Neutral Citation Number: [2010] IEHC 421

THE HIGH COURT

2007 1135 JR

BETWEEN

AQS AND KIS

APPLICANTS

AND

REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 23rd November, 2010

1. This application for judicial review may be said to provide in its own way a modern exemplification of Neville Chamberlain's remarks apropos of (what was then) Czechoslovakia at the height of the Munich crisis in September 1938 about a quarrel "in a far away country between people of whom we know nothing." It is, however, a plain - if uncomfortable - fact that few Irish people could speak knowledgeably about Azerbaijan or the nature of its internal politics. Yet it is those internal politics and, specifically, the nature of the Azeri state apparatus that is at the heart of the present case.

2. The general issue in this case is whether the Minister for Justice, Equality and Law Reform was precluded by the terms of s. 17(4) of the Refugee Act 1996 ("the 1996 Act") from granting the applicants a declaration of refugee status in the State. At a more specific level it amounts to whether the Refugee Applications Commissioner was entitled summarily to reject the applications for refugee status made by Mr. S. and Ms. S. on the ground that they had already obtained such status in Poland and that the Minister had no jurisdiction in the matter.

3. Section 17(4) of the 1996 Act provides as follows:

> "The Minister shall not give a declaration to a refugee who has been recognised as a refugee under the Geneva Convention by a state other than the State and who has been granted asylum in that state and whose reason for leaving or not returning to that state and for seeking a declaration in the State and does not relate to a fear of persecution in that state."

4. The present application arises in the following way. The applicants are husband and wife who are Azeri nationals who applied for and obtained asylum status in Poland in April, 2006. Mr. S is a journalist who became editor in chief of a prominent opposition newspaper in Baku in Azerbaijan in 1994. He complained that during his tenure as editor he was subjected to assaults, threats and blackmail and, indeed, that agents of the Azeri security forces made an attempt on his life. It was against that background that the S

family decided to leave Azerbaijan in July, 2005 for Poland, having first secured a Polish visa.

5. Upon their arrival in Poland, both Mr. and Ms. S. then applied for asylum. Mr. S.'s affidavit in these proceedings has chronicled their treatment in a Polish refugee camp which, according to this uncontradicted account, was hard and decidedly unpleasant. During this period Ms. S. gave birth to the couples' second daughter and suffered from general ill-health. At the end of April, 2006 the applicants were granted refugee status and were issued with a Geneva Convention passport.

6. It is important to state that, certainly judged from the relatively recent country of origin information concerning Azerbaijan which has been exhibited in the present proceedings, there seems little doubt but that repression of journalists and political opponents is, regrettably, a commonplace. There have also been in recent times politically motivated kidnappings of prominent opponents of the regime. While the identity of the kidnappers is not known, it is quite possible that such actions involved agents of the Azeri state Accordingly, the grant of refugee status by Poland can scarcely come as a surprise and seems to have been abundantly justified in the circumstances.

7. Even then, it seems clear that life in Poland was still very difficult and the S family encountered poverty, unemployment and racism, the grant of refugee status notwithstanding. The applicants were undoubtedly unhappy with life in Poland and, indeed, made two abortive attempts to seek asylum in Germany and Denmark respectively. The applicants then travelled from Poland to Ireland in the early summer of 2007 and applied for asylum in Ireland on 3rd June, 2007. The reason given for seeking asylum in this State in the application was described in the application form as being "social" in nature.

8. There were, however, a number of events which, according to Mr. and Ms. S caused to them to leave Poland for Ireland. Thus, Mr. S, contends that they encountered a woman taking photographs of them walking on the street in April, 2006 and they believe that she was a private detective employed to locate them on behalf of the Azeri Government. Another example was provided by an incident in Warsaw in March, 2007 where Mr. S. felt that he was being watched and followed as he walked through the city centre. He then contends that he recognised the driver of a prominent member of Azeri Parliament whom he thought was following him. He attempted to follow this individual, but he lost him in the crowd.

9. As a result of this encounter, Mr. S. says that he feared that his enemies from Azerbaijan *(i.e.,* agents of the Azeri Government) had managed to locate him in Poland and that he no longer felt safe there. For many people, this account might seem to be belong more to the pages of Ian Fleming and might accordingly be thought to stretch credulity. Yet it is worth recalling that there have been at least two recorded instances in the last thirty years or so where dissident journalists from Eastern Europe have been killed abroad by agents of foreign Governments in unusual and unorthodox circumstances. Judged by the accounts contained in the country of origin information, one can merely say it is not impossible that agents of the Azeri State would to seek to frighten a known opponent of the regime, even in a relatively distant country such as Poland.

10. The question, therefore, which arises is whether the Minister had any statutory discretion in this matter. This in turn raises the question of whether the applicants could realistically claim that they had a "fear of persecution" in Poland.

11. It is clear from the Long Title of the 1996 Act that it was intended to give effect in domestic law to the provisions of the Geneva Convention (1951) and the New York

Protocol thereto. Of course, this does not mean that the Convention has a form of direct effect in Irish law: cf. by analogy the reasoning of the Supreme Court in *McD v. L* [2009] IESC 81. Rather, the Convention is part of the our law only to the extent that, in accordance with Article 29.6 of the Constitution, the Oireachtas has so determined. This means in turn that it is the actual text of the 1996 Act which is the governing law, albeit that, as befits legislation intended to give effect to a major international treaty such as the Geneva Convention, it would be appropriate that such statutory provisions be construed liberally in order to give effect to the noble and humanitarian principles which underpin it. There is, after all, a presumption that our domestic law is in accordance with international law (see, *e.g.*, the admittedly obiter comments of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 at 159), even if in the case of unavoidable conflict our domestic law must prevail. It must further be recalled that the Geneva Convention applies throughout a vast swathe of both the common law and civil law world and the Oireachtas could not be taken to have intended that our legislation designed to give effect to the Convention should be interpreted by an Irish court in some confined or artificial manner or without regard to the need to ensure a broad consistency with the jurisprudence which has emerged from other jurisdictions.

12. The construction of the terms of s. 17(4) is, therefore, the critical issue so far as the present case is concerned. In this regard, it is scarcely a surprise that the respondents rely heavily on the decision of McMahon J. in *SY v. Refugee Appeals Tribunal* [2009] IEHC 18. In that case the applicant was ethnically Eritrean but she had been living in the Sudan. She had arrived in Italy as a stateless person and successfully applied for refugee status in that state. She then moved to Ireland for largely for economic reasons and sought refugee status here. Her application was refused for reasons set out in a letter to her of June, 2007:

> "From an examination of the documents which you have produced in relation to your status it is noted that you were granted asylum in Italy. As you have not claimed to have a fear of persecution in that state and in accordance with section 17(4) of the Refugee Act, 1996, as amended, the Minister is precluded from giving a declaration that you are a refugee. No purpose would be served by investigating your claim, accordingly your application is not being admitted for processing."

13. In passing, it may be noted that the applicants in the present case each received a letter in July, 2007 from the Office of the Refugee Applications Commissioner which is substantially identical to the letter which had been issued to the applicant in *SY*. At all events, in the subsequent judicial review proceedings in *SY* the applicant maintained that before the Minister exercised his power under s. 17(4) he was obliged to give her an opportunity to make her case and that he had acted contrary to fair procedures in failing to afford her that opportunity. The Minister, on the other hand, contended that since she had been accorded refugee status in Italy, such an investigation was a futile exercise.

14. It is plain that McMahon J. found on the facts of that case that the applicant had moved here purely for economic reasons and that this was critical to his conclusion that the Minister's decision should be upheld:

> "It is quite clear from the affidavits and from the evidence before the court that the applicant has not made out the case that she has any fear of persecution if she is returned to Italy. On the contrary she has clearly stated in the documentation that she has left Italy largely for economic reasons and because she has no suitable accommodation. Moreover, notwithstanding the very clear indication from the Commissioner by letter on 14th June, 2007, which pointed out to the applicant that there was no claim of a risk of persecution in Italy, she has not since put forward any factual basis which would make s. 17(4) of the Act inapplicable in her

> case. This is an important point to bear in mind since such a finding removes any room for factual dispute in relation to the "fear of persecution" issue. If a "fear of persecution" was in issue then the applicant's case would be much stronger. Absent this, however, the issue in s. 17(4) is a purely legal one, bearing in mind again that it is common case that the applicant has been recognised as a refugee in Italy.
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> For this reason alone, and since the section is in no way ambiguous on the issue, the first named respondent is correct when he says to conduct an interview in those circumstances would be a futile exercise. It is important to note that s. 17(4) does not give the Minister a discretion in the matter and the Commissioner's decision is not one which usurps a Ministerial discretion. If s. 17(4) gave the Minister a discretion then of course the Commissioner could not pre-empt the Minister's decision. This, however, is not the case here as can be clearly seen from the wording of the subsection."

15. In sum, therefore, the applicant in *SY* failed by reason of the fact that she had obtained refugee status in Italy; she had come her purely for economic reasons and, critically, she did not allege a fear of persecution in Italy.

16. This brings us directly to the question of whether the applicants in the present case had a well founded fear of persecution in Poland. Section 17(4) makes it clear that the Minister has no discretion to grant refugee status to a person who has already been granted refugee status in another country where that person's reason for leaving or not returning to the state which originally granted asylum status "does not relate to a fear of persecution in that state." If the applicant does not allege a fear of persecution, then the Minister has no discretion in the matter and an investigation of the case by the Refugee Applications Commissioner would be a pointless exercise.

17. The present case is, however, somewhat different from that of *SY*. Certainly, it would not suffice for the applicants to point to the difficulties of refugee life in Poland or that their circumstances in Ireland were more pleasant and welcoming than that which they had experienced in Poland. Unlike the applicant in *SY*, the applicants in the present case have, however, alleged that they had a fear of persecution in the country which afforded them refugee status in that they contended that they were being watched and beset by agents of the Azeri State.

18. This brings us to the vexed question of the extent to which the threat posed by non-State actors can constitute a "fear of persecution" in the sense conveyed by s. 17(4). Of course, the complaint of Mr. and Ms. S has never been investigated by the Office of the Refugee Applications Commissioner: that, after all, is the essence of the present case. *If* the issue solely turned on the question of whether Mr. and Ms. S had alleged that they were at risk if returned, then I think that it would have been inevitable that the impugned decision would have to be quashed, since it would have been incumbent on the Commissioner to investigate the credibility of these claims. As I have, I think, already indicated, it is just possible that the claims of the S family are well-founded and that there is lurking under the surface an otherwise invisible murky underworld of intrigue, the nature of which is difficult to evaluate by reason of our almost total unfamiliarity with Azerbaijan and its complex internal politics.

19. The matter does not, however, end there. What is striking about the entire claim made by the S family is that no attempt at all was made to inform the Polish authorities and to invoke their protection in respect of these events. No suggestion has been made anywhere in the affidavits that they ever invoked the protection of the Polish authorities.

20. Of course, I do not overlook the fact that by this stage Mr. and Ms. S were thoroughly disenchanted with life in Poland. Equally, however, I cannot pass over the fact that Poland is a member of the European Union and a party to the ECHR. Quite apart from any issues arising from the ECHR, it is incontestable that an unwillingness by Poland to investigate credible (or potentially credible) threats to the life and well being of refugees within its protection would constitute a manifest breach of its EU obligations, not least having regard to the obligations contained in the Charter of Fundamental of Rights. One can, I think, also take judicial notice of the fact that the Polish Constitution of 1997 is committed to the rule of law and the protection of fundamental rights.

21. While we of all countries are presently in no position to point to the failings of others, one must, of course, acknowledge that Poland has not succeeded in every respect and that, in particular, its prison conditions have been the subject of adverse comment: see, e.g., Application 17785/04*Orchowski v. Poland* [2009] and *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45. At the same time, it is clear that the rights protected by the Polish Constitution are not simply illusory and that the other branches of the Polish State are subject to ultimate supervision by the Polish Constitutional Court as well as externally by the European Court of Human Rights and, indeed, by the Court of Justice.

22. At all events, it is clear that it is not enough for the applicant simply to allege a fear of persecution: he or she must go further and must *generally*show that the state in question is either not disposed to granting reasonable protection or, perhaps, is simply not in a position to do so: see generally the reasoning of the House of Lords in *Hovrath v. Home Secretary* [2001] 1 A.C. 489. To this, of course, there may be well justified exceptions, not least where it may be inferred from the general state of affairs prevailing in the state in question in the circumstances that such would be pointless or even dangerous. One can here take obvious historical examples: thus, for example, a Jewish shopkeeper in Germany who was fearful of mob violence in the wake of Kristallnacht in November, 1938 could scarcely have been expected to wait for a police report on these incidents before deciding to flee.

23. But this historical example finds no counterpart in the modern Poland which is a modern, thriving democracy. This is really where the applicants' case in the present proceedings fails, since there has been no attempt at all to show that Poland is not in a position to provide some reasonable degree of protection, not least because they never invoked the protection of the Polish state. For this reason, Mr. and Ms. S. cannot claim that they have a fear of persecution in the particular sense understood by the 1996 Act.

24. In those circumstances, I regret that I must conclude that the refugee claims of Mr. and Ms. S. are doomed to fail *in limine*, precisely because they cannot show that Poland will not protect them. In these circumstances, I am driven to the conclusion that the Office of the Refugee Applications Commissioner was justified in refusing to investigate the complaints since in these circumstances the Minister had no jurisdiction to grant them refugee status.