Neutral Citation Number: [2006] IEHC 365

THE HIGH COURT

[2004 No. 942 JR]

BETWEEN

DRAGICA VERCEVIC

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
AND
AIDAN EAMES SITTING AS
THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on the 14th day of November 2006.

1.1 The Applicant is from Croatia and was born on the 6th May, 1961. She arrived in Ireland in February, 2001. She immediately applied on the 12th of that month for refugee status and duly completed the standard application. Her application was initially considered by the Refugee Applications Commissioner who recommended on the 20th February, 2002, that the Applicant should not be granted a declaration of refugee status. That was appealed by a notice of appeal dated the 9th April, 2002.

1.2 On the 23rd June, 2004, the second named Respondent, sitting as a member of the Refugee Appeals Tribunal, proceeded upon an oral hearing of the Applicant's appeal. There is a transcript of that oral hearing conducted on the 23rd June, 2004. At that oral hearing the Applicant was represented by both solicitor and counsel. The Applicant was questioned by her own counsel and also by the presenting officer and at the conclusion of that questioning the Applicant's counsel was provided with and availed of an opportunity to make submissions. The submissions made by counsel on behalf of the Applicant highlighted that it was the Applicant's claim that there was no effective State protection particularly in the enclave or area which was home to the Applicant. In the course of those oral submissions it was requested that the Applicant's lawyers might provide the Tribunal with an overall submission framed on the issue of State protection and the approach which the Tribunal should adopt in assessing country of origin information and it was expressly stated (at p. 26 of the transcript) that the member of the Refugee Appeals Tribunal conducting the hearing "would go through all the materials that have been submitted". The presenting officer was then given an opportunity to make a submission and the hearing concluded.

1.3 By letter dated the 14th July, the Applicant's solicitors forwarded written submissions together with four country of origin documents namely a UNHCR field survey dated January, 2001, a Human Rights Watch report, on the Balkans of 2004, a Human Rights Watch briefing paper of 13th May, 2004 and a US Department of State report on Croatia dated the 25th February, 2004. Also forwarded with that letter were two positive recommendations in respect of two refugee Applicants namely a Mr. Ruzic and a Ms. Ognjenovic who both came from the same area as the Applicant and whom it was contended had succeeded based upon similar facts to the facts in the Applicant's claim.

1.4 A decision was duly made by the member of the Refugee Appeals Tribunal in relation to the application which was dated the 29th September, 2004. The member determined that the appeal should be dismissed and affirmed the original recommendation of the Refugee Applications Commissioner. The decision to refuse the appeal was notified to the Applicant by letter dated the 5th October, 2004 and the Applicant duly applied for relief by way of judicial review in respect of the decision of the Refugee Appeals Tribunal dated the 29th September, 2004. The Applicant was granted leave to seek an order of *certiorari* quashing the decision of the 29th September, 2004, together with a declaration that such a decision was arrived at in breach of the principles of natural and constitutional justice and for a consequential order remitting the Applicant's asylum claim for rehearing together with any directions that might be made in relation to the correct test to be applied in considering applications for refugee status as the court may seem just or appropriate.

1.5 The Applicant was granted relief to seek judicial review on two specified grounds namely;

> 1. The second Respondent in the course of the Applicant's oral hearing of her appeal against the recommendation of the Refugee Applications Commissioner refused and/or failed to allow the Applicant to call a witness, namely Svetlana Pavlovic whom she wished to give relevant evidence on her behalf. Accordingly, the second Respondent failed to adhere to the principles of *audi alteram partem* and thereby breached the Applicant's right to have her appeal dealt with according to the tenets of natural and constitutional justice.
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> 2. The second Respondent in his decision of the 29th of September, 2004, failed to consider all relevant material, more specifically the positive recommendations of the Refugee Applications Commissioner in the cases of Zoran Ruzic, RAC Reference 69/24558/01A and Dobrila Ognjenovic RAC Reference 69/32272/01B which were tendered by the Applicant to the second named Respondent in the course of the said oral hearing in support of her application for asylum. The second Respondent also failed to consider the written submissions submitted by the Applicant subsequent to the said oral hearing and which the Applicant was given leave to submit subsequent to the said oral hearing. Accordingly, the second Respondent failed to adhere to the principles of *audi alteram partem* and thereby breached the Applicant's right to have her appeal dealt with according to the tenets of natural and constitutional justice.

2.1 It is in respect of those two grounds that this court must consider whether or not the Applicant is entitled to judicial review.

2.2 The first ground relied upon is that it is claimed that during the course of the Applicant's oral hearing before the second member Respondent that the second named Respondent refused and/or failed to allow the Applicant to call a witness, namely, Svetlana Pavlovic whom it was claimed wished to give relevant evidence on the Applicant's behalf and that as a result of such refusal and/or failure there was a failure on the part of the second named Respondent, to adhere to the principles of *audi alteram partem.*

2.3 It is clear that a body such as the Refugee Appeals Tribunal must apply procedures that ensure constitutional justice. The *audi alteram partem* principle encompasses two concepts, firstly, that a person affected by a decision must have due notice and secondly, that such person must be allowed appropriate facilities to make the best possible case in reply. It is the alleged failure to allow the Applicant to make the best possible case in reply by failing to allow Svetlana Pavlovic be called as a witness which is claimed amounts to a breach of the principles of *audi alteram partem.*

2.4 The factual position in relation to this issue can be gleaned from the transcript of the hearing before the second named Respondent on the 23rd June, 2004. At the commencement of the hearing counsel for the Applicant identified to the second named

Respondent that there was one witness namely Svetlana Pavlovic. The second named Respondent questioned as to how such witness might assist the Tribunal and counsel for the Applicant informed him that she was from the same area as the Applicant and the second named Respondent indicated as follows:

> "All right. Well, we will take a view as we go through the evidence, as to whether it will be necessary to call Ms. Pavlovic."

At the end of the questioning of the Applicant no application was made to call the witness nor was the issue raised. In fact what occurred was that the second named Respondent identified that the real issue in the case which was going to have to be determined was the issue of effective State protection. It was in respect of that issue that the hearing continued and the Applicant's counsel made further submissions thereon and requested to be allowed to put in further written submissions and documentation. At that stage no request was made for the witness to be called nor was it suggested that such witness was required. There was no reference to the witness in the letter of the 14th July, 2004, or the written submissions attached thereto. Those submissions together with the attachments dealt with country of origin information, the forward looking aspect of the claim and a submission in relation to what at law amounts to persecution.

2.5 The decision of the second named Respondent did not call into question any facts identified by the Applicant nor was any adverse determination made in relation to the credibility of the Applicant. It was also the case that the proposed witness had left Croatia a number of years prior to 2004. In the above circumstances it appears to this court that there were clear and compelling reasons as to why the hearing before the second named Respondent proceeded on the basis that the proposed witness's evidence was not necessary and this is confirmed and clearly demonstrated by the fact that counsel for the Applicant did not suggest otherwise, even though there was a clear statement that if it was deemed necessary to call the witness Ms. Pavlovic that the same would be considered. The Applicant's counsel did not raise the matter other than at the start and made no attempt to suggest that such evidence was necessary.

2.6 In the light of the above facts this court is satisfied that the correct position is that there was not a refusal to call a proposed witness but merely an indication that the decision as to whether or not to call such witness would be delayed until the stage of the hearing when it could be determined whether or not such evidence was necessary. This court is satisfied that there was never a refusal or failure to allow the Applicant to call a witness and that the true position is that such evidence was deemed to be unnecessary. This court is therefore satisfied that in relation to the first of the grounds identified at paragraph E1 of the amended statement required to ground an application for judicial review that there was no refusal or failure on the part of the second named Respondent to allow or permit the calling of a witness and that the principles of *audi alteram partem* have not been breached.

3.1 The second ground upon which leave was granted is that the second named Respondent in his decision of 29th September, 2004, failed to consider all relevant material, more specifically the positive recommendations of the Refugee Applications Commissioner in the cases of Zoran Ruzic, RAC reference number 69/24558/01A and Dobrila Ognjenovic RAC reference number 69/32272/01B which were tendered by the Applicant to the second named Respondent in the course of the said oral hearing in support of her application for asylum. The ground for relief went on to state:

> "The second named Respondent also failed to consider the written submissions submitted by the Applicant subsequent to the said oral hearing."

It was claimed in the said ground that as result of the failure to consider the above identified two positive recommendations and the written submissions that there was a failure to adhere to the principle of *audi alteram partem* and therefore a breach of the Applicant's right to have her appeal dealt with according to the tenets of natural and constitutional justice.

3.2 The Applicant had applied at leave stage for leave on wider grounds and had claimed leave at paragraph 5 of the application on the ground that:

> "the decision of the second named Respondent displays an error of law on its face and is wholly at odds with the decision of the High Court in *Rostas v. Refugee Applications Tribunal and Minister for Justice, Equality and Law Reform* (Unreported, High Court Gilligan J. 31st July, 2003) which is authority for the principle that when the Tribunal is presented with conflicting sets of country of origin information, those sources which are more favourable to the Applicant are to be preferred over those which are not, and in that the Applicant presented independent country of origin information which was supportive or operative of her claim for asylum to the second named Respondent. Yet the second named Respondent in his said decision preferred alternative country of origin information which was not supportive of the Applicant's claim for asylum."

Leave was not granted to seek judicial review on that ground. It followed that during the hearing before this court that the issue which required to be considered is not the favouring of one piece of country of origin information as opposed to an other but rather the issue as to whether or not the second named Respondent considered the two cases in which positive recommendations were made and also considered the written submissions submitted with the letter of 14th July, 2004.

3.3 It is appropriate to identify a number of facts relevant to this ground of appeal. Firstly, as is clear from the grounding affidavit of the Applicant (at para. 6), it is apparent that during the oral hearing on 23rd June, 2004, before the second named Respondent that the documentation relating to the two positive recommendations relied upon by the Applicant was tendered to the second named Respondent. That documentation was again included and attached to the written submissions forwarded by letter of 14th July, 2004, subsequent to the oral hearing. It therefore follows that the documentation dealing with the two positive recommendations was placed before the second named Respondent on two occasions. Whilst it was submitted during the oral hearing no reference was made to it by the Applicant's counsel in his submissions to the second named Respondent. Again when further written submissions were forwarded by the letter of 14th July, 2004, including copy documentation dealing with the two positive recommendations once more no express reference was made to such positive recommendations. Those two positive recommendations were made in 2002, almost two years prior to the oral hearing. In the light of the information contained in the country of origin information as to the changing circumstances within Croatia such lack of reference is not surprising. Those positive recommendations would have been based upon the factual position existing as of 2002, and due to the passage of time it is no surprise that there was no express reference to those recommendations in either the oral submissions or the two written submissions.

3.4 It is against that background that the absence of an express reference to either of the two positive recommendations in the written decision must be considered. This court is satisfied that no inference can be drawn from the absence of such express reference. That is all the more so where it is clear, beyond doubt, that the second named Respondent had the documentation relating to such positive recommendations and in circumstances where the second named Respondent had (at p. 30) of the transcript of the

oral hearing of 23rd June, 2004, expressly stated that he would go through all the country of origin reports and would take into account all of the submissions made by the barrister acting on behalf of the Applicant and where the second named Respondent had also on the same occasion invited lawyers acting for the Applicant to make further written submissions and allowed and permitted such submissions to be made. Also as is apparent from the finding hereinafter made it is also clear from the ultimate written decision of the second named Respondent that express reference was made to part of the documentation included with the letter of the 14th July, 2004.

3.5 The written decision also stated at paragraph 4 on p. 11 that the second named Respondent had carefully considered all the papers submitted to him for the purpose of the appeal and all the matters required to be considered under s. 16(16) of the 1996 Act. The second named Respondent reiterated that he had considered all the evidence at the bottom of p. 14 of his written decision.

3.6 Against the above factual background this court is satisfied that it cannot be said that the express reference to careful consideration of all the papers and all matters required to be considered under s. 16(16) of the 1996 Act and reference to consideration of all the evidence could be categorised as a formula of words or a statement of a mere administrative formula. (See *G.K. v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 at pp. 425 and 426.) The manner in which the second named Respondent dealt with this matter is indicative of a willingness to consider and have regard to documentation provided by and submissions made on behalf of the Applicant. This court is satisfied that there should be due regard to the express statements made by the second named Respondent.

3.7 Counsel on behalf of the Applicant urged that the approach identified by Clarke J. in *Muia v. O'Gorman and Others* (Clarke J., 11th November, 2005), as stated at paragraph 4.6 of that judgment should be followed. In that paragraph Clarke J. stated:

> "Where, however, as here, there is no evidence to be found in the decision that the country of origin information favourable to the Applicant's case was considered and, equally, as a consequence, no rational explanation as to why it was rejected, it seems to me there are at least arguable grounds for the Applicant's contention that the decision maker did not take into account relevant considerations."

This court is satisfied that that approach, albeit that it was at leave stage, is of no benefit to the correct approach to be followed on the facts of this case. The information concerning two positive recommendations was of little or any relevance to the matters under consideration by the second named Respondent. Due to the lack of real relevance this court cannot draw any inference from the lack of express reference in the written decision. The quality of the information to be gleaned from those two positive references was such that it could not be said that a stated rational explanation was required to reject same. This court is satisfied that the Applicant has not made out the claim that the second named Respondent failed to consider relevant material or failed to consider the said two positive recommendations or that any inference can be drawn from a lack of an express reference to such recommendations in the written decision of the second named Respondent.

4.1 The final ground which the court must consider is the ground relied upon in the second part of paragraph 2 in section E of the amended statement required to ground an application for judicial review. That ground relates to a claim that the second named Respondent failed to consider the written submissions submitted by the Applicant subsequent to the said oral hearing. Those written submissions together with documentation were forwarded with the letter of the 14th July, 2004. Such submissions were invited by the second named Respondent and he expressly refers in his written decision to the fact that he had considered all the evidence and had carefully considered all the papers submitted to him for the purposes of the appeal. This court, as outlined above, is satisfied that those references, on the facts of this case, were not a mere formula of words but were a true statement of what had occurred.

4.2 This court is confirmed in its conclusion that the second named Respondent considered the written submissions from the text of the actual decision. The written submissions contained extensive quotes from a number of country of origin documents and copies of those documents were attached. One of those documents was a Human Rights Watch report on minority returns in the Balkans 2004, which was not only attached to the submissions but was also referred to by quotation in a number of places in the written submission. In the second paragraph on the third page of that report it was stated:

> "By 2003, physical attacks against returnees in Croatia, already rare in comparison to Kosovo and Bosnia had all but disappeared."

On p. 15 of the written decision of the second named Respondent he stated:

> "The EU Accession Report on Croatia and the Human Rights Watch report on Croatia for 2003, make similar points even though both recognise that there are ongoing hostilities and difficulties in this post conflict situation. The Human Rights Watch report on Croatia for 2003, state:
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> 'In 2003, physical attacks on returning Serbs are… rare and… almost disappeared.'"

I am satisfied that a proper reading of that written decision makes it clear that the Human Rights Watch report on Croatia for 2003, is in fact the report dated January, 2004, as it is that report which covers the situation in Croatia for 2003. It would appear highly probable that the reference on p. 15 of the written decision to that report amounts to what could almost be described as a quotation and confirms, beyond doubt, that such a report was considered. This court is satisfied that the written decision itself makes it clear that at least some of the documentation submitted with the letter of the 14th July, 2004 and referred to in the written submissions attached thereto was considered and that the lack of express reference to other documents is not material on the facts of this case.

4.3 A complete and proper reading of the decision and the country of origin information submitted with the letter of the 14th July, 2004, makes it clear that this is not a case of selective quotation or the use of an isolated example of State protection. The decision of Clarke J. in *Idiakheua v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* judgment May, 2005, had indicated that there were arguable grounds for judicial review if the decision of the Refugee Appeals Tribunal relied on selective quotations from the report contrary to the overall conclusions or relied on an isolated example of State protection to justify a finding of adequate State protection (see p. 6).

4.4 A reading of the country of origin information submitted with the letter of the 14th July, 2004, leads this court to the conclusion that the findings contained in the written decision of the second named Respondent could not be described as reliance upon selective quotations or at variance with the overall conclusions of those reports. It was apparent from those reports that the government was cooperating with the UNHCR and other humanitarian and international organisations in assisting refugees and returnees and that there were joint programmes as of December, 2003, being organised by the UNHCR and the government.

4.5 In the light of the above findings I therefore refuse the reliefs sought.