THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 638

RECORD NO. 2023/1147/JR

Between:

GR AND CK

AND DR (AN INFANT SUING BY HER FATHER AND NEXT FRIEND GR)

AND TR (AN INFANT SUING BY HER FATHER AND NEXT FRIEND GR)

Applicants

- and -

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE CHIEF INTERNATIONAL PROTECTION OFFICER, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

Respondents

***Ex Tempore* decision of Ms. Justice Hyland of 27 October 2023**

Introduction

1. This is an application for leave to seek judicial review. I heard the matter on Monday 23 October 2023 and reserved my judgment to today in order to consider whether the application met the substantial grounds threshold. As identified in *McNamara v An Bord Pleanala (No. 1)* [1995] 2 ILRM 125, for an application for leave to meet that threshold, it must be reasonable, arguable and weighty. It must not be trivial or tenuous.

2. I have concluded that the applicants are not entitled to the reliefs set out at paras. 1, 3 and 4 of the Statement of Grounds and I refuse leave for same. However, I will grant leave in respect of reliefs 2 and 5. Relief 5 seeks a declaration that the failure of the first respondent to notify in advance a refusal of an oral hearing is unlawful. There are other cases where leave has been granted and the same point is being litigated, and it may be that a decision requires to be made as to whether a test case should go forward in this respect. In any case, that is a matter that can be considered on another day.

3. Relief no. 2 seeks an Order of *certiorari* quashing the decisions/recommendations pursuant to s.49 of the International Protection Act 2015 reached in respect of the applicants both dated 14 April 2023. The reasoning in support of this relief simply states the uncontroversial proposition that if the substantive underlying decision is quashed, the s.49 decisions should also be quashed. Because I am allowing relief 5, that ground should remain in case the Tribunal decision is quashed.

Factual Background

4. Turning now to the matters where I am refusing leave, I should explain the nature of the application and why I conclude that they do not meet the substantial grounds threshold. There is a statement of relevant facts in the written submissions provided on behalf of the applicants and I am proceeding on the basis of the facts as identified there at paragraphs 1 to 10. These provide as follows.

5. The first applicant is a national of Georgia born in 1976. The second applicant, born in 1975, is the first applicant's wife and also a national of Georgia. The

infant applicants are children of the first and second applicants and are also nationals of Georgia, born in 2008 and 2016 respectively.

6. The first applicant came to Ireland and applied for international protection on the 8th September 2022. The second applicant came to Ireland with the two children of the adult applicants and applied for international protection in the State on the 16th January 2023.

7. The applicants' claims for international protection are all based on the same set of circumstances, that the first applicant was targeted for exposing an individual to prosecution and subsequent imprisonment and that both he and his family were at risk in Georgia from actions of individual/s in Georgia acting on behalf of the imprisoned individual. The above factual basis was rejected by the International Protection Office at first instance as lacking in credibility but was accepted as credible on appeal by the first respondent in the impugned decision.

8. Until the impugned decision was issued on 7 September 2023, the first applicant's application had been dealt with separately to the application of his wife and children. This was presumably because the applications were made on different dates. The first and second applicants had separate legal representation until these proceedings were issued.

9. The applicants' fears, if returned to Georgia, relate to fears of persecution they may encounter as a result of actions of a criminal and his associates / family members. Their claims for refugee status/subsidiary protection were rejected by the International Protection Office and appeals to the first respondent were duly filed. Georgia has been designated a "safe country of origin" by the third respondent and, despite request, the applicants were not provided with an oral hearing of their respective appeals.

10. A decision of the first respondent dated 7 September 2023 ("the impugned decision") was issued to the applicants and their claims, which appear to have been "joined" by the first respondent, were both denied and the earlier decisions of the second respondent were affirmed by the first respondent. In that decision, the Tribunal concluded that, although it accepted the claim in respect of fear of persecution, there was no basis to consider that there was any nexus to a refugee convention ground in the claims made by any of the applicants. On that basis, their claim for international protection was refused.

Relief 1

11. The first relief sought is an Order of *certiorari* quashing that part of the decision of 7 September 2023 in which it was found that there was no basis to consider that there was any nexus to a refugee Convention ground in the claims made by any of the applicants. In relation to the question of nexus, the Tribunal records that in their questionnaires, both appellants ticked "none of these" in relation to the nexus to a Convention ground. It is noted at para. 5.1 of the Tribunal decision that no submissions were received in the course of the appeal from the first named appellant suggesting that there is any nexus.
12. Accordingly, in relation to the first named appellant, I can discern no argument whatsoever as to why the Tribunal erred in finding that no nexus had been established.
13. In relation to the remaining appellants, it is claimed that simply because the first applicant did not identify any nexus, that does not mean that no such nexus existed in the case of the remaining applicants. The argument is made that the three other applicants belong to a particular social group because they are members of the first applicant's family. In that respect reliance is placed upon

the decision of Humphreys J. in the case of *B.K. v Refugee Appeals Tribunal & Ors.* [2017] IEHC 746. In fact, *BK* is a decision where Humphreys J. refused to accept that a person who had been threatened could claim family membership as the Convention nexus. It is true that Humphreys J. acknowledged that it may be that a family member secondarily targeted could claim to be a member of a social group, but that was not the case in the matter before him. In my view, that observation cannot be treated as authority for the proposition that a family of a person threatened by another person must be considered to be a particular social group.

14. In fact, this matter was discussed in some detail by the decision of the Tribunal. At para. 5.2, the decision maker notes that the second named appellant had claimed a Convention nexus i.e., family members of persons under threat from criminal actors. The decision cites s.8(1)(d) of the 2015 Act which provides as follows:

> *A group shall be considered to form a particular social group where in particular –*
>
> *(i) members of that group share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or*
>
> *(ii) that group has a distinct identity in the relevant country, because it is received as being different by the surrounding society,*
>
> *and, depending on the circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation;*

15. The Tribunal records its conclusions at para. 5.3 and 5.4 as follows:

> *5.3 The Tribunal does not consider that there is an innate characteristic or common background that cannot be changed to people who have been threatened by criminals. Being threatened is not an innate characteristic or shared background. Further, membership of a particular social group cannot be defined solely by reference to the persecution itself, as to do so would render the requirement redundant. Finally, while family members can, in particular circumstances (such as the family members of a particularly notorious individual) constitute a particular social group, it is not correct to say that every family is part of a particular social group. It is only if that family is perceived as different, rather than the fact that they are a family in and of itself, that being a family member can constitute a particular social group.*
>
> *5.4 The Tribunal cannot see any issue which could be considered an issue of race, religion, ethnicity, nationality or political opinion in this case. Membership of a particular social group is not a catch all provision and the suggested particular social group is based, in the Tribunal's view, on the basis that the persecution should define its own group of victims which, it is well established, is not a valid basis for finding that there is a particular social group. Overall, therefore, the Tribunal can see no basis to consider that there is a nexus to a refugee convention ground in this case.*

16. In my view, the applicants have failed to establish substantial grounds to identify why this finding is unlawful or incorrect. The submissions made do not identify why this family must be considered to be a particular social group. They

simply refer to the decision of Humphreys J. without seeking to explain why this family could be considered to form a particular social group. In the circumstances, I conclude that no substantial grounds have been adduced in respect of this argument.

17. A linked argument is made on the nexus point and it relates to para. 5.1 of the decision of the Tribunal. At para. 5.1 it is stated as follows: "*They were found not to have a nexus to any particular Convention ground in the s.39 report*".

18. The decision maker concluded in the s.39 report that he did not find that the applicant would face a reasonable chance of persecution if returned to his country of origin and reasons for same were provided. At para. 6 of the same report, it is provided that if a negative finding is made in respect of one of the subsections above, no further analysis will be provided in respect of the remaining subsections. Therefore, no analysis of the nexus ground was made by the IPO decision, and it was simply stated to be n/a, in other words, not applicable.

19. The applicants criticise the wording at 5.1 of the Tribunal decision as suggesting that there had been an analysis of nexus and a determination by the IPO, whereas that was not in fact the case. It is certainly true that there is an ambiguity in the sentence at paragraph 5.1 identified above. On one reading, it implies that there had been a substantive finding in relation to nexus. On another reading, it indicates there was no finding on nexus to any particular Convention ground.

20. Even taking the first interpretation *i.e.*, the applicants' case at its highest, the error does not appear to me to be material in any way. No grounds are raised as to why this sentence may have prevented the Tribunal from correctly evaluating the nexus point. There is no other evidence that the Tribunal believed there had

been a substantive adjudication on nexus. No argument has been made as to how its allegedly mistaken evaluation of what the IPO did caused it to go wrong or undermine its conclusion. Therefore, I can see no substantial grounds in relation to any arguments on nexus and I refuse leave on this issue.

Reliefs 3 and 4

21. Reliefs 3 and 4 may be treated together. Relief 3 seeks an Order remitting the nexus issue and all other undecided issues at first instance (i.e., State protection, internal protection/relocation alternative and exclusion) to the IPO for a first instance adjudication, while preserving the credibility findings made by the first respondent. Relief 4 seeks a declaration that the process adopted by the IPO for the adjudication of claims of international protection and thereafter acquiesced in by the Tribunal, is contrary to domestic, constitutional, and European law.
22. In the written legal submissions, it is identified that the reliefs should be granted on account of the inadequacy of the consideration of the various elements of the claim and the legality of the process adopted by the IPO and acquiesced in by the Tribunal in assessing the claim. The core of this argument appears to be that the IPO did not make a finding on nexus because they had rejected the claim in relation to the existence of persecution. The Tribunal on the other hand accepted the claim of persecution and then went on to deal with the second issue i.e., that of nexus. The applicants complain that an element will be introduced and adjudicated upon for the first time at second instance i.e., nexus, that was not considered at all at first instance. They say this deprives the applicants of an effective remedy in respect of the decision of the IPO in that respect. It is said that an applicant is entitled to a fair hearing at first instance and in respect of any appeal, and that a fair appeal will not cure an unfair first instance decision.

It is argued that the absence of any authorised body to whom the applicants can appeal the finding of an absence of nexus in the absence of remission to the second respondent is in breach of the right to fair procedures and of an effective remedy. The only case law identified in support of this proposition is that of *Stefan v. MJELR & Ors.* [2001] IESC 92.

23. The applicants are undoubtedly entitled to a fair hearing and in my view that means that an applicant ought not to be taken by surprise at the Tribunal, for example where an entirely new ground that the applicant did not anticipate is raised and the applicant does not get an opportunity to address it. That may well be in breach of fair procedures and therefore result in the remedy not being effective.

24. Here however, the applicants must be taken to be aware of the six different stages that the IPO/Tribunal must go through when adjudicating upon an international protection claim. The applicants were legally represented at Tribunal stage. Therefore, they must have understood that the question of nexus would be addressed if they were successful on their assertion that the IPO had been incorrect about persecution. The very point made by the applicant was that the IPO were wrong in that respect. If vindicated on that point – as indeed they were – it was inevitable that the Tribunal would have to go on to consider the question of nexus. Equally, if they were successful on that, then each of the other four steps identified in the Act would have to be considered by the Tribunal in turn. The applicants were therefore not taken by surprise in relation to this issue. The first named applicant must also to be taken to be aware that he had not claimed a nexus to a Convention ground in his interview/application form. Despite this, the grounds of appeal that he lodged did not address the

question of nexus at all. Separately, the other applicants did indeed make the argument in relation to nexus identified above *i.e.,* that they should be regarded as a member of a particular social group by reason of being the family members of a person who is at risk of criminal behaviour. Therefore, they were certainly not taken by surprise in relation to this matter. There was no unfairness in relation to how the Tribunal dealt with nexus, or the fact that they dealt with nexus. Accordingly, insofar as the applicants are seeking to make a fair procedures argument, I am satisfied they have not raised substantial grounds.

25. The applicants are also seeking to make an alternative, radical argument and one which they have not supported by case law. That argument is that in every appeal, the first instance decision maker must address all the aspects of a decision which may potentially be dealt with by the second instance decision maker. In other words, it is contended that because the question of nexus was not addressed by the first instance decision maker, there is automatically a breach of the right to an effective remedy and fair procedures. In relation to the question of an effective remedy, the applicants have not identified any grounds, let alone substantial grounds, which would support the proposition that an effective remedy in the context of a decision of the Tribunal requires it to limit itself to considering matters that were the subject of a finding by the IPO, and that each element of the requirements to be satisfied to establish international protection must be the subject of a finding by both the first instance and the second instance body. That is manifestly problematic in the international protection context, where there are six requirements to be met to obtain a finding of international protection. The import of the applicants' argument is that the IPO must deal with each and every requirement, even if a negative finding has

been made in respect of a prior requirement. That is a startling proposition, and for it to reach the level of substantial grounds it would have to be supported by authority. No such authority has been identified.

26. The far reaching implications of this argument are in fact identified by the applicants, where they say that all relevant questions including persecution, nexus, State protection, internal protection/relocation alternative and exclusion must be duly considered at a first instance hearing before the IPO, and, if necessary, on appeal to the second respondent. It is clear that the applicants have engaged with the far-reaching implications of their argument, but have failed to make any coherent legal argument based on case law and/or statute as to why this should be so. Therefore, I do not find that this argument reaches the substantial grounds threshold.

27. As noted above, relief 3 seeks to have the decision of the Tribunal remitted back to the IPO while preserving the credibility findings made by the Tribunal. The applicants say that fair procedures demand that, when the matter is remitted back to the IPO, they should be entitled to rely on the findings of the Tribunal on appeal that their core story re persecution was accepted as credible. It is difficult to understand the legal basis for this argument. The challenge is to the decision of the Tribunal. Even if the matter were to be remitted to the IPO – and for the reasons I identified above the applicants have not identified substantial grounds calling for such a remittal – then no basis is explained as to why the applicants would be entitled to preserve certain aspects of the Tribunal's decision that were favourable to them, but to reject those parts that were unfavourable. No legal authority has been cited in that respect. I therefore refuse leave in respect of this ground also.