

Municipal Court of Budapest

No.2.

In non-litigious procedure – initiated by the applicant represented by attorney dr. Lilla Farkas against the Office for Immigration and Nationality of MOI (hereinafter referred to as OIN) represented by XY – aiming at the judicial review of OIN's decision made in the course of the refugee status determination procedure, the Municipal Court makes the following

D e c i s i o n

The Court hereby changes the decision of OIN (August 2000) and recognizes the applicant as a refugee.

The decision shall also apply to the applicant's spouse and minor children.

The Court obliges OIN to pay the applicant HUF 3000 (three thousand Forints) within 15 days as compensation for his expenses.

The procedural fees, of HUF 3750 (three thousand seven hundred and fifty Forints), not paid in advance because of the right to deterred payment, shall be born by the State.

The decision may be appealed within 15 days upon delivery. The appeal shall be addressed to the Supreme Court and submitted to this court in three copies.

R e a s o n i n g

The applicant, citizen of the Federal Republic of Yugoslavia, of Serbian nationality, fled together with his family to Hungary in May 1999 during the war in Kosovo.

He substantiated his application for asylum by stating that the military authorities had obliged him to serve in the military because he had criticized the war, however, he escaped from the arrest of the authorities.

According to the statement of the Office of the UN High Commissioner for Refugees (UNHCR) in Hungary, issued in October 1999, there is no obstacle to apply the 1951 Geneva Convention in the case of the applicant.

In its decision of November 1999, OIN refused to recognize the applicant and his family as refugees, however, recognized them as beneficiaries of subsidiary protection (“persons authorized to stay”).

OIN argued that the criteria set forth by the 1951 Geneva Convention were not applicable, since the applicant's objection to serve in the army had not been driven by religious conviction or political opinion. He has not had to expect unusually harsh punishment on account of his race, religion or national affiliation due to his escape. The threat of imprisonment may only serve as the basis to provide subsidiary protection.

In its decision the Municipal Court (February 2000) annulled OIN's decision and obliged OIN to conduct a new procedure. The Court's decision became final in March 2000.

The Court based its decision on OIN's failure to examine the political/conscientious motives of the draft evasion/desertion and its relevance from the point of view of the asylum procedure in such a depth that would have been necessary to deliver a well-founded decision in the case.

During the interviews held in April and in August 2000 in the course of the repeated procedure, the applicant claimed that politics had become a part of everyday life during the war in Kosovo. Leaflets reported that the democratic world condemned the military actions of the Milosevic regime. The applicant shared the general opinion that the war made no sense. He refused the participation in committing war crimes in spite of the propaganda of the Yugoslav leadership and the attempts to intimidate him. He believes that many people shared this opinion but not even in a circle of friends was it possible to discuss such matters without consequences. This is confirmed by the events that led to his escape.

The police interrogated him because he had expressed his views against the war and the government during a meeting with friends on 8 April 1999. During the police interrogation held on the same day, he was slapped in the face repeatedly and warned "not to do this again". A couple of days later the draft call arrived. It was obvious for the applicant that he was drafted just because he expressed his opinion, since he had not been drafted during the war in Bosnia and his professional expertise was useless for the army. He hid in the neighborhood, but the Military Police came looking for him within a couple of days and he was arrested on 1 May 1999. His family was also intimidated. He was detained for seven days without being able to notify his relatives and then he was put on a truck on 7 May. He escaped and - with assistance - managed to flee to Hungary on 17 May. His wife and children followed him the next day.

In her statement, the applicant's wife corroborated the reasons and the circumstances of the escape. She claimed that her husband disagreed with the political leadership of their country of origin and that he would not have opposed had he not had to fight in a war condemned by the world.

The evidence obtained in the course of the repeated procedure failed to change OIN's view concerning the merits of the case. In its decision of August 2000, OIN refused to recognize the applicant as refugee, instead it recognized him as a person authorized to stay by extending the scope of this decision to the family members of the applicant.

In the reasoning of the decision OIN questioned that the story of the applicant's escape was genuine. It was established as a fact that the applicant's passport had not been withdrawn. It was also established that the war condemned by both the Hungarian society and the international community had come to an end not long after the applicant's escape.

OIN gave no further reasons of the rejection. It recognized, however, due to the threat of imprisonment for the rejection of the military service, the applicant as a person authorized to stay.

OIN based its decision on Section 2c, Section 13 (1) and Sections 21, 36, 39 and 40 of Act CXXXIX of 1997 on Asylum (hereinafter: AA) and on Section 2 of Government Decree 24/1998 (II. 18) (hereinafter referred to as "GD").

In his petition for judicial review, the applicant requested the Court to change OIN's decision and recognize him as a refugee. As a secondary claim, he requested the Court to oblige OIN to repeat the procedure.

The applicant pointed out that OIN had failed to take into consideration a large part of what he had said and to abide provisions of the court decision ordering the repetition of the procedure and to examine whether the established facts could substantiate his persecution. The applicant also pointed out the lack of reasons of the rejection and OIN's failure to identify/name the legal provisions the decision was based on. He also stated that in spite of his (and his wife's) coherent and credible statements, which do not run against generally known facts, OIN questioned the circumstances of his escape and evaluated the fact that his passport had not been withdrawn, to his disadvantage.

OIN in its submission to the court requested the rejection of the applicant's appeal. In OIN's view, the repeated asylum procedure fully complied with the legal requirements.

The applicant's petition for judicial review is well-founded due to reasons as follows.

The criteria for recognizing a person as a refugee are set forth by Section 3(1) of AA.

According to this provision – with exceptions defined in Section 4 – the refugee authority shall, on application, recognize a foreigner as a refugee who verifies or substantiates that Article 1 Section A and Section B, Subsection (1), paragraph b) of the Geneva Convention, and Article 1, subsections (2) and (3) of the Protocol shall apply to him.

Under Article 1, Section A, Subsection (2) the term “refugee” shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.

Under Section 16(1a) the applicant is supposed to substantiate the existence of the reasons that forced him to flee.

Consequently, the foreigner who verifies or substantiates that in his/her country of origin he/she is threatened by persecution as defined in the Geneva Convention, shall be recognized as a refugee.

The basis of substantiation is the applicant's consistent and credible personal statements, therefore, during the refugee status determination, the first thing to judge shall be whether the applicant's statements supporting the application are credible. If the presentation of the claimant is credible, the authority shall examine whether the reason to flee claimed by the applicant falls within the scope of protection set forth by the Geneva Convention.

The applicant has given a detailed explanation of the reasons and circumstances of his escape. His statements before the Hungarian authorities have been consistent, non-contradictory and concordant with that of his wife. There hasn't been any circumstances which would question his credibility. Therefore, he has correctly criticized OIN which evaluated his statements on the escape and passports as factors decreasing his credibility. The Court fully concurs the applicant's views that the refugee authorities shall properly have to substantiate their doubts.

The above lead to the conclusion that the statements of the applicant and his wife suitably and – after the repeated procedure – sufficiently substantiate the facts the decision on the merit of the claim can be based on. The Court, therefore, has to proceed to examine whether the potential punishment for draft evasion can be considered as adequate ground for recognizing the applicant as a refugee.

Having carefully consulted the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and especially paragraphs 167–174 on deserters and draft evaders, the Court based its decision on what is set forth in para 171:

“Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.”

In this context, it must be taken into consideration that the applicant left his country in order to avoid participation in a military action condemned by the democratic community and this condemnation was widely known. Therefore, in his case it has to be examined whether his political opinion is genuine and whether it is linked with the punishment to be faced by draft-evaders/deserters. If this latter condition is fulfilled, the applicant shall not be excluded from protection asylum might provide for.

The credibility/genuinity of the applicant’s anti-war conviction is supported by the fact that it is in full conformity with the public opinion generally as well as with the views of the international community. The credibility/genuinity of the conviction is also confirmed by the consistency with which during the course of the procedure the applicant presented the reasons leading to his persecution.

As the Court emphasized in its earlier decision, a credible conviction condemning military actions which are severe and mass violations of international norms and human rights, might be considered as political opinion as set forth by the Geneva Convention’s refugee definition.

Thus, the applicant’s views regarding the war may be considered as political conviction, and the criticism he articulated on 8 April 1999 may be considered to be the expression of his political opinion.

The expression of this political opinion was closely followed by a series of events which makes it likely that the applicant’s interrogation at the police station, his drafting and arrest and the intimidation of his relatives were the consequences of his criticism of the regime.

From the fact that the linkage between the expression of his political opinion and the measures that forced the applicant to escape has been substantiated, it concludes that the sanction for the escape is linked to the political opinion of the applicant.

Based on the above argumentation, the Court has come to the conclusion that the imprisonment that may be imposed on the applicant in his country of origin does amount to the threat of personal persecution based on political opinion under the Geneva Convention.

Therefore, the Court has decided that instead of the protection provided by the status of “person authorized to stay”, the applicant is eligible to the degree of protection guaranteed by the refugee status.

Consequently, since the OIN’s decision refusing to recognize the applicant as a refugee but recognizing him as a person authorized to stay is not in accordance with the law, the Court has decided to change it and recognize the applicant as a refugee under Section 39 (2) of the Asylum Act.

Under Section 2. a) of AA the decision recognizing the applicant as a refugee shall also extend to the immediate family members of the applicant, as determined by Section 2.f) of AA.

Under Section 78 (1) of the Civil Procedure Code – applicable due to Section 13 (3) of Government Decree No. 105/1952 (XII. 28) – OIN shall be obliged to compensate the applicant for his expenditures, the sum of which has been established by the Court on the basis of Section 1(1) d) of Decree 12/1991 (IX. 29) of the Ministry of Justice.

The court duty prenotated in accordance with the right to prenotation stemming from the subject matter of the case and established in accordance with Section 39(3) b) of Act XCIII on Duties and Fees (hereinafter referred to as “Duties Act”) shall be born by the State under Section 5(1) c) of the Duties Act.

Budapest, 4 October 2000.

Judge