

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2005 118 J.R.**

**BETWEEN/**

**CHASLAVA ARLOVSKAYA**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**Judgment of Mr. Justice Murphy delivered the 15th day of July, 2005.**

**1. Notice of Motion**

The applicant sought leave to apply for judicial review for the following reliefs: an order of *certiorari* quashing the decision of the Tribunal made 21st December, 2004, upholding the decision of the Commissioner that the applicant's claim for asylum be refused and for a declaration that the decision was *ultra vires* together with an interim injunction restraining the Minister from implementing the consequential deportation order.

**2. Chronology**

From the questionnaire and affidavit of the applicant the following dates and facts are relevant:

08.09.48. Date of birth of applicant in Belarus.

11.03.02. Work visa granted; no work available.

11.06.02. Returned to Belarus; operated a market stall and received threatening letter.

--.09.02. Detained.

--.09.02. Returned to Ireland.

--.06.03. Passport seized by Gardaí; applied for refugee status.

03.06.04. Interviewed by authorities.

25.06.04. Refusal of application: s. 13 assessment: credibility impugned.

07.07.04. Notice of appeal.

04.08.04. Country of origin information.

30.08.04. Oral appeal adjourned.

17.11.04. Oral appeal adjourned.

21.12.04. Appeal refused: judicial review pleadings; leave granted

**3. Grounding affidavit of applicant dated 7th February, 2005.**

The applicant swore that she arrived in Ireland on 11th March with a work permit for a factory at Blanchardstown but was informed there was in fact no work for her. A visa was not exhibited nor was any correspondence in relation to the work. She said she did not want to return to Belarus as she had suffered there. She lived with her son who resided in Ireland. She had no option but to return home.

Prior to coming to Ireland she operated a stall in a market where a trade union, established in 1999, was organised to protect the stall holders' interests from corrupt officials who demanded bribes from traders. She also protested against high taxes. When the chairman of the union was detained in June, 2000, she organised a demonstration in Lenin Square in Grodno, on 20th June, 2000, where she gave a speech. She was arrested, held for two days, her family received telephone threats.

She stayed in Ireland until 17th June, 2002 where her daughter, who suffered from epilepsy, was ill. She became involved with a trade union, was again detained and threatened. She returned to Ireland in September, 2002 and stayed with her son. Her passport was taken by the Gardaí in June, 2003, at which time she applied for asylum and exhibited the questionnaire. She was interviewed on 3rd June, 2004 and referred to a copy of the interview notes.

The interview stated in answer to what she feared if she returned to her country as follows:

“I cannot go back to my country because I have a fear for my life. I cannot live in the country which is not democratic and where human opinion and demand mean nothing.” (Question 9)

The interview notes at Question 13, as to why she came back to Ireland stated:

“In September I came back again. I decided to leave because of threat to me. I was working in the market in Belarus. I had a small business there, then they began to impose big taxes – we had to pay fines very often and also we had to pay bribes to the authorities. I became a member of the union of the local businessmen, we were trying to change somehow this situation. It didn't really help. Then I started to get anonymous telephone calls with threats that I should stop my activities. My daughter didn't want to tell me at first. Then I found out that they were threatening her as well. Because of that reason her seizures were happening more often. ... I also received an

anonymous letter saying ‘Go away or we will make you disappear’. The calls were happening especially after meetings, protests of the local businessmen.”

Later in the interview she said she had been in custody for two days. No-one else was held. She was arrested because she was one of the leaders of the protest. She distributed propaganda to people to participate in the protest.

#### **4. Section 13(1) Report**

On 25th June, 2004, the Office of the Refugee Applications Commissioner refused a declaration that the applicant be a refugee and considered that she should not be afforded the benefit of the doubt. Her claims had not been supported by any documentation, thus undermining her overall credibility. It was considered that she would have applied for asylum in this State at a much earlier date in the event that she genuinely did have a fear of persecution in Belarus. Additionally, there were credibility issues surrounding her claim to have been in Belarus in the timeframe of the alleged incidents. As such it was considered that this applicant was not in need of international protection.

#### **4. Country of origin information**

**4.1** The applicant says that there was a serious mistake in that assessment. She believed that her credibility was impugned because she had no proof that she had in fact returned to Belarus in June, 2002, which evidence was held by the Gardaí at the time. She appealed the decision on 7th July, 2004.

**4.2** Further country of origin documentation and submissions were sent to the Appeals Tribunal by her solicitor on 4th August, 2004.

The documentation also included an untitled web page referring to market vendors to stage nationwide protest the copy of which was defective and incomplete.

The letter of 4th August, 2004 from the applicant’s solicitors to the Refugee Appeals Tribunal referred to the documents as consisting of Amnesty and Human Rights Watch reports of 2004, together with an extract from the personal website of the leader of one of Belarus’s independent trade unions. The first Amnesty report of 1st May, 2004 referred to independent trade unions being subject to a deliberate pattern of obstruction, harassment and intimidation and that the right of association was violated on a regular basis. It referred in particular to the detention in Minsk of officials of trade unions for alleged interference with trade unions’ internal affairs and for an article criticising the decision of the Belarusian Supreme Court. Neither referred to the applicant’s trade union nor to the dates or place identified by the applicant in her affidavit. The second report covering events from January to December, 2003, post-dates the applicant’s return to Ireland as, indeed, does the first Amnesty report. The second report refers to Minsk but also to

Grodno in June, 2002. The latter refers to a conviction for libel in an unpublished article which raised concerns about the government's involvement in disappearances. This was not claimed by the applicant to refer to the demonstrations in which she was involved.

Human Rights Watch of January, 2004 refers to events in 2003 of a general nature.

A further Human Rights Watch document, also dated January 1st, 2004, referred to restrictions on the press and on civil society, biased elections, disappearances and, what was termed "key international actors". There was no reference made, particular to any part of that report nor, indeed, does it appear to have direct relevance.

The last reference to the personal site of Valery Levonevski referred to a raid on the Grodno house of the chairman of the striking committee of entrepreneurs on February 15th and 16th, 2003. This appears to refer to an incident which post-dated the applicant's return to Ireland.

"On October 25th, the council of the Free Trade Union of Entrepreneurs announced that vendors from all regions in Belarus would go on strike to press the government to address demands, reported Nasha Svaboda. The entrepreneurs' demand that he (*sic*) government re (*sic*) on entrepreneurs and customs tariffs on goods imported from Russia, simplify the -- take measures to prevent officials, police and tax officers from exhorting money from vendors"

Amnesty International (2003), under the heading "Detention of Protesters" reported the Belarusian authorities continuing to resort to repressive measures to stifle peaceful protest and referred to detentions occurring sporadically in Minsk, resulting in peaceful protesters serving prison sentences of between two and ten days for participating in unsanctioned meetings and demonstrations. The report related to demonstrations on 12th, 23rd and 25th March. There was no indication of whether this was in 2003 or earlier.

**4.3** The first document exhibited (as an appendix to exhibit C to the letter of 25th June, 2004 from the Office of the Refugee Applications Commissioner) headed "Belarus" being p. 12 of 29, under the heading "Freedom of Peaceful Assembly and Association" referred to the 1994 and 1996 Constitutions providing for freedom of peaceful assembly but the government severely restricting this right in practice. The undated and untitled article referred to applications having to be made fifteen days in advance to local officials for permission to conduct a demonstration, rally, or meeting and, beginning with September, 2001 elections, most permits either had not been granted or had been granted only for demonstrations in obscure, hard to reach locations. It referred to demonstrations on February 14th, March 12th and

March 23rd. On October 1st, 29th and 30th it referred to arrests and sentences from five to ten days for organising and attempting to demonstrate in Minsk against increased government violations of workers' rights. There was no specific reference to the demonstration in Lenin Square in Grodno on June 20th 2000, as deposed to in para. 2 of the applicant's affidavit or in para. 4 (bis) in relation to the country of origin documentation sent by the applicant's solicitor on 4th August, 2004, to which reference has been made.

**4.4** There is a note among the country of origin documentation submitted to the court which stated that the applicant had come to Ireland in March, 2002 on a work visa but never got any work and that her visa expired on 20th June, 2003. The note by Anne M. Gill on that date stated that the applicant was seeking asylum as she was a trader in the flea market in Belarus and the taxes were so high she organised a protest against this. She had no profit as everything was taken in tax, this is the reason she said she cannot return to Belarus.

I am uncertain what significance this note has or, indeed, whether it is a mistake or, indeed may be privileged. No application was made in relation thereto at the hearing. It appears that it was part of the submissions in exhibit "(E)".

**4.5** A further reference sent to the Tribunal headed "Credit Cards Magazine" referred to an article on October 2nd, 2002, entitled "Vendors in Belarus launch strike action to protest tax increases, insurance fees and other regulations" and referred to Belarusian vendors having staged occasional strikes since July to protest tax hikes. The strike action was to commence on the Tuesday before October 2nd, 2002. The applicant had, of course, returned to Ireland in September, 2002. The period she complained of threats in the letter were between June, 2002 and September, 2002.

**4.6** The applicant, having recovered her passport from the Gardaí, who appeared to have mislaid same, exhibited photo-copies thereof but made no specific reference to the 32 stamped visas therein. A stamp from the immigration office of Shannon Airport for 2nd September, 2002 is evidence of the applicant's return to Ireland on that date.

A visa dated 27th February, 2002, specifying "D – employment bearer only" and a similar visa dated 14th June, 2002, rubber stamped 11th March, 2002, is also included. The latter would appear to be the visa referred to by the applicant, dated 11th March, 2002.

**4.7** The remainder of the applicant's affidavit referred to the decision of the appeal Tribunal dated 21st December, 2004 which, the applicant said, did not properly address the issues and failed to properly apply the law in determining the appeal. She said that the decision contains a number of factual mistakes:

- the July, 2002 demonstration appeared to be confused with that of June, 2002;
- she did not say her daughter was attacked on two different occasions but was hospitalised with epilepsy from stress;
- 14th June, 2002 is not in fact the date she returned to Belarus;
- para. 3 of her affidavit said she stayed in Ireland until June 17th, 2002, when she returned to Belarus;
- she said she was not “confident” as such in returning to Belarus but that she had no option in all the circumstances. It was the events that occurred on her return that convinced her that her safety was in such peril that she had to remain out of Belarus on a long-term basis.

She accordingly prayed to the court for the relief sought in the notice of motion for judicial review.

## **5. Decision of the Court**

**5.1** It seems to this court that the reference to factual mistakes in para. 10 (bis) of the applicant’s affidavit, apart from the last mentioned submission, are not, in the circumstances, significant. She had referred to a June, 2000 demonstration. There would appear to have been no corroborating evidence of that in June or indeed in July. She did not say her daughter was attacked. If anything, the fact that she was hospitalised with epilepsy from stress was not as serious.

Her affidavit made no mention of whether or not she was confident in returning to Belarus. In fact there appeared to be no specific question asked in relation to her return to Belarus. Question 33 referred to her then fear that if she returned to Belarus that her rights would not be protected and that she was “afraid to disappear”. Her reference to the events that occurred on her return convincing her that her safety was in such peril is, of course, not a factual mistake but rather a further submission.

**5.2** The s. 13 report had made an adverse finding based on lack of documentation which the applicant had correctly stated had been taken by the immigration authorities.

The s. 13 report, which concluded that the applicant should not be afforded the benefit of the doubt, referred to her claims not being supported by any documentation which thus undermined her overall credibility. The report concluded that it was considered that she would have applied for asylum in this State at a much earlier date in the event that she genuinely did have a fear of persecution in Belarus. Additionally there were credibility issues surrounding her claim to have been in Belarus for the timeframe of the alleged incidents.

The applicant’s legal representative relied on the applicant’s passport which, it was submitted, supported the applicant’s case. There is no reference to such documentation being limited to her passport. Indeed she had her

passport up until June 2003, nine months after she returned to Ireland. Before she came to Ireland on a work visa she had been imprisoned and threatened. She said that she was also threatened subsequently on her return in the summer of 2002.

**5.3** The applicant has not controverted the finding that when she returned to her country of origin on 17th June, 2002, (which was the date deposed to by her contrary to her statement that the Appeals Tribunal had mistaken the date for the 14th) she had obtained a re-entry to be effective from the 14th to 13th September, 2002 when she did return.

The summary of evidence is detailed and notwithstanding the insignificant errors of fact, comprehensive.

The Appeals Tribunal summarised the submissions of the applicant and referred to articles 94 to 96 of the handbook on procedures and criteria for determining refugee status concerning refugees *sur place*.

The Tribunal must, of course, have regard to the background contained therein and would appear to have done so. The Tribunal referred to the submissions that the country of origin information supported the applicant's claim. There would appear to be nothing specific in relation to the place and dates referred to by the applicant in any of the country of origin information submitted.

Moreover, it seems that the Tribunal did consider the entire events surrounding the applicant's arrival in Ireland and the reasons why she returned to Belarus for three months and returned to Ireland in September of 2002.

**5.4** The Tribunal had considered the definition in s. 2 of the 1996 Act of a refugee in the context of the well-founded fear of being persecuted, *inter alia* for membership of a particular social group being a trade union. The burden of proof lies on the person making the assertion being shared between the applicant and the adjudicator. The standard of proof was correctly stated as being the balance of probabilities but in refugee claims the adjudicator needed to decide on the credibility of the applicant and a recognition that it might not be possible for a refugee to prove every part of his or her case and the necessity frequently to give an applicant the benefit of the doubt.

The Tribunal had considered *R. v. Secretary of State for the Home Department ex parte Siva Kumeran*, where well-founded fear of persecution should be a reasonable degree of likelihood that the applicant would be prosecuted for a Convention reason if returned to his own country; that such was a serious possibility; that it be objectively determined by reference to circumstances prevailing in the country of origin of the applicant's nationality and that the objective facts are those believed by the applicant to be true.

The Appeals Tribunal analysed the meaning of persecution by reference to

*Valeri Zgant'ev* decision of Finnegan P., 29th March, 2001, which considered it appropriate to have regard to the United Nations High Commissioner for Refugees handbook. Fear was subjective so that determination of refugee status would primarily require an evaluation of the applicant's statements other than a judgment on the situation prevailing in the applicant's country of origin. The applicant's frame of mind must be supported by an objective situation.

The Appeals Tribunal also considered Lord Hope's considerations in *Horvath* [2000] W.L.R. 379 at 387; *Abdullah Ali Khamis*, Unreported decision of Smith J., 24th June, 2002 and other cases.

I have been referred to the decision of *M.K.*, judgment of Finlay Geoghegan J. on 2nd April, 2004, regarding the well-founded fear of persecution in Uzbekistan by reason of her ethnicity and religion. The applicant in that case had submitted that the Tribunal Member had reached his conclusion on a cumulative basis by reason of three matters: credibility; failure to go to the authorities in relation to alleged extortion and incidents of harassment, intimidation and discrimination not having occurred by reason of the applicant's ethnic background. The court concluded that there were substantial grounds for asserting the principles relied on in the application for leave for judicial review, credibility findings could only really be made on the basis of a complete understanding of the entire picture. The court was of the view that one cannot assess a claim without placing that claim in 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 (*per* Judge Pearl in *Horvart* [1999] I.N.L.R. 7).

**5.5** In *R v. IAT ex p. Ahmed* [1999] I.N.L.R. 473, David Pannick Q.C., applying the principles in *Horvart*, held that it was incumbent on the 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.

The Tribunal did make such findings and, on that basis, assessed the credibility of the applicant.

I have also been referred to *Asu Charles Bisong*, O'Leary J., 23rd April, 2005. In that case matters relating to credibility were also in issue. The crucial and deciding matter was that each of the errors related to a single issue of credibility. Had they related to separate areas of assessment they would not necessarily have a cumulative effect. However, each of the errors, when taken together, had a cumulative effect on the assessment of credibility. There are not grounds for contending that the Tribunal erred in law in failing to apply such a test.

The Tribunal had taken into account the visas on the passport which had previously been mislaid by the Gardaí. It found that the applicant's passport and work permit verified the fact that she arrived in Ireland on 11th March,



2002 on foot of a valid passport, returned to Belarus in June, 2002 and stayed there until September, 2002, returning to Ireland when she realised that the situation was not improving.

**5.6 The Refugee's Appeal Tribunal continued:**

“After carefully assessing the whole evidence I have come to the conclusion that the applicant left the country in the first instance not out of a well-founded fear of persecution but because of an economic reason to obtain work. The applicant, not obtaining work in Ireland, chose to return to Belarus where she immediately went back to her job and resumed her trade union activity. In my view this evidence does not show a well-founded fear of persecution within the meaning of s. 2 of the 1996 Act. Further, while country of origin information concerning Belarus is clear that there is a dictatorship in place, I am satisfied that the provisions of articles 94 to 96 do not apply to the applicant concerning any claim to be a *'sur place'* refugee.

The applicant was confident enough firstly to return to Belarus, and secondly resume her trade union activities before deciding to return once again to Ireland in September, 2002.

I do not find these acts to be consistent with someone who genuinely fears for her personal safety should she return to her country of origin.”

The Appeals Tribunal were entitled to make a finding that that was evidence of her intention to return to her country of origin.

It seems to this court that the Refugee Applications Commissioner had grounds for the consideration mentioned above which was relevant to the applicant's credibility regarding her fear of persecution. The Tribunal made a clear finding and gave reasons in relation thereto.

The appropriate test to be applied was whether it was objectively unreasonable for the claimant not to have sought the protection of the home authorities.

The applicant's claim to a well-founded fear of persecution was entirely based upon alleged past events and a fear that they would be repeated if returned to her country of origin. There does not appear to be substantial grounds for contending that the Tribunal erred in law in failing expressly to apply a forward looking test in the light of its conclusions on the alleged past discrimination.

It seems to this court, having regard to the principles and practice in relation to applications for judicial review of a decision, that the Appeals Tribunal had evidence before it which justified its findings and conclusion and gave reasons in relation thereto.

Accordingly, this court refuses the application for leave to apply for judicial review.