Neutral Citation Number: [2011] IEHC 262

THE HIGH COURT

JUDICIAL REVIEW

2008 1100 and 1101 JR

BETWEEN

G. V. AND I. V.

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Ryan delivered the 1st July, 2011

1. This is a post-leave application for judicial review where the applicants Mr. and Mrs. V seek, among other reliefs, orders of *certiorari* quashing the decisions of the Refugee Appeals Tribunal (the "Tribunal") in respect of their respective applications for refugee status. The parties are husband and wife and the Court heard their two cases together because they involved the same issues. This Court was satisfied that there were two substantial grounds for contending that the decisions were invalid and ought to be quashed, namely,

> (1) that the Tribunal erred in law in holding that the discrimination faced by the applicants did not constitute "persecution" within the meaning of s. 2 of the Refugee Act 1996;
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> (2) that the Tribunal failed to have regard to a previous Tribunal decision (Ref. 69/32501/01B) or failed to offer any reason for distinguishing that previous decision.

2. The applicants are both citizens of Croatia and the husband is an ethnic Serb. The couple married in 1989 and lived together in a village in northern Croatia but, according to the husband's account, following the outbreak of war in 1991, the great preponderance of the ethnic Serb population in the village fled and what had been a large ethnic majority of the village's population then became a tiny minority. The applicants fled first to Serbia, where they stayed for two weeks and were recognised as refugees, before moving to an area that was then a Serbian controlled part of eastern Croatia.

3. The wife says she returned once to her home village in 1996 whereupon threats were made to her against her husband's safety if he were to return there. According to the husband, people in the village blame him for failing to prevent war crimes that occurred there during the Serb-Croat conflict.

4. In 1998 the applicants left eastern Croatia because they say the Croats were returning en masse to the area and there were frequent incidents including violent clashes. The couple moved to Serbia proper and again successfully applied for refugee status but eventually decided to leave in 2005 as a result of various difficulties they experienced, including not being able to register their car, buy property in their own name or obtain full-time state employment. It is claimed that the couple's mixed marriage has given rise to serious strains on both sides of the family. The husband says that he was unable to claim Serbian citizenship because he would have had to renounce his Croatian citizenship to do so, something which he has do wish to do. The husband sold his property in his home village but due to his circumstances he says he was forced to accept a price that was half of the market value. The husband also says that his mother (now deceased) had been denied her pension entitlements, which he claims was ethnically motivated, and he also complains of the length of time it took him to sort out his inheritance from his mother.

5. The couple arrived in Ireland in March, 2005 and applied for asylum. They were both rejected at the s. 13 stage by the Refugee Applications Commissioner and on appeal by the Refugee Appeals Tribunal. Of note is the fact that on 15th November, 2004, the Minister for Justice designated Croatia as a safe country of origin pursuant to s. 12(4) of the Refugee Act 1996. The significance of this is in relation to s. 11A of the Act, which provides:-

> 11A.—(1) Where, at any time during the investigation of an application by the Commissioner under sect ion 11, it appears to him or her that an applicant—
>
> (a) is a national of, or has a right of residence in, a country standing designated by order under section 12(4) as a safe country of origin, or
>
> (b) had lodged a prior application for asylum in another state party to the Geneva Convention,
>
> then the applicant shall be presumed not to be a refugee unless he or she shows reasonable grounds for the contention that he or she is a refugee.
>
> […]
>
> (3) Where an applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee.

6. Thus, there is a presumption that a person from a designated safe country is not a refugee and the applicant therefore has to discharge what I think is a higher onus, because he or she has to displace this presumption. Another consequence is that in most

circumstances the decision of the Commissioner against recommending refugee status can only be appealed on paper and not by way of an oral hearing. That is what happened in this case, as the Commissioner confined the appeal to writing only. The applicants' written submissions to the Tribunal were accompanied by a substantial body of supporting documentation, including country of origin information.

7. The focus of the appeal was very much on the risks facing the husband if returned to Croatia as an ethnic Serb, and the wife's claim was assessed largely on the basis that she might be at risk because she is party to a mixed marriage. The same Tribunal member, Ms. Elizabeth O'Brien, determined both appeals, in decisions dated 9th September, 2008.

8. In the earlier part of her decision, the Tribunal member acknowledged various country of origin information submitted on behalf of the applicants:-

> "Reference is made to the fact that little more than one third of the over 300,000 ethnic Serb IDPs and refugees have been able to return to Croatia. It offers the opinion that about two thirds of past returns are not sustainable and for the remaining Croat IDPs the main obstacle to return is the poor economic conditions in return areas. For Serb IDPs the main barriers to return and reintegration are property, housing issues and lack of employment opportunities as well as continuing discrimination.
>
> According to the International Helsinki Foundation, there are reports of cases of ethnically motivated discrimination in certain areas of employment, for example State institutions, hospitals, courts and schools reportedly rejected job applicants of those categories (of mixed Serbs) although they had adequate training and instead hired people from other Croatian cities.
>
> Reference is made to the US Department of State Human Rights Practices Report for 2006 which states that the government did not fully implement programmes providing housing to ethnic Serb refugees who lost access to socialised housing. While NGOs noted a significant decline in violence against ethnic Serbs, societal violence and discrimination against ethnic minorities, particularly Serbs and Roma, remained a problem.
>
> It also refers to the fact that open discrimination continued against ethnic Serbs and Roma."

This notwithstanding, the Tribunal member was not satisfied that there was a well-founded fear of persecution in this case:

> "I accept the country of origin information that points out that there is still open discrimination against ethnic Serbs in Croatia, along with other minorities, however I need not point out that discrimination per se does not constitute persecution. As acknowledged by the applicant's legal representatives in the submissions, discrimination may amount to persecution if it has effects of a substantially prejudicial nature. Thus for example if the discrimination in question led to an applicant being in effect unable to feed his family, such that the most basic human right, the right to life, was threatened, then such discrimination would clearly amount to persecution. However it is not apparent to me that the discrimination that is prevalent in Croatia is of such a nature and extent, or of such a degree that it would cause consequences of a substantially prejudicial nature to this applicant."

9. The Tribunal member accepted that the husband may find difficulty in obtaining public sector employment, though she said it was not apparent that his qualifications were such that he was in a position to apply for such employment. Referring to the couple's mixed marriage, the Tribunal member said she accepted that inter-ethnic tensions remain to some degree, and perhaps to a worse degree in certain parts of Croatia. However, she thought that one incident of a verbal threat having been made to the wife did not constitute persecution. She noted that mixed marriages were not uncommon in Croatia and the country of origin information did not refer to any incidents of violence against persons in mixed marriages in Croatia.

10. The Tribunal member accepted that the husband had suffered some difficulties in enforcing his property rights and that he was forced to sell his property at less that market value. She held, however, that it was not apparent from the evidence that the husband's mother was denied her pension rights on ethnic grounds.

11. Thus, the Tribunal member rejected both appeals for the same main reason, which was that any discrimination that the couple would be subjected to if returned to Croatia would not be of such a nature and extent or of such a degree that it would amount to persecution.

The Application for Judicial Review.

12. Turning first to the persecution issue, the applicants say that the country of origin information submitted to the Tribunal indicated that discrimination was so severe that most ethnic Serbs could not remain in Croatia. They rely in particular on a report of the Internal Displacement Monitoring Centre of April, 2006 which said that little more than one third of the over 300,000 displaced ethnic Serbs had been able to return to Croatia, and that approximately two-thirds of past returns were not sustainable. The report said that the main barriers to return and reintegration were property, housing issues and lack of employment opportunities, as well as continuing discrimination. The Tribunal member referred to this specific country information and did not appear to take any issue with it and the applicants argue that the Tribunal member failed to provide any reasoning as to how the discrimination which the applicants might face would not be of such a degree to constitute persecution and that she therefore erred in law in her finding in respect of persecution.

13. As regards the second issue, the applicants assert that the Tribunal member's failure to make any reference to its previous decision 69/32501/01B or to deal with that case in any way renders her decision unlawful. It is submitted that this omission is in breach of fair procedures and the Tribunal's statutory duty pursuant to article 5 of the European Communities (Eligibility for Protection) Regulations 2006 to consider all relevant materials presented by the applicant.

The Persecution Issue.

14. It is well established as a matter of refugee law that cumulative acts of discrimination may, taken together, amount to persecution within the meaning of s. 2 of the Refugee Act 1996. In *Rostas v. Refugee Appeals Tribunal* (Unreported, High Court, 31st July, 2003) Gilligan J., having regard to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, held that a fear of persecution may arise from "the cumulative effects of various measures of discrimination where they may have seriously prejudicial consequences." The UNHCR Handbook provides as follows:-

> "53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of

insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved."

The European Communities (Eligibility for Protection) Regulations 2006 transpose the Qualification Directive (2004/83/EC). Paragraphs (1) and (2) of article 9 provide (emphasis added):-

9. (1) Acts of persecution for the purposes of section 2 of the 1996 Act must:

(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

(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 subparagraph (a).

(2) Acts of persecution as qualified in paragraph (1) can, inter alia, take the form of—

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in section 2(c) of the 1996 Act;

(f) acts of a gender-specific or child-specific nature.

15. It is clear from these principles that a measure of discretion will inevitably lie with the decision maker – in this case the Tribunal – to determine whether certain discriminatory measures, taken cumulatively, amount to persecution in any given case. It is not possible to identify when a precise threshold has been reached so that the discrimination is of such a degree that it constitutes persecution. It should also be borne in mind that persecution itself can be an uncertain concept. At para. 51 of the UNHCR Handbook it is observed: "There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success."

16. It is true of course that decisions on the facts are to be made by the Tribunal member hearing the application. But that is not the issue here. The question is whether the evidence of discrimination contained in the materials accepted by the Tribunal actually constituted persecution as a matter of law. On the basis of the evidence and country of origin information available to her, I do not think the Tribunal member erred in law in reaching the conclusion that she did. Under article 9 of the 2006 Regulations, there must be an accumulation of measures that is sufficiently severe as to affect an individual in a manner that is at least comparable to a severe violation of basic human rights. In other words, it is a question of degree, and the Tribunal member clearly acknowledged this when she stated that "discrimination may amount to persecution if it has effects of a substantially prejudicial nature". I do not think that the case that was made to the Tribunal member was so strong as to leave open only one possible conclusion, namely, that the discrimination at issue was such as to constitute persecution. There may be cases where a Tribunal member disregards flagrantly prejudicial instances of discrimination that on any objective and reasonable analysis must amount to persecution but I do not think that this is such a case.

17. The applicants emphasise one extract from the 2006 Internal Displacement Monitoring Centre report, which was in fact referred to by the Tribunal. However, when the body of country information is considered as a whole, and in particular some of the subsequent reports that pointed towards an improving situation for ethnic Serbs in certain respects, it is clear that the Tribunal member's findings were broadly in line with the general thrust of the country information. She accepted that the applicants had suffered "considerable hardship" in the past and that there was still "open discrimination" against ethnic Serbs in Croatia. However, she did not accept that such discrimination that might be visited upon the applicants if returned to Croatia would be such as to rise to the level of persecution.

18. Of course, it is not for this Court to say whether a different conclusion should have been reached. It is enough that the correct legal principles were considered and that the decision made was open to the Tribunal. I am satisfied that this is the case. I consider this to be a reasoned decision where the Tribunal member has clearly undertaken a careful assessment. In the circumstances, the conclusion that she reached was one that was open to her. The test that she applied has its basis in international refugee law and our domestic legislation, namely article 9 of the 2006 Regulations, which is referred to in the Tribunal decision.

The Previous Decision Issue.
19. The second question for which leave was given relates to a previous decision made by the Tribunal in a case (Ref. 69/32501/01B) involving a woman from Croatia who was part of a mixed marriage. The Tribunal held that the woman by association with her husband had demonstrated a well-founded fear of persecution for reasons of ethnicity and political opinion in Croatia. A copy of this decision was submitted to the Tribunal member in support of the applicants' appeal. The Tribunal member did not refer explicitly to the decision, nor did she seek in any way to distinguish the facts or circumstances that were decided on that occasion in favour of the applicant so as to distinguish them from the instant cases. The question therefore arises as to whether the decision is flawed because it does not refer to that earlier case for the purpose of distinguishing it in some way from the circumstances here.

20. A number of points should be borne in mind in considering this matter. First, the Tribunal is not bound by its previous decisions but, as the Supreme Court said in *P.P.A. v. Refugee Appeals Tribunal* [2007] 4 I.R. 94, "consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary." Secondly, I do not think it can be said that the Tribunal member did not consider the previous decision; rather the issue is that she failed to refer to it or attempt to distinguish it. In her decision the Tribunal member does say that she considered all of the documents submitted to her and I see no reason to doubt that she did. Thirdly, the previous decision was from January, 2004. Some ten months later, Croatia was designated as a safe country by the Minister and the country of origin information would suggest that conditions have improved somewhat in recent years, something which the Tribunal member in this case observed in her analysis.

21. It seems to me that the facts of the previous case are by no means on all fours with the applicants' particular circumstances. Of particular note is that the previous case concerned a woman married to a man of dual Serb *and* Roma ethnicity, who had served in the Serb armed forces and who the wife claimed was being sought by the Croatian authorities and would be arrested, along with her, if they returned to Croatia. It is clear that there are significant distinguishing features of the previous decision as compared with the facts before the Tribunal.

22. The same argument that the applicants are making in the within proceedings was raised in *I.T.N. v. Refugee Appeals Tribunal* [2009] I.E.H.C. 434. At para. 37 of her judgment, Clark J. said as follows:-

> "The Tribunal Member found that the previous decisions submitted were not relevant to this case. Having reviewed those decisions it is apparent why the Tribunal Member came to that conclusion. The previous RAT decisions were not of sufficient significance to warrant the overturning of the Commissioner's recommendation. The Court is also satisfied that there was no obligation on the Tribunal Member to engage in a detailed assessment of each decision or to explain why his conclusions differed from those reached in each of the previous decisions furnished."

I adopt these observations. The extent to which a Tribunal member should engage with a previous decision depends on the relevance of that decision. In the circumstances of the case under consideration, is the earlier decision so relevant that it is necessary for the Tribunal to refer to it explicitly in its decision?

23. I am satisfied that that was not the situation here because of (1) the significant factual differences between the two cases; (2) the passage of time; (3) the designation of Croatia as a safe country; and (4) the country of origin information as to improving conditions in Croatia for ethnic Serbs. The earlier case was not sufficiently important or relevant or decisive as to make the Tribunal decision unlawful for failure to refer to the earlier case. Such omission did not constitute unreasonableness or breach of the applicants' right to fair procedures.

24. I am not satisfied that either of the grounds upon which the Court granted leave have been substantiated and I must therefore refuse the reliefs sought.

25. It does seem to me that the applicants are a deserving couple who have had a very difficult, uncertain and anxious experience and who have now been out of their home for some ten years and are in Ireland for six years, with their status being precarious as asylum seekers or failed asylum seekers. I hope that they will be able to make a humanitarian case against the making of a deportation order.