ODESSA ADMINISTRATIVE COURT OF APPEAL
RULING

IN THE NAME OF UKRAINE

September 3, 2013 Case № 815/3681/13-a

Category 3.4 Presiding in court of court of the first instance Yukhtenko L.R.

The panel of judges of Odessa Administrative Court of Appeal:

Presiding judge - Semeniuk G.V.

Judge - Potapchuk V.O.

Judge - Koval M.P.

The panel of judges considered in written proceedings at Odessa Administrative Court of Appeal the administrative case of the Applicant's complaint regarding the Ruling of the Odessa District Administrative Court dated 11 June 2013. Plaintiff's appeal requested to find unlawful the decision of the State Migration Service of Ukraine which ruled on 29.03.2013 №192-13 to refuse to recognize him as a refugee or a person in need of complementary protection, and to oblige the taking of a decision on recognition as a refugee or a person in need of complementary protection.

THE PANEL OF JUDGES HAS ESTABLISHED:

The plaintiff filed a complaint against the State Migration Service of Ukraine, requesting to find unlawful its decision of 29.03.2013 №192-13 to refuse to recognize him as a refugee or a person in need of complementary protection, and to oblige the taking of a decision on recognition as a refugee or a person in need of complementary protection.

The claim was denied by the ruling of the District Administrative Court on 11 June 2013.

Having disagreed with the ruling of the trial court, the plaintiff filed an appeal, in which he requests the appellate court to cancel the ruling of the court and adopt a new ruling that satisfies his claims.

In support of arguments of appeal, the plaintiff refers to incomplete ascertainment of the District Administrative Court of the circumstances relevant to the case, the discrepancy between the findings of the District Administrative Court of the circumstances of the case, and violations of substantive and procedural law.

Having heard the plaintiff, having checked the arguments of the appeal and the case materials, the panel of judges considers that the complaint should be partially satisfied, given the following.

The District Administrative Court established that the plaintiff, DOB 12.10.1970 is a citizen of Syria, nationality -Arabic, religion - Sunni Muslim. He arrived to Ukraine legally on 21.04.2010 on a tourist visa and national passport, by air flight Aleppo (Syria) - Odessa (Ukraine).

On 18.06.2012 plaintiff filed an application to the Office for Refugees and Aliens of the Chief Directorate of the State Migration Service of Ukraine in Odessa region to recognize him as a refugee or a person in need of complementary protection.

After reviewing the documents to provide the plaintiff a refugee status in Ukraine, the Office for Refugees and Aliens of the Chief Directorate of the State Migration Service of Ukraine in Odessa

region drafted a conclusion on 28.02.2013 ODS 12/234 concerning the refusal to recognize him as a refugee or a person in need of complementary protection, justifying it by the fact that the analysis of the plaintiff's personal file indicated that in the country of origin he had not been and would not be threatened, and no torture was expected. Furthermore, no one had threatened or persecuted the applicant personally. Also, in the interview protocol, the plaintiff specified that he had no intention to return to the country of origin because of a desire to seek work in the territory of Ukraine. Therefore, based on the case materials, one could detect the plaintiff's desire only to reach a more financially stable country to improve his living conditions.

The Ruling of the State Migration Service of Ukraine dated 29 March 2013 №192-13 held that the above mentioned conclusion was supported and the plaintiff, a Syrian citizen born on 12.10.1970, was denied recognition as a refugee or a person in need of complementary protection.

Based on the given ruling, the Office for Refugees and Aliens of the Chief Directorate of the State Migration Service of Ukraine in Odessa region served notice 36 on 13.05.2013 to the plaintiff, notifying him of the refusal to recognize him as a refugee or a person in need of complementary protection.

Having disagreed with the above mentioned ruling the plaintiff appealed to the District Administrative Court.

In its Resolution dated 11 June 2013, the District Administrative Court denied the appeal.

The Board of Judges of the Court of Appeal disagreed with the conclusion of the trial court with regard to the following:

In accordance with Section 13 of Article 1 of the Law of Ukraine "On refugees and persons in need of complementary or temporary protection" 3671 – VI dated 8 July 2011 – a person in need of complementary protection is a person who is not a refugee under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees and this Law, but who needs protection because that person has come to Ukraine or remained in Ukraine as a result of a threat to life, safety or freedom in the country of origin because of concerns about its use of the death penalty or execution, or torture, inhuman or degrading treatment or punishment.

That is, a condition to provide complementary protection in Ukraine is in particular a concern of use of torture, inhuman or degrading treatment or punishment.

This formulation literally coincides with the disposition of Article 3 of the European Convention on Human Rights which contains the prohibition of torture, inhuman or degrading treatment or punishment.

The European Court of Human Rights provides an interpretation of the term "threat of torture, inhuman or degrading treatment or punishment" in its rulings.

In the case of *Sufi and Elmi v. the United Kingdom* (8319/07 and 11449/07, Ruling dated 28 June 2011), the court concluded that the return of a person to a situation of a civil war may constitute a threat of torture, inhuman or degrading treatment or punishment (paras. 217-241).

According to Article 17 of the Law of Ukraine 3477 -VI "On implementation and application of the European Court of Human Rights" dated 23 February 2006 the courts shall apply the Convention and practice of the European Court of Human Rights as source of law when deciding cases.

According to country-of-origin information on Syria, both parties to the conflict were using methods and tactics of war that increase the risk of civilian casualties. In July 2012 the International Committee of the Red Cross recognized the conflict in Syria as an armed conflict of a non-international character. The number of people affected by the conflict at the moment is very high and

is still rising. Sources of information on the country of origin reported that as of May 2013 more than 70,000 people were killed, and the number of refugees exceeded 1.5 million. Besides, numerous cases of extrajudicial executions, torture and other serious violations of human rights were recorded, as evidenced in particular by paragraphs 1, 2 of UN General Assembly Resolution 66/253 “The Situation in the Syrian Arab Republic” dated 03.08.2012 and paragraph 1 of UN General Assembly Resolution 67/183 “Situation of human rights in the Syrian Arab Republic” dated 20.12.2012. According to COI the situation in Der-ez-Zor, where the plaintiff resided, is also dangerous because of military operations with heavy weapons, bombings, violence against civilians, instances of extrajudicial executions, torture, and human rights violations.

Taking into account this position and the circumstances of the plaintiff′s personal case, the conclusion of the defendant and the trial court on the absence in the plaintiffs case of the conditions required to recognize him as a person in need of complementary protection is unreasonable.

The requirement of the trial court to provide "the circumstances regarding specific threat" are also found unreasonable.

In accordance with paragraph 13 of Article 1 of the aforementioned Law, the grounds for declaring a person in need of complementary protection include concerns about the use of the death penalty or execution, or torture, inhuman or degrading treatment or punishment.

Thus, in using the term “fear”, the law implies the existence of a certain risk, the reality of which should be evaluated by the State Migration Service or by a court in a particular case. In each case, certain factors should be taken into account. The risk of torture, inhuman or degrading treatment or punishment to the plaintiff in Syria is real, considering the risk assessment criteria that the European Court of Human Rights has established and taking into account information on the country of origin.

The existence of a real risk confirms the relevance of fears that the plaintiff will face torture, inhuman or degrading treatment, which in turn is the basis for declaring the plaintiff a person in need of complementary protection.

Besides, this District Administrative Court’s position does not meet the practice of the European Court of Human Rights. In the case of *Sufi and Elmi v. the United Kingdom* dated 28.06.2011 (8319/07 and 11449/07), the European Court of Human Rights concluded that there is no need to demand from an applicant to demonstrate special distinguishing features when he can otherwise demonstrate that the general situation of violence in the country of destination has reached sufficient intensity to create a risk of a breach of Article 3 (paras. 217 of the ruling). The return of persons to a country where they may suffer persecution, torture, inhuman or degrading treatment is a violation of Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

In addition, the return of the plaintiff to Syria at present would be contrary to the position of UNHCR concerning the international protection of persons who leave Syria (December 2012).

In accordance with Section 5 of Article 10 of the Law of Ukraine 3671 – VI “On refugees and persons in need of complementary or temporary protection” dated 8 July 201 - the central executive body implementing the state policy in the field of refugees and persons in need of complementary or temporary protection rules on recognition as a refugee or a person in need of complementary protection, or on refusing recognition as a refugee or a person in need of complementary protection after a comprehensive study and evaluation of all the documents and materials that may be evidence of the conditions to recognize as a refugee or a person in need of complementary protection.

At the time of adoption of the ruling by the defendant on recognition as a refugee or a person in need of complementary protection (29.03.2013), the defendant did not take into account the UN General Assembly Resolution 66/253 “Situation in the Syrian Arab Republic” dated 03.08.2012 and UN General Assembly Resolution 67/183 “Situation of human rights in the Syrian Arab Republic” dated

20.12.2012 and the practice of the European Court of human Rights in *Sufi and Elmi v. the United Kingdom* dated 28.06.2011 (8319/07 and 11449/07).

Taking into account the abovementioned, the ruling of the State Migration Service of Ukraine 192-13 dated 29.03.2013 and the decision of the trial court that are being appealed by the claimant cannot be considered as having been adopted in accordance with Part 3 of Article 2 of the Code of Administrative Court Procedure of Ukraine. As a result, the panel of judges concluded that there were grounds for substituting these previous rulings with a new ruling.

Given the above, and the requirements of Part 2 of Article 11, p. 162 Code of Administrative Court Procedure of Ukraine, the panel of judges decided that the State Migration Service of Ukraine was under an obligation to decide to recognize the plaintiff as a person in need of complementary protection.

References by the plaintiff in the lawsuit and in the appeal to grounds for recognition of his refugee status were not corroborated during the proceedings in the Administrative Court of Appeal, and therefore his claim in this section cannot be satisfied.

According to Section 3, Part 1, Article 198, p. 202 of Code of Administrative Court Procedure of Ukraine of Ukraine, upon consideration of an appeal on the decision of the trial court, the appellate court cancels it and adopts a new decision, if satisfied that the trial court violated substantive or procedural law, which led to the wrong decision in the case.

Based on articles 11, 162, 160, 198, 202, 205, 207, 254 of Code of Administrative Court Procedure of Ukraine of Ukraine, the panel of judges –

HAS RULED:

To allow the Applicant's appeal partially.

To cancel the Ruling of the District Administrative Court dated 11 June 2013 on the case 815/3681/13-a.

To adopt a new ruling that partially satisfies the claim.

To recognize as unlawful and to repeal the Decision of the State Migration Service of Ukraine 192-13 dated 03.29.2013 insofar as it refused recognition of the Applicant as a person in need of complementary protection.

To oblige the State Migration Service of Ukraine to take a decision recognizing the Applicant as a person in need of complementary protection.

The rest of the claim is denied.

The Ruling comes into effect five days after sending its copies to all persons involved in the case, but it may be appealed to the Supreme Administrative Court of Ukraine within twenty days from the date of coming into effect.

Presiding Judge G. V. Semeniuk

Judge V.O. Potapchuk

Judge M.P. Koval