THE HIGH COURT

HC 240/04

JUDICIAL REVIEW

RECORD NO. 2003/5 J.R.

BETWEEN:

N. K.

APPLICANT

AND

**REFUGEE APPEALS TRIBUNAL PAUL McGARRY,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE ATTORNEY GENERAL IRELAND**

RESPONDENTS

JUDGMENT delivered by Finlay Geoghegan J. on the 2nd day of April 2004

This is an application for leave to issue an application for judicial review seeking primarily to quash a decision of the second named respondent in his capacity as a member of the Refugee Appeals Tribunal given on the 26th November, 2002, in which he determined that the applicant is not entitled to a declaration of refugee status and that the recommendation of the Refugee Appeals Commissioner to that effect should be upheld.

The application is one to which s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 applies and hence the application must be made within 14 days on the date upon which the applicant was notified of the decision. Also, the applicant must have substantial grounds for contending that the decision is invalid or ought to be quashed.

Extension of Time

The applicant has deposed to the fact that she received notice of the decision on 2nd December, 2002. On that date she attended at the office of her solicitor who

had represented her before the Tribunal but was unable to see her solicitor due to his commitments until 9th December, 2002. On that date she instructed him to obtain an opinion of counsel on the merits of an application for judicial review. The applicant's solicitor has deposed to the fact that a brief was sent to counsel on 18th December, 2002; that he was contacted by counsel to discuss the matter on the 31st December and again on the 2nd and 3rd January to obtain further clarifications. Papers were drafted and a notice of motion issued on the 8th January, 2003.

On these facts I am satisfied that there is good and sufficient reason for extending the 14 day period in s. 5(2)(a) of the Act of 2000. The applicant herself moved immediately to seek advice on the merits of an application for judicial review. Pressure of work at the end of term and the Christmas vacation caused some of the delay. In addition I am influenced by the fact that the Statement of Grounds is a carefully drafted document which raises very specific grounds for contending the invalidity of the decision which clearly required a full consideration of both the facts of the case and the relevant law, including law from other jurisdictions.

Accordingly, I will extend the time for the making of this application up to and including the 8th January, 2003.

Background Facts

The applicant is an ethnic Russian who is a citizen of Uzbekistan. She arrived in the State on the 26th October, 2001 with her daughter, E. (born 24.12.84.) and claimed refugee status. She claims to have a well-founded fear of persecution in Uzbekistan by reason of her ethnicity and religion. She also claims that she had to leave Uzbekistan because of such persecution.

Following the procedures provided for under the Refugee Act, 1996 the Refugee Applications Commissioner recommended that she not be declared to be a refugee. She appealed from that decision to the Refugee Appeals Tribunal and an oral hearing was held on the 10th October, 2002, before the second named respondent as a Member of the Tribunal, at which she was represented by solicitor. The second named respondent issued a decision on the 26th November, 2002.

The Decision of the Tribunal

The decision of the second named respondent is essentially divided into three parts. It comprises an analysis of the applicant's case; a recital of submissions made on behalf of the applicant and the Commissioner and the decision. At the end of the latter part it is stated at p.9:-

> "For these reasons, I find that the Applicant has not established that there is a reasonable degree of likelihood that she has a well-founded fear of persecution for one of the reasons set out in s. 2 of the Refugee Act, 1996 (as amended). The Applicant is therefore not entitled to a declaration as to refugee status pursuant to that section."

It is submitted on behalf of the applicant that the above conclusion indicates that the Member of the Tribunal reached his conclusion on a cumulative basis by reason of the three matters he deals with in that part of the decision under the heading of "Decision". For the purposes of an application for leave it appears to me that this is the way in which the contested decision ought to be construed.

Substantial Grounds

At this stage the applicant is obliged to establish that she has substantial grounds for contending that the decision of the second named respondent is invalid. Insofar as I express conclusions on the propositions of law advanced on behalf of the applicant they are only intended as conclusions of a substantial ground to such propositions.

Cumulative Reasons

As already indicated, it is submitted on behalf of the applicant that there were three cumulative reasons set out by the second named respondent for his ultimate conclusions. These were:-

i. his doubts as to the credibility of the applicant; and

ii. his conclusion that the failure of the applicant and her husband to go to the authorities in Uzbekistan in relation to alleged extortion and consequent persecution of them by a government official, precluded the applicant from asserting that that country was unable or unwilling to provide them with protection from persecution; and

iii. his conclusion that the incidents of harassment, intimidation and discrimination which he appears to have accepted did occur by reason of the applicant's ethnic background, did not either individually or by reason of their cumulative effect, amount to persecution within the meaning of s. 2 of the Act of 1996.

The applicant submits that the Member of the Tribunal committed errors of law in relation to each of the above conclusions and in the alternative that even if an error of law were committed in relation to one such error, such error renders invalid

the final conclusion as it was based upon the cumulative effect of all three reasons. I accept, for the purposes of an application for leave that if there are substantial grounds for asserting that the second named respondent erred in law in relation to any one of the above matters that there are substantial grounds for asserting that the final conclusion is invalid.

The applicant also contends that the decision is invalid as the second named respondent failed to apply a forward looking test in determining whether the applicant had a well-founded fear of persecution if returned to Uzbekistan.

Credibility

The first contention on behalf of the applicant is that where an issue is raised as to the credibility of the applicant that the Tribunal is obliged to make an express finding as to the credibility of the applicant. It is submitted that it is not permissible, simply to indicate doubts about the credibility of the applicant and apparently take such doubts into account in the final conclusion. It is contended that such was done in this case.

The credibility of an applicant is often crucial to the determination as to whether or not an applicant is entitled to a declaration of refugee status. Credibility potentially comes into play in two aspects of the assessment of the claim. It is well established that the determination as to whether a person is a refugee within the meaning of s. 2 of the Act of 1996 and the similar definition in the 1951 Geneva Convention, relating to the status of refugees contains both a subjective and objective element. The subjective element requires the applicant to establish that he or she has a fear of persecution for a Convention reason if returned to his/her own country. As

assessment as to whether an applicant has such a fear will normally involve an assessment of credibility.

The objective element involves the assessment as to whether the subjective fear is well-founded or, as sometimes put, objectively justifiable. Often, and as appears to have been the position in this case, the objective element requires an assessment of objective facts relied upon by the applicant to establish that the fear is well-founded. This applicant, (as is often the case) does not appear to have been able to provide independent evidence of the facts alleged to have occurred in Uzbekistan prior to her leaving that country. The only evidence of such facts was the applicant's own statements in relation to same. Hence the acceptance of such facts by the second named respondent involved the assessment of the credibility of the applicant.

Accordingly, the assessment of the applicant's credibility in this application was relevant to both the subjective and objective elements of her claim to be a refugee. I am satisfied that there are substantial grounds for contending that the Tribunal or an adjudicator at first instance is obliged, where an issue is raised as to the credibility of the applicant, to assess the applicant's credibility either in general or in relation to particular factual issues and make a clear finding on that issue. The importance of this issue in an application for a declaration of refugee status appears to require such a clear determination. There are substantial grounds for contending that there is no such clear finding in the decision in this case.

There are two further grounds relied upon by the applicant in relation to credibility. I have concluded that there are substantial grounds for each of the following further contentions in relation to credibility and that the applicants are entitled to leave in order that they may pursue them in the alternative if it becomes necessary.

Firstly it is contended that where the Tribunal Member makes a specific adverse finding as to the applicant's credibility, this must be based upon reasons which bear a legitimate nexus to the adverse finding. The applicant relies in particular for this proposition upon a decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v. INS* 914 F. 2d 1375, (9th Cir. 1990). Whilst it is to be noted that the standard of review by the US Court of Appeal of an Immigration Judge's credibility findings in the American system may be different to that undertaken by this court in accordance with our principles of judicial review, I have concluded that there are substantial ground for contending that the principle relied upon applies in this jurisdiction.

In reaching this conclusion I also have had regard to the decision of Blayney J. in the High Court in *International Fishing Vessels v. The Minister for Marine* [1989] I.R. 149 in relation to the obligation of certain decision makers to give reasons and the purpose of such obligation. In that case at issue was the obligation of the Minister to give reasons for refusing a fishing licence to the plaintiff. It was common case that the Minister in deciding whether to grant or refuse the licence was obliged to act fairly and judicially in accordance with the principles of constitutional justice. In dispute was whether that obligation involved a duty to give reasons for his decision. Blayney J. concluded that it did and that unless the Minister gave his reasons that it could not be said that the procedure he adopted in giving his decision was fair. He identified two facts in particular which led him to this conclusion the first of which was (at p.155):

> "(1) It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious

> obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed. A procedure which places an applicant at such a disadvantage could not in my opinion be termed a fair procedure, particularly where the decision which the applicant wishes to challenge is of such crucial importance to the applicant in its business".

Secondly it is submitted that the second named respondent was obliged to assess the credibility of the applicant in the context of the available country of origin information, and that he failed to do so. The second named respondent refers at the end of the decision, to the fact that he had regard to country of origin information. However, this bald statement is arguably different to the principle relied upon by the applicant as determined in *Milan Horvath v Secretary of State for the Home Department (United Nations High Commissioner for Refugees Intervening)* [1999] I.N.L.R. 7 and as explained with its appropriate subtleties by David Pannick Q.C. (sitting as a Deputy Judge of the High Court) in *R. v. Immigration Appeals Tribunal ex parte Sardar Ahmed* [1999] I.N.L.R. 473. *Horvath* is a decision of the Imigration Appeal Tribunal presided over by His Honour Judge Pearl. At p.17E of the report Judge Pearl stated:-

> '(21) . . . It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view

> that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin.'

In *R v. IAT ex p Ahmed,* David Pannick QC stated at p. 477:

> "Applying the principle in *Horvath*, which in my judgment is a correct principle which has application in relevant cases, this special adjudicator, by considering credibility in complete isolation from the general picture, has erred in law. I emphasise that I do not find that it is incumbent on all special adjudicators to make detailed, or indeed any, findings on the general position where they consider that an applicant lacks credibility. I find that in the circumstances of this case, given the nature of the applicant's complaints, it was, in my judgment, incumbent on this adjudicator, if she was properly to assess the applicant's credibility, at least to make some findings about the general position and to assess the credibility of the applicant's concern in that context".

I have concluded that that are substantial grounds for asserting the principles relied upon by the applicant and, as set out by David Pannick Q.C. in the above decision, properly form part of the correct legal approach to the assessment of the credibility of this applicant's claim to refugee status in this jurisdiction.

Failure to Report Extortion

A significant part of the applicant's story related to theft of cargo from the applicant's husband's employer in 1997. It was stated that the cargo was linked with

a very high ranking government official and this person threatened the applicant's husband and told him that he had to reimburse the value of the cargo. The facts as recorded in the decision indicate that it was claimed that by reason of the nature of the threats and the high rank of the official who was threatening them, the applicant's husband felt that there was no option but to accede to the requests. Eventually the applicant and her husband sold off their home and most of their property and paid $25,000 to this person. It is stated that, even though the applicant's husband had paid some money to the person threatening them, that this did not appear to be the end of the matter and they were continually on the receiving end of further threats.

From the decision of the second named respondent it appears that the applicant told the Tribunal that she and her husband were afraid to go to the police. Further, the applicant asserted that the police would not have been able to help her because of the nature of the person that was persecuting them. She also asserted that human rights protections are not enforced in Uzbekistan and that the local Mafia resolves its problems in its own ways. Finally, she stated that her husband was also afraid that if he reported the threats to the police then the high ranking official would find out and this would lead to more problems for them.

The second named respondent at p. 8 of his decision, under the heading of "Decision" stated:-

> "In addition, the Tribunal contends that the failure of the Applicant or her husband to go to the authorities in relation to this matter precludes them from arguing that the State was unable or unwilling to provide them with protection from persecution for the purposes of paragraph 65 of the Handbook as follows:-

> 'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'"

Whilst the second named respondent uses the word "contends" the above appears to be intended as a conclusion of the Tribunal.

On behalf of the applicant it is submitted that the second named respondent erred in law in concluding that the applicant was precluded from asserting that the State was unable or unwilling to provide them with protection from persecution by reason of her failure to go to the police. Counsel on her behalf submit that the proper approach is that, where an applicant has failed to seek State protection in her own country, then the Tribunal must consider whether it was objectively reasonable for the applicant to have failed to do so. In this submission they rely upon the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Ward* [1993] 2 SCR 689. In that case La Forest J., in delivering the judgment of the Court, and considering the test for determining fear of persecution, asked the question, "Does the plaintiff first have to seek the protection of the State, when he is claiming under the 'unwilling'

branch in cases of State inability to protect?" Following a consideration of the question, La Forest J. stated at p.724:-

> ". . . I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection 'might reasonably have been forthcoming', will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of 'Convention refugee' where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state."

The rationale of including persecution by non State agents in the Convention definition of refugee, is clearly set out by La Forest J. earlier in the same judgment, where it is stated at p.716:-

> "The international community was meant to be a forum of second resort for the persecuted, a 'surrogate' approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution. The former is of course comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection."

I have carefully considered the reasoning which led the Supreme Court of Canada to reach the above conclusion as fully set out in its judgment and have concluded that there are substantial grounds for contending that a failure to approach the State will not necessarily defeat the applicant's claim and that rather the appropriate test to be applied is as put by the Supreme Court of Canada: "Is it objectively unreasonable for the claimant not to have sought the protection of his home authorities". As stated by La Forest J. at p.724:-

> ". . . it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state merely to demonstrate that ineffectiveness."

Accordingly I would also grant leave on this ground.

Assessment of cumulative effect.

At page 8 of his decision, the second named respondent stated:

> "The Applicant has also given evidence as to incidents of harassment, intimidation, and discrimination that she suffered while living in Uzbekistan. While it might be said that these events did occur because of the Applicant's ethnic background, the Tribunal does not accept that these incidents constitute acts of persecution on their own or that the cumulative effect of these incidents amounts to persecution for the purposes of paragraph 53 of the Handbook as follows:

> *"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."*

On behalf of the applicant it is submitted that the second named respondent erred in law both in his assessment of the cumulative effect of incidents which he accepted occurred by reason of the applicant's ethnic background and also by reason of the fact that he wrongly excluded the facts surrounding the extortion incidents from such assessment.

I have concluded for the purpose of an application for leave that the applicant has established substantial grounds for asserting that the second named respondent erred in law in his assessment of the cumulative effect of acts described as "incidents of harassment, intimidation and discrimination" which he accepted occurred by reason of the applicant's ethnic background in failing to carryout the type of assessment set out in par. 53 of the Handbook. By reason of my earlier conclusion there also appears to be substantial grounds for asserting that the apparent exclusion of the facts surrounding the alleged extortion of the applicants husband (which it was

contended occurred by reason of the fact that he was an ethnic Russian) was an error of law.

Forward looking test.

Finally, on behalf of the applicant it was submitted that the second named respondent in reaching his decision failed to apply a forward looking test in determining whether the applicant had a well founded fear of persecution were she to be returned to Uzbekistan.

On behalf of the respondents it was accepted that the definition of refugee in s. 2 of the Act of 1996 involves a forward looking test. However it was submitted that where an applicant claims to have a well founded fear of persecution if returned to the country of origin, by reason of acts of persecution alleged to have occurred in the past in that country and the Tribunal Member effectively determines that the applicant has not suffered persecution in the past that it is then unnecessary to also apply a forward looking test.

It appears to me, on the facts of this case that the applicant's claim to have a well founded fear of persecution was entirely based upon alleged past events and a fear they would be repeated if returned to Uzbekistan. She does not appear to have relied upon any change in Uzbekistan since the date of her departure from there. In such factual circumstances I accept the submission made on behalf of the respondent. There do not appear to be substantial grounds for contending that the second named respondent erred in law in failing expressly to apply a forward looking test in the light of his conclusions on the alleged past discrimination. I would therefore refuse leave on that ground in this case.

Conclusion

I will grant leave to apply for Judicial Review to seek the relief sought at par. 4 (a),(e),(f) of the Statement of Grounds upon the grounds set out at par. 5 (i) and (ii) with the latter amended to read

> "The second named respondent failed to make a clear finding on the credibility of the applicant and to state his reasons therefor and so erred in law."