

Title: Z.K. -v- Refugee Appeals Tribunal & anor

Neutral Citation: [2014] IEHC 543

High Court Record Number: 2009 748 JR

Date of Delivery: 11/19/2014

Court: High Court

Composition of Court:

Status: Approved

Link to Memo on Judgment: [Link](#)

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THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 748 J.R.]

BETWEEN

Z.K.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 19th day of November, 2014

1. This is an application for leave to apply for judicial review seeking an order of *certiorari* quashing the decision of the first named respondent (the Tribunal) dated 22nd April, 2009, notified to the applicant on 10th June, and an injunction restraining the second named respondent (the Minister) from taking any steps to deny the applicant refugee status under s. 17(1)(b) of the Refugee Act 1996 (as amended). The application was initiated on 10th July, 2009, some two weeks outside the fourteen day period within which this application must be brought pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The hearing was conducted by consent of the parties by means of a telescoped hearing and, if leave to apply for judicial review is granted and an extension of time within which to bring the application, the parties are satisfied that the court should determine the substantive claim in respect of grounds upon which leave may be granted on the same submissions and evidence as relate to the leave application.

The Grounds

2. The decision of the Tribunal is challenged on the following grounds:-

- (i) The Tribunal erred in law by applying an incorrect standard of proof.

(ii) Without prejudice to the foregoing, insofar as the Tribunal rejected the applicant's credibility, he failed to do so upon reasons which bear a legitimate nexus to the adverse finding and/or failed to ground the rejection of credibility on a rational analysis explaining why credibility is rejected.

(iii) The Tribunal made a finding that there is no evidence to suggest that discrimination by Georgian society against gay persons is condoned by the State. The said finding contains a fundamental error of fact in that the Tribunal failed to take into account the country of origin information which was before it.

(iv) The Tribunal arbitrarily preferred certain country of origin information over conflicting country of origin information.

Background

3. The applicant is a Georgian national who arrived in Ireland on 1st February, 2007. He applied for asylum on 2nd. His application was grounded on a fear of persecution due to his sexual orientation as a homosexual in Georgia, and discrimination against him by the Georgian Orthodox Church of which he is a member and which condemns homosexuality.

4. The applicant claims that he was discriminated against in his daily life in Georgia because of his homosexuality. This led to tensions and arguments within his family because he would not live a traditional life and start a family. In addition, locals caused great difficulty for him, his parents and for his family who were insulted, attacked and mocked by others.

5. As a result of his experiences in his home town he left in his mid twenties and travelled to T'blisi. He worked as a hairdresser, but was unable to do so openly and was confined to working from his own apartment. The apartment was purchased for him by his parents when he was a child. He lived with his partner for a number of years and claimed that they were subjected to verbal insults, beaten, robbed, had stones thrown at them and were spat at in the street because of their sexual orientation. There was widespread intolerance in society of gay people. He and his partner found the situation there intolerable and decided to leave the country in the autumn of 2006. They had seen a television programme about the treatment of minorities in other countries, including Ireland, and he and his partner decided to come here "in order to live freely and happily". They sold his apartment and several of their items and arranged for an agent to bring them to London for \$5,000.00. An individual was to take them to Ireland and help them to seek asylum here.

6. On 1st January, 2007, the applicant claimed that he and his partner went out to celebrate the New Year. On their way home they were accosted by five young men who were drunk. They were insulted verbally and then attacked because of their homosexuality. When asked why they did not conform, they refused to discuss the matter at which the young men became violent. They had knives. The applicant was hit in the face and knocked to the ground. His partner resisted strongly but he was stabbed. The young men ran away and his partner later died in hospital. The applicant was not seriously injured, suffering swelling to his face and a number of bruises and bleeding from the nose.

7. The applicant complained that when the matter was reported to the police they did nothing about it, though they maintained that they were still investigating the matter. He said that his partner's parents did not accord him a proper funeral because of his sexual orientation. Though the police attended at the hospital, he did not attend the police station. He claimed that attacks on homosexuals were not prosecuted or investigated by the police. He also claimed that he would have to pay the police to carry out a proper investigation because of corruption. He speculated that the police may have found the killers but were bribed by them not to pursue the matter.

8. The applicant obtained a UK visa which was endorsed on his passport which he left with the agent. He later claimed in the s. 11 interview that he did not apply for asylum in the United Kingdom or Latvia because the agent dictated where he was going. He claimed not to know where he was going and that when told he was being taken to Ireland, he had no

other option because he was depending on the agent. However, he then said that he had asked to be taken to Ireland because it was the only country about which he had information and in which he felt he could be safe.

9. The applicant maintained that there were no gay organisations in Georgia while he was living there. He had never heard of the Georgian LGBT Organisation and rejected country of origin information that suggested that Georgia, though a very traditional society which was not very open towards gay and lesbians, was growing more tolerant in urban areas. It also indicated that Georgia was the first country in the South Caucasus's to decriminalise homosexuality when it joined the Council of Europe. The age of consent was set at 16 years for both homosexual and heterosexual intercourse. He rejected the suggestion that there were any gay friendly bars or restaurants in T'blisi, though this was supported by country of origin information.

The Section 13(1) Report

10. The office of the Refugee Applications Commissioner (ORAC) found that the applicant had failed to establish a well founded fear of persecution under s. 2 of the Refugee Act 1996. It concluded that there were no indications that his life would be in any danger from Georgian society in general. He did not know the names or addresses of his attackers on New Year's Day, and was only able to describe them to the police. He feared being targeted by these people if he returned. ORAC considered it unlikely that this would occur and also that the lack of information about his attackers may be a factor in the apparent failure of the police investigation. Though his account suggested that he "may well have suffered a level of discrimination by society in general", there was no evidence to suggest that this was condoned by the state. Furthermore, the applicant's denial of the existence of any form of support group or social life for homosexual people in Georgia ran counter to information issued by the International Lesbian and Gay Association. A conclusion was reached that the applicant had not provided any evidence that he had been anything other than a victim of random violence in Georgia, however distressing that might be. He had not provided any evidence to suggest that the police had refused to help him for reasons of his sexual orientation or for any other reason, nor had he established that he would be persecuted should he return to Georgia. It was also considered that the applicant failed to fully exhaust all avenues of state protection that were available to him.

The Tribunal Decision

11. The applicant appealed the ORAC decision to the Tribunal. An oral hearing was held on 19th March, 2009. The applicant's claim was summarised in the decision, which set out the applicant's personal history. He was born on 9th July, 1973, and is single. He is a member of the Georgian Orthodox Church. His parents and two brothers live in Georgia. He attended secondary school from 1979 until 1991 and then attended a beauty salon in T'blisi from 1st October, 2000 until 1st June, 2002, where he was trained. He then operated as a hairdresser from his own apartment. His claim of persecution as a homosexual is summarised accurately in the decision.

12. The court agrees with the submission by counsel for the applicant that the format and content of the Tribunal decision is confusing. Many of the findings set out in the ORAC s. 13 report are verbatim transcribed into the Tribunal decision without attribution or acknowledgement that they are direct quotations from that decision. The transcribed portions of the ORAC report are interspersed with quotations from textbooks, the UNHCR Handbook, extracts from judgments of the High Court, extracts from s. 11B of the Refugee Act 1996 (as amended), and other *dicta* from a Canadian case. No logical sequence is followed. The court had considerable difficulty in discerning what exactly had been decided by the Tribunal. The hearing before the Tribunal is a *de novo* hearing and although it is open to a Tribunal to reach the same conclusion as ORAC on the basis that having heard the evidence of the applicant, it is satisfied to adopt aspects of the decision at first instance, the structure and confusing manner in which the decision is laid out gives me concern that the applicant's appeal was not properly considered and fairly weighed. This is particularly so because there is no finding in the decision as to whether the applicant was a homosexual or not. There is no specific finding as to whether he was the subject of discrimination by reason of his sexual orientation and the abuses and humiliation which he describes. The court is left to speculate whether it was accepted that he was a person in need of state protection. There is no finding as to the level of state protection that he

required, if any. Though it is submitted by the respondents that it is implicitly accepted that he is a homosexual, nevertheless adverse credibility findings are made on the basis that he appeared to be unfamiliar with the gay scene in Georgia, which suggests that at some level the Tribunal rejected his claim to be a homosexual living in the gay community in T'blisi.

Ground (ii)

13. The applicant complains, quite correctly in the view of the court, that certain passages of the Tribunal decision purported to reject the applicant's credibility. As noted above, the Tribunal failed to specify exactly which aspects of the applicant's claim were not accepted as true. The court is concerned that though there is no explicit suggestion that his claimed homosexual orientation is not accepted, there are adverse credibility findings concerning his involvement in and knowledge of the gay and lesbian scene in T'blisi and Georgia which suggest that his credibility in respect of his claimed sexual orientation is not accepted. The court has a concern that a finding has been made against the applicant which has not been expressed on this central issue. If that finding is to be made, it should be made in clear and express terms with reasons. In *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85, MacEochaidh J. faced a similar problem which he referred to as follows:-

"9. The Tribunal member refers to the fact that he believes the applicant is a happily married man, - not language indicative of an acceptance that the applicant is gay. It seems to me that the tribunal member does not accept that the applicant is gay. A clear and reasoned finding on this central issue was required of the tribunal and a failure by the tribunal member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision is unlawful and leave to pursue this complaint is granted."

The court is satisfied that the applicant in this case has also established a basis upon which to apply for leave on ground (ii) on a similar basis.

Country of Origin Information: Grounds (iii) and (iv)

14. The applicant complains that the Tribunal's conclusion that there was "no evidence" to suggest that discrimination in Georgian society against gay persons was condoned by the state was mistaken. Furthermore, the conclusion reached on country of origin information failed to take any or any adequate account of the information which was presented to the Tribunal, and it failed to give any or any adequate reasons as to why the country of origin information in support of the applicant's claim was not relied upon or rejected.

15. The applicant contends that discrimination against the gay community is widespread in Georgia and that the country of origin information confirmed this. The applicant cites, in particular, two reports published by the Immigration and Refugee Board of Canada:-

"1. Georgia: Update 2GGA32976E of 7 October, 1999, on the situation of homosexuals (dated 24 November, 2004), and

2. Georgia: Situation of Homosexuals including Societal Attitudes and Availability of State Protection." (dated 27 May, 2008).

16. In the 2004 report a Professor of Sociology at T'blisi State University stated that some human rights organisations "stored data" about physical and verbal violence against homosexuals often displayed by the police in recent years, and the Professor was of the opinion that the state had not been pro-active in the promotion of the human rights of homosexuals. The 2008 report cited the reports of the International Lesbian and Gay Association of Europe (ILGA) and COC Netherlands, a fact finding mission which described homosexuals as "the most despised group in Georgian society". Both organisations found that only economically independent homosexuals living in T'blisi could live openly. The 2008 report noted a Unesco Report published in 2005 which found that many homosexuals in Georgia had difficulty in finding treatment and care for HIV/AIDS due to social stigma. It cited a physical attack on a 25 year old man on the grounds of his sexual orientation and commented on the general reluctance amongst the gay community to report attacks to the police because of intimidation. An interview with the Chairperson of the Georgian Parliamentary Committee for Human Rights and Civil Integration was cited in which it was

acknowledged that the Georgian Government “neither infringes nor defends” the rights of sexual minorities and expressed some upset at what was stated to be an increasing tendency amongst young people to change their sexual orientation which could lead to a “catastrophe” worse than if they turned to organised crime. A report from a Georgian Public Defender (Ombudsman) was cited which stated that he felt it unnecessary to offer his support to the LGBT organisation’s “demands for equality”.

17. The Tribunal relied on the fact that homosexuality was decriminalised in Georgia in June, 2000 and noted that while Georgia met European standards in its anti-discrimination legislation, the Constitution did not specifically provide for protection against discrimination based on sexual orientation. Some material from the reports relied upon by the applicant was referred to by the Tribunal. A study undertaken by “Inclusive Foundation” which was the first organisation in Georgia devoting itself to serving the needs of the lesbian, gay, bi-sexual and transgender (LGBT) population in August, 2007 was also cited in which three priorities were identified for the LGBT community, namely the prevention of HIV/AIDS infection, securing a meeting place and promoting lobbying and advocacy in respect of issues relevant to the community.

18. It was noted that the ILGA European website indicated that a gay scene was developing in major cities, but included a warning that “cruising in any sense whether in a bar, bath or parks is considered very bad tone” and is particularly dangerous on the streets or in parks. The article indicated that police patrols do not harass gay men. The Tribunal also noted that the ILGA Europe organisation stated that Georgia is the most open-minded country in the region when it comes to sexual orientation and that in Georgian law, the age of consent for both homosexuals and heterosexuals is sixteen. Nevertheless, it is clear from a reading of the country of origin information before the Tribunal that there is a nationwide and majority prejudice against homosexuals. The information available states clearly that homosexuals are subject to daily insult, humiliation and assault if their sexual orientation is known. There is evidence to suggest that the authorities, including the police, do not address issues of targeted violence against homosexuals in a sympathetic or respectful way.

19. The court is mindful of the fact that it is not the court’s function on this application to review the merits of the decision made by the Tribunal. However, if country of origin information is to be preferred, there must be a logical reason for doing so if the preference made is adverse to the applicant.

20. In *D.V.T.S. v. The Minister for Justice, Equality and Law Reform & Ors* [2008] 3 I.R. 476, Edwards J. held that a Tribunal could not arbitrarily prefer one piece of country of origin information over another and be selective in the material relied upon in arriving at a conclusion that the objective element for a well founded fear of persecution had not been established by the applicant. In the case of conflicting information, it was incumbent on the Tribunal to engage in a rational analysis of the conflict in the materials and justify the preferment of one view over another on the basis of that analysis.

21. The court is not satisfied that the Tribunal gave any reasons for the preferment of the materials upon which it relied. The single line statement in the British Embassy Report also relied upon stated that, though homosexuality was not widely acceptable this had not transposed itself into violence against homosexuals, whereas there was considerable material available from what might be regarded as reliable sources to suggest that such violence was common and widespread in the country. All that is noted is that the applicant did not accept that the country of origin information which the Tribunal suggested did not support his account of how he and other homosexuals were treated in Georgia. However, his account was corroborated to some degree by other country of origin information. Inexplicably, having made that observation, the Tribunal then goes on to consider the applicant’s account of his journey from Georgia to Ireland in a manner that has no logical connection to the topic then under review.

22. The court has taken into account the decision in *K. v. RAT & Anor* [2006] IEHC 132, in which the decision of La Forest J. in *Canada (Attorney General) v. Ward* [1993] 2 RCS 689 addressing the presumption that nations should be presumed capable of protecting their citizens was considered. Herbert J. stated that:-

“Subject to such exceptional circumstances, the fact that the power of the state to provide protection to its nationals is a fundamental feature of sovereignty and the fact that the protection afforded to the refugee status is “a surrogate coming into play where no alternative remains to the claimant”, renders it both rational and just for a requested state to presume, unless the contrary is demonstrated by “clear and convincing proof”, on the part of the applicant for refugee status, that the state of origin is able and willing to provide protection to the applicant from persecution, even if at a lesser level than the requested state.”

23. The respondent particularly emphasises that state protection was available in respect of the killing of the applicant’s partner. The applicant states that the state protection was token because of their sexual orientation and that no progress was made in the investigation. The tribunal member, however, found that police were investigating the killing without the necessity of complaint by the applicant, who was interviewed in hospital. In this aspect the Tribunal was entitled to form its own view. However, I am not satisfied that this conclusion on the issue of his partner’s death determines the matter. It appears to me that the unsatisfactory treatment of the country of origin information and the failure to indicate why the alternate information was rejected and found to be in some way insufficiently reliable, vitiates this decision.

24. Though the submissions addressed the issue of relocation as dealt with in the Tribunal decision, no ground has been advanced in the statement of grounds in relation to this matter and I do not propose to consider it any further. Furthermore, I do not think there is any substance in ground (i).

Conclusion

25. The court regards the decision in this case as fundamentally flawed. The conclusion ultimately reached at the end of the decision states that the applicant’s explanations for contradictions that arose in his evidence were neither plausible nor credible. The Tribunal failed to identify the conflicts and contradictions said to undermine his credibility. It was stated that on the basis of the information provided, he had not suffered any persecution for a Convention reason in Georgia, nor was he likely to face persecution upon returning to his country of origin. This conclusion is reached without addressing the central issue in the case as to whether this man was a homosexual or not. Furthermore, it is far from clear whether his evidence of the daily difficulties he encountered while residing as a homosexual in Georgia were accepted as credible or not. These are matters essential to the determination of the issues in this case (see *H.J. (Iran) v. Secretary of State for the Home Department* [2011] 1 A.C. 596 as applied in *M.A. v. the Minister for Justice, Equality and Law Reform* [2011] 3 I.R. 41, and as considered in *S.Q. v. the Minister for Justice, Equality and Law Reform* [2013] IEHC 94, *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85 and *Adams v. the Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 17th December, 2009).

26. It is important that firstly a determination be made as to whether the applicant is homosexual or not. Secondly, it is crucial that clear findings of facts are made in relation to his claims in respect of his alleged experiences as a homosexual in Georgia, and that a reasoned consideration be given to country of origin information in relation to whether or not his claim is corroborated by other sources in an objective or independent way. The court is satisfied that the time should be extended for this application for leave to apply for judicial review on the basis of the reasons furnished for the delay which was relatively short, and in the interests of justice because the court is satisfied that the applicant has established substantial grounds in respect of grounds (ii), (iii) and (iv) upon which to grant leave. The court is also satisfied for the reasons set out above that the applicant has succeeded in establishing that the decision is fundamentally flawed on these grounds and I, therefore, quash the decision.