on the applicant having an oral appeal hearing by reason of the fact that Croatia had been designated a safe country of origin pursuant to the Refugee Act 1996 (safe countries of origin) Order 2004. It was submitted on the applicant's behalf that the individual circumstances of the applicant in the present case, are such that his case could only properly determined by way of an oral hearing.

16. In addition to the foregoing arguments counsel on behalf of the applicant argued that the continuing designation of Croatia as a safe country of origin was unlawful by reason of the failure on the part of the second named respondent to have any transparent system in place to provide for timely reviews of Croatia's designation as a safe country of origin.

The Burden of Proof

17. In order to obtain leave to apply for judicial review, the applicant must demonstrate substantial grounds to demonstrate that the decision of the first named respondent dated the 18th August, 2006, should be quashed or declared unlawful. The applicant urges the court to adopt what has become commonly referred to as the "anxious scrutiny test" when approaching the decision as to whether or not leave should be granted, notwithstanding the fact that the Supreme Court has yet to lend its support to this test. At the core of the "anxious scrutiny test" is the contention, that where a party seeks to challenge a decision which relates to core personal rights, such as constitutional rights or human rights, the court should perhaps grant leave to challenge that decision somewhat more readily by subjecting the decision in respect of which complaint is made to closer criticism than it might otherwise do if applying the well established test of unreasonableness or irrationality as per the decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R.39.

18. The respondents argue that whilst there are a number of High Court decisions in support of the adoption of the "anxious scrutiny test" that the Court should nonetheless favour the continued applicability of the *O'Keefe* test. In this regard the respondents refer to the decision of McGuinness J. in *V.Z. v. Minister for Justice* [2002] I.R. at page 158, where the learned trial Judge described the difficulty of trying to unravel the distinction to be drawn between "anxious scrutiny", "careful scrutiny" and "heightened scrutiny". Given that the Supreme Court has yet to rule upon the applicability of the "anxious scrutiny test" on a leave application, I favour the approach which has been adopted by my colleague Charleton J. in *T.G. v. David McHugh* acting as Refugee Appeals Tribunal (High Court, Unreported, 18th April, 2007), wherein at para. 7 of his judgment he stated as follows:-

> "As I understand the submissions, the appropriateness of the test to be applied in these circumstances is subject to a number of reserved judgments. I have therefore decided to look at this case on the basis that I should do my best to scrutinise it carefully, (emphasis added) pending a definitive decision as to the correct test as between reasonableness and anxious scrutiny".

Right of G.S. to Appeal to the Refugee Appeals Tribunal

19. The next matter to be considered is whether the applicant's right to appeal the decision of the first named respondent of the 18th August, 2006, disentitles him from seeking leave to apply for a review of that decision.

20. Whilst the right to pursue judicial review proceedings against a decision of the Refugee Applications Commissioner has been significantly curtailed by the Courts in recent times, there are nonetheless certain exceptions to the general principle that the availability of an appeal to the Refugee Appeals Tribunal will normally justify the court declining to grant leave to challenge a decision of the first named respondent. The decision of Hedigan J. in *Nigy Nganzunuj v. Refugee Applications Commissioner 9th Oct 2008* is a case in point where the court considered the fact that the applicant did not have a right to an oral hearing on appeal from a decision of the Refugee Applications Commissioner, a reason to justify the court departing from the general rule that an appeal to the Refugee Appeals Tribunal is the appropriate remedy.

21. The applicant in the present case, because he is a citizen of a safe country of origin, does not enjoy a right to a full oral rehearing by way of appeal from the decision of the Refugee Applications Commissioner by reason of the provisions of s. 13(5)(a) of the Refugee Act 1996. The respondents argue that the matters raised in the present proceedings on behalf of the applicant could just as equally be dealt with before the Refugee Appeals Tribunal and for this reason the court should exercise its discretion and refuse the leave sought.

22. I am not convinced that the statutory procedure available for the correction of an error made by the primary decision maker i.e.

the Commissioner, under The Refugee Act 1996 (as amended) is adequate to meet the justice of the case should I conclude that the applicant has substantial grounds for contending that such decision should be quashed. The statutory appeals procedure which would apply in the present case is fundamentally different in nature to that which takes place before the primary decision maker. It is an appeal on paper by reason of the designation of Croatia as a safe country of origin. If the applicant were to be refused a right to judicial review solely on the basis of the availability of a statutory appeal the applicant would lose the right to present oral evidence and or make oral submissions to the tribunal regarding his allegedly well founded fear of persecution and the adequacy of police protection. In this regard it is material to note that the burden of proof is on the applicant to establish a well founded fear of persecution. Critical to this proof in the instant case is likely to be the evidence of his mother regarding her own persecution, the persecution of the applicant's father and of her extended family by reason of their ethnicity whilst residing in Croatia. Of further relevance is the potential evidence to be given by the applicant's mother as to how, having requested police protection, neither she nor her extended family had been successfully protected from persecution. Finally the court considers it of some importance that the correspondence exchanged between the parties to the present application acknowledges that the applicant's mother was curtailed in the evidence she was permitted to give to the investigating officer and was confined to directing her answers solely toward the applicant's circumstances.

23. Accordingly, on the facts of this case I believe that the applicant would be prejudiced if his rights were to be confined to an appeal on paper should he establish substantial grounds for alleging that the decision of the first named respondent made in the course of an oral hearing should be quashed. I am therefore of the view that the court retains a full and free discretion on this leave application and concludes that the applicant is not disqualified from seeking the reliefs sought notwithstanding his right appeal to the Refugee Appeals Tribunal.

The Claim

24. There are a number of legal matters which are of particular significance to the present application to which I will briefly refer as they are matters to which the officer of first named respondent was obliged to have regard in reaching her decision. The first of these is that the relevant authorities suggest that the first named respondent, when making her determination, was bound to take into account the most recent information available pertaining to the relevant country of origin. In this regard the applicant relied upon the decision of Birmingham J. in *F.A.A. v. Minister for Justice, Equality and Law Reform and Des Zidian* (sitting as the Refugee Appeals Tribunal) of 24th June, 2008 wherein the court stressed the importance of decisions in relation to claims for asylum being based "on the most up to date and authoritative information possible".

25. The second matter is that if there is a significant conflict between the country of origin documentation submitted by an applicant and that otherwise available to the respondent, the respondent is obliged, in the face of such conflicting materials, to provide a reasoned basis for any conclusions emanating from such conflicting documentation. In this respect reliance was placed upon the decision of Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform*, (High Court, July, 2007) wherein he stated as follows:-

> "While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis".

26. From the evidence put before the court in the present case, it seems that a substantial body of country of origin documentation was submitted by the applicant. The documentation dealt with human rights issues in relation to ethnic minorities in Croatia. The information so provided was, to quote Birmingham J. in *F.A.A. v. Minister for Justice Equality and Law Reform and Another*, both "authoritative and up to date". The country of origin documentation provided was as follows:-

> (a) A report of Human Rights Watch dated January, 2006,referable to human rights issues in Croatia;
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> (b) The report of Amnesty International furnishing an overview of human rights issues in Croatia from January to December, 2005,
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> (c) A report of the United States, Department of State, on Human Rights Practices for 2005, referable to Croatia and
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> (d) A report of the International Helsinki Federation for Human Rights, dated the 8th June, 2006, once again referable to Croatia.

27. The aforementioned documentation supported a serious deterioration in the course of 2005 in relation to human rights issues in Croatia and reported upon the risk of persecution of ethnic minorities, including Serbs, and most importantly the failure of Croatian authorities to adequately react to and investigate these attacks.

28. In addition to the above country of origin documentation the first named respondent had heard evidence, which she apparently accepted, of the persecution of Y.S. and her extended family by reason of their ethnicity whilst residing in Croatia. These facts themselves were at least *prima facie* evidence that whatever policing system was in operation at the relevant time, the adequacy of the protection being afforded by the state to ethnic minorities was questionable.

29. Whilst Y.S., in the course of her interview, did not personally refer to the documentation which had been submitted by her solicitor and which is detailed above, it must be the case that the intention of Y.S. was to rely upon her own experiences and the content of the country of origin documentation in support of her contention that the applicant should be considered to have a well-founded fear of persecution if deported to Croatia.

30. The first named respondent in the s. 13 report of the 18th August, 2006, in stark contrast to the above oral and documentary evidence concluded that the applicant's fear of persecution based on his ethnicity was not well founded. The basis for the first named respondent's conclusion is stated by the respondent to be found in the documentation which she appended to her report and in this regard it is to be noted that she states at the outset of her report that she considered all of the documentation submitted.

31. The first document appended to the decision is one addressed to the Council of Europe and emanates from the Croatian Government dated April, 2004. This document is substantially less up to date than the documentation submitted by the applicant. This document was relied upon by the first named respondent in rejecting the concerns expressed by Y.S. that her son would be discriminated against in terms of his language and education rights if deported to Croatia. That document reports that progress was being made to ensure that minorities within Croatia would have a right to be educated in their own language and would not be

discriminated against in terms of education or employment. This document does not report upon other human rights issues such as the persecution to which Y.S. and her family were allegedly subjected and neither does the documentation deal with the ability of the police to protect against any such persecution.

32. The second document appended to the report comprises two pages selected from the nineteen page document submitted by the applicant emanating from the U.S. Department of State referring to the Government's apparent increased willingness to prosecute war crimes committed by ethnic Croats and to secure the representation of minorities within the police force. This extract refers to the ongoing unwarranted arrest of Serbs for war crimes and expresses concern regarding the unwillingness or inability of the police force to provide protection to ethnic minorities against persecution. The report of the investigating officer notes the unsatisfactory police performance and goes on to record that country of origin documentation suggests that the government was addressing the need for reform. Immediately thereafter, the investigating officer concluded that the applicant had not presented any reasonable grounds to outweigh the general presumption that the applicant is not a refugee. The officer of the first named respondent does not state in her report how she came to this conclusion having regard to the oral evidence and the conflicting country of origin documentation filed on behalf of the applicant. Neither nor does she append to her report any documentation in support of her conclusion that the applicant should not have a well-founded fear of persecution should he be deported to Croatia. Pages 7 – 15 of the document emanating for the U.S. Department of State deals in some detail with societal violence and physical abuse of religious minorities in Croatia yet these pages are not appended to the report. Further there is no mention in the report as to how the first named respondent apparently rejected the information regarding the deterioration in Croatia's human rights situation so graphically depicted in the other documentation submitted on behalf of the applicant and in particular the report of the International Helsinki Federation for Human Rights.

Substantial Grounds

33. Against this backdrop of evidence the officer of the first named respondent concluded that the applicant's fear of persecution was not well founded and recommended that he should not be declared a refugee. Having regard to the decisions referred to in this judgment and the content of the report of the 18th April, 2006, I am forced to conclude that the applicant has substantial grounds to be concerned as to whether or not the first named respondent fully considered all of the up to date country of origin documentation before her notwithstanding the statement that she did so set out on the first page of her report. I further conclude that the applicant has substantial grounds for contending that even if the first named respondent did consider the applicant's country of origin documentation that the decision was perverse in the face of the evidence. Finally I believe that the applicant has established substantial grounds to assert that the respondent's decision should be quashed due to her failure to furnish a reasoned explanation for her rejection of the independent, authoritative and up to date country of origin documentation submitted on the applicant's behalf.

34. Having considered all of the evidence submitted by the applicant on the present application, I have no difficulty whatsoever in concluding that the applicant has discharged the burden of proof sufficient to justify leave being granted to seek judicial review in the terms set forth at para. 4(i) and (ii) in the statement of grounds on the basis specified at para. 5(a) of the said statement.

35. In relation to the remaining reliefs sought by the applicant, I am not prepared to grant the applicant leave to pursue these claims at the present point in time. Claims to the effect that statutory provisions are unconstitutional are remedies of last resort and there is ample authority for the proposition that when other reliefs may be open to an applicant that relief of this nature should not be granted. However, I accept the applicant's argument that he may wish, depending on the outcome of his application for refugee status, to renew an application for liberty to seek judicial review in respect of those reliefs set forth at para. 4 III, IV, V and VI of the statements of grounds. I readily accept the submission made by counsel on behalf of the applicant that if the applicant was to participate unsuccessfully in the entirety of the statutory process for the purposes of establishing refugee status and thereafter to contend that the very legislation which he had sought to utilise was unconstitutional, that an argument of estoppel might be raised against him. I therefore do not fault the applicant in seeking to maintain these additional claims to challenge the legality of the framework within which the first named respondent's decision was made and I express no view on the potential outcome of any of these remaining applications. I will merely preserve the right of the applicant to renew his application to seek judicial review in respect of these remaining matters notwithstanding the relief to be granted to him now in respect of the decision of the first named respondent dated the 18th August, 2006.