E.D. (a minor suing through his father and next friend G.D.), Applicant v. **The Refugee Appeals Tribunal** and **The Minister for Justice, Equality and Law Reform**, Respondents [2011] IEHC 431, [2009 No. 955 JR]

High Court 10th November, 2011

Immigration – Asylum – Persecution – Real risk of not receiving basic education – Discrimination – Violation of basic human right – Whether denial of education constituting severe violation of basic human rights – Whether discrimination amounting to persecution – Whether respondent erred – European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518), reg. 9 – Refugee Act 1996 (No. 17), s. 2 – Constitution of Ireland 1937, Article 42 – Council Directive 2004/83/EC, article 9 – Charter of Fundamental Rights of the European Union, article 14 – European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, article 2 of First Protocol – United Nations Convention on the Rights of the Child, article 28.

Section 2 of the Refugee Act 1996 defines a "refugee" as:-

> "a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it …".

The applicant was born to Serbian parents living in Ireland. His parents, although of Ashkali ethnicity, were regarded as Roma in Serbia. The applicant made an application for refugee status on the grounds that if he were returned to Serbia he would be likely, as a member of the Roma community, to face pervasive discrimination such as would impair his right to receive a basic education and that this impairment amounted to persecution. The first respondent made a finding that there was a real risk that the applicant would not receive a basic education if returned to Serbia but that he had not established a well founded fear that he would suffer persecution within the meaning of s. 2 of the Act of 1996. A challenge to that decision was brought by way of judicial review seeking an order of *certiorari* of the decision of the first respondent.

Held by the High Court (Hogan J.), in granting the relief sought and quashing the decision of the first respondent, 1, that the first respondent erred in its application of what constituted persecution. The potential denial of a basic education to the applicant constituted a sufficiently severe violation of basic human rights amounting to persecution within the meaning of s. 2 of the Act of 1996.

Anisminic v. Foreign Comp. Comm. [1969] 2 A.C. 147, *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218; *Lambert v. An tÁrd Chláraitheoir* [1995] 2

I.R. 372, *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449 and *A.M.T. v. Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 I.R. 607 followed; *Brown v. Board of Education* (1954) 347 U.S. 483 considered; *M.S.T. (a minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529, (Unreported, High Court, Cooke J., 4th December, 2009) and *G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011) distinguished.

2. That the discrimination against the group to which the applicant belonged gave rise to a real risk that the applicant would not get a basic education if returned to his country of origin.

Cases mentioned in this report:-

Anisminic v. Foreign Comp. Comm. [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208.

Brown v. Board of Education (1954) 347 U.S. 483.

Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218; [1998] 1 I.L.R.M. 1.

Lambert v. An tÁrd Chláraitheoir [1995] 2 I.R. 372.

Shannon Regional Fisheries Board v. An Bord Pleanála [1994] 3 I.R. 449.

A.M.T. v. Refugee Appeals Tribunal [2004] IEHC 219, [2004] 2 I.R. 607.

M.S.T. (a minor) v. Minister for Justice, Equality and Law Reform [2009] IEHC 529, (Unreported, High Court, Cooke J., 4th December, 2009).

G.V. v. Refugee Appeals Tribunal [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011).

Judicial review

The facts have been summarised in the headnote and are more fully set out in the judgment of Hogan J., *infra*.

By order dated the 31st May, 2011, the High Court (Dunne J.) granted the applicant leave to seek relief by way of judicial review (see [2011] IEHC 354). The application for judicial review was heard by the High Court (Hogan J.) on the 19th, October, 2011.

Michael Lynn for the applicant.

Cindy Carroll for the respondents.

Cur. adv. vult.

Hogan J. 10th November, 2011

[1] The applicant was born in the State in 2006, although he is not an Irish citizen. His parents were born in the Preshevo municipality of Serbia and are of Ashkali ethnicity, albeit that they are regarded as Roma in the parents' country of origin. Subject to questions of registration, it would appear that the applicant is Serb. An application was made for asylum on the applicant's behalf, but this was ultimately refused by the first respondent in a decision delivered on the 17th August, 2009. It is this decision which is challenged in these proceedings pursuant to leave which was granted by the High Court (Dunne J.) in a judgment delivered by her on the 31st May, 2011 (see [2011] IEHC 354).

[2] Central to the applicant's claim that he will suffer persecution if returned to Serbia is the contention that he is likely to face pervasive discrimination such as will impair his right to receive a basic education. The first respondent found he will:-

> "in all likelihood face discrimination if sent to his country of nationality. I am not persuaded on the evidence submitted and available however that such discrimination will rise to the level of persecution. The fact that the applicant may not receive a full or indeed a basic education is not sufficient in my view to lead to a conclusion that the requirement that there be persecution is satisfied."

[3] The essential question presented here is whether such a finding of fact ought properly to have compelled the first respondent to conclude that there was a well founded fear that the applicant would suffer persecution if he were returned to Serbia.

[4] The country of origin information attests to the fact the Ashkali and Roma communities in Serbia are subject to widespread discrimination, as evidenced by a climate of indifference, hostility and intolerance among the general public. Thus, in its report on Serbia in June, 2008, the United Nations Committee on the Rights of the Child concluded, at para. 75, that it remained:-

> "deeply concerned at the negative attitudes and prejudices of the general public and at the overall situation of children of minorities and in particular Roma children. The Committee is concerned at the effect

this has with regard to discrimination and disparity, poverty and the denial of their equal access to health; education; housing; employment; non-enrolment in schools; cases of early marriage and decent standard of living. The Committee is also concerned at the very low levels of participation in early childhood development programmes and day care and the deprivation of education."

[5] The views expressed by the European Commission in a report entitled "Serbia 2008 Progress Report", at p. 20, are in much the same vein. It found that:-

"There have been some improvements in the number of Roma children attending secondary schools due to the affirmative measures taken by the Ministry of Education and the Ministry of Human and Minority Rights. However, the generally low school attendance by Roma children remains a serious problem, in particular among Roma girls.

In practice the Roma population continues to face extremely difficult living conditions, exclusion and discrimination. One of the major persistent problems facing the Roma community is access to personal documents. This has had grave consequences for the ability of large sections of the Roma population to gain access to basic social and economic rights. A significant proportion of the Roma population still lives in extreme poverty and illegal settlements. The Roma population, especially women, are subject to widespread discrimination when it comes to access to the labour market. There are a disproportionately high number of Roma children in special schools for children with learning difficulties. A climate of intolerance towards the Roma population continues to prevail in Serbia."

[6] A 2008 United States State Department report for Serbia found that:-

"Romani education remained a problem. Many Romani children, especially girls, did not attend primary school; reasons included family objections, lack of identity documents, judgments by school administrators that they were unqualified and societal prejudice. According to an Open Society Institute report presented in October, only 2% of Romani children were in preschool, while fewer than 40% attended primary school. In some cases, children who attended school sat in separate Roma-only classrooms or in a group at the back of regular classes. Few teachers were trained in the Romani language and many Romani children did not learn to speak Serbian. Some Romani children were mistakenly placed in schools for children with emotional

> disabilities because the Romani language and cultural norms made it difficult for them to succeed on standardized tests in Serbian. In October the Ministry of Education announced the introduction of assistant teaching positions for Roma in pre- and primary schools."

[7] Of course, as the first respondent correctly observed, not all infringements of even basic civil liberties or even acts of discrimination will amount to persecution within the meaning of s. 2 of the Refugee Act 1996. As we shall presently see, to constitute persecution for this purpose, absent an immediate and serious threat to life and limb, something in the nature of systematic and pervasive infringements of a basic human right is generally required. The question of what constitutes "persecution" for this purpose is in the first instance a matter of law which the first respondent must correctly define if it is to remain within jurisdiction, see, *e.g.,* by analogy *Anisminic v. Foreign Comp. Comm.* [1969] 2 A.C. 147, *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449, *Lambert v. An tÁrd Chláraitheoir* [1995] 2 I.R. 372, *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218.

[8] Assuming, therefore, that the first respondent has correctly defined the term as a matter of law, then its application of that legal principle to the facts of the case can only be disturbed where the conclusions are either unreasonable or vitiated by a manifest error of fact: see generally the judgment of Finlay Geoghegan J. in *A.M.T. v. Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 I.R. 607 and the subsequent case law, and Daly, *Judicial Review of Factual Error in Ireland* (2008) 30 D.U.L.J. 187.

[9] The concept of what constitutes persecution does not lend itself to precise analysis and as Ryan J. noted at para. 15 in *G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011), at para. 51 of the United Nations High Commissioner for Refugees handbook it is observed that:–

> "There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success."

[10] In *G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011) Ryan J. set out and applied paras. 53 to 55 of that handbook:-

> "53. 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.

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, *e.g.* serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved."

[11] Ryan J. next referred to the European Communities (Eligibility for Protection) Regulations 2006 which transpose the Qualification Directive (Council Directive 2004/83/EC). Ryan J. referred to reg. 9 of the Regulations of 2006 which provides, *inter alia*:–

"(1) Acts of persecution for the purposes of section 2 of the 1996 Act must:
(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a).

(2) Acts of persecution as qualified in paragraph (1) can, *inter alia*, take the form of –
   (a) acts of physical or mental violence, including acts of sexual violence;
   (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
   (c) prosecution or punishment, which is disproportionate or discriminatory;
   (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
   (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in section 2(c) of the 1996 Act;
   (f) acts of a gender-specific or child-specific nature."

[12] The decision of Ryan J. in *G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011) and that of Cooke J. in *M.S.T. (a minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529, (Unreported, High Court, Cooke J., 4th December, 2009) are illuminating, not least because both cases have as their background contemporary events in the former Yugoslavia, but also because they illustrate how sporadic events of discrimination and ill-treatment can fall short of discrimination for this purpose. In *M.S.T. (a minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529, the issue was whether the treatment of a mother and her daughter, two ethnic Serbs, in Croatia amounted to a form of persecution. The evidence was that their house had been attacked in an ethnically motivated incident and the child had suffered bullying and taunting while at school.

[13] Cooke J. at p. 23 nevertheless rejected the argument that this amounted to persecution:–

> "[50] Having regard to the case law as to the essential nature of 'inhuman or degrading treatment' for this purpose, the court is satisfied that this conclusion, as made on that limited basis by the Minister could not be upset as being unsound or unlawful. While the attacks on the house and window breaking, the expressions of racial hatred, the bullying of J. in school and the attack upon her which broke her nose, are all undoubtedly frightening, stressful, painful and ugly, it could not, in the court's judgment, be said that they are such as amount to

inhuman or degrading treatment on the basis of their essential character, duration or level of severity."

[14] The decision of Ryan J. in *G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011) is in much the same vein. Here the applicants were a husband and wife whose applications for refugee status had been rejected by the respondent. He was an ethnic Serb and she was a Croat. He contended that he had suffered discrimination in Croatia in that, for example, he had been forced to sell his property at less than prevailing market prices. He was also less likely to secure public sector employment, although it was not apparent that his qualifications were such that he would have been in a position to apply for such employment. The couple had been subjected to isolated verbal taunting, but the country of origin information did not suggest that couples in mixed marriages were liable to the threat of violence in Croatia. While the respondent accepted that the applicant had suffered "considerable hardship" in the past and while it was further accepted that there was "open discrimination" against ethnic Serbs in Croatia, it could not conclude that:-

"such discrimination that might be visited upon the applicants if returned to Croatia would be such as to rise to the level of persecution."

[15] It is perhaps not surprising that Ryan J. upheld this finding of the respondent. It had carefully analysed the concept of discrimination and had defined it correctly. The respondent had then undertaken a reasoned assessment based on the evidence and Ryan J. found that it was open to it to make such findings.

[16] What, then, is the situation in the present case? Having set out the country of origin information and discussed the question of persecution, the respondent concluded:-

"Insofar as there is discrimination against the grouping to which the applicant belongs, I cannot conclude that it is in every case of a serious nature or degree. In this case, there is no history to rely upon, thus I am left simply to rely on the objective accounts of what the current position is in the country and from that to deduce what might await the applicant if he is to live in this country. The applicant is still a child and not yet of school going age. While the situation is far from ideal, the fact remains that there are initiatives referred to above designed to address the problem of registration, and the UNHCR has ceased, some years ago, recommending that this ethnic grouping not be returned. I conclude that, whether the elements are taken singly or regarded cumulatively, the possible discrimination that this applicant

might face does not amount to the denial of human dignity in any key way. The standard of a sustained or systemic denial of core human rights is simply not met."

[17] Before analysing the respondent's conclusions, one must first examine the level of discrimination which the applicant is likely to encounter if he is returned to Serbia. The available country of origin information uniformly painted a picture of pervasive discrimination against Roma children (I am including the Ashkali for this purpose) with regard to access to even basic education. As the United States State Department report for 2008 found, fewer than 40% of Romani children attended primary school. Even in the case of those who attended school, it is plain that they were allowed to do so only on sufferance and in a climate of barely concealed contempt and hostility. A range of such reports attest to the fact that Roma children were often sent to the back of the class or educated in what amounts to segregated classrooms. A disproportionate number of Roma children were transferred to special schools, designed for children with special needs and which are quite unsuited for children who are not so intellectually or physically disadvantaged.

[18] Almost 60 years ago the United States Supreme Court famously declared in *Brown v. Board of Education* (1954) 347 U.S. 483 that segregated schooling violated the equality principle contained in the 14th Amendment to the United States Constitution. As Warren C.J. said at p. 493:–

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does … Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system... We conclude that, in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought

> are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

[19] Of course, it does not follow in the least that simply because a practice is held to be unconstitutional - even by a leading court such as the United States Supreme Court - that this could in itself necessarily be equated with persecution for the purposes of the Geneva Convention. But *Brown v. Board of Education* (1954) 347 U.S. 483 nonetheless illustrates a point which all can intuitively understand, namely, that segregated schooling is a general hallmark of a society where the disadvantaged group will be subjected to pervasive discrimination and exclusion which, in some circumstances, at least, can amount to persecution.

[20] The present case goes further again, since, as we have already seen, the statistics suggest that the applicant is likely not to obtain even a basic education. The question then becomes whether official indifference to the entitlement of a member of a disadvantaged group to secure even a basic education can amount to persecution in this sense. It seems curious that this issue does not hitherto appear to have received judicial examination, whether in this jurisdiction or elsewhere. In her monograph, *International Refugee Law and Socio-Economic Rights* (Cambridge, 2007), Foster refers to a decision of the Australian Refugee Review Tribunal in 1995 which found that the potential exclusion from primary education of a young child from an unnamed country by reason of the fact that his mother had full blown AIDS could amount to persecution:-

> "The applicant's son is also a member of a social group, family members of HIV sufferers. There is a real chance that he would be denied access to education, even at a primary level. There is also a real chance that he would face social isolation, and worse, after the death of his mother from an AIDS related illness.
>
> Discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution."

[21] Useful as this decision undoubtedly is, the matter nevertheless requires to be examined as a matter of first principle. In his classic textbook, *The Law of Refugee Status* (Butterworths 1991), Professor Hathaway defines persecution, at p. 112, as the:-

> "sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include the breach of any right within the first category, a discrimination or non-emergency abrogation of a right within the second category, or the

failure to implement a right within the category which is either discriminatory or not grounded in the absolute lack of resources."

[22] The right to education may be regarded as coming within the third category in Hathaway's characterisation.

[23] The right to education (and especially the right to basic education) is widely regarded as fundamental. This is reflected in Article 42 of the Constitution, article 2 of the First Protocol of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 and article 14 of the Charter of Fundamental Rights of the European Union. It is also reflected in international agreements, such as article 28 of the United Nations Convention on the Rights of the Child.

[24] As Glendenning, *Education and the Law* (Butterworths, Dublin, 1999) observed, at p. 251, the right to education must be regarded as a most significant human right, since the denial of that right means that "many other human rights are likely to be beyond reach". Similar views may be found in O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall, Dublin, 2006) at pp. 18 to 25. If the applicant is denied the right to even a basic education he will effectively be excluded from any meaningful participation in Serbian society and, echoing the words of Warren C.J. in *Brown v. Board of Education* (1954) 347 U.S. 483, he will carry the brand of inferiority and stigma with him for the rest of his life. In that respect, it is far more serious than the isolated taunting and bullying which was at issue in *M.S.T. (a minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529, (Unreported, High Court, Cooke J., 4th December, 2009) or the hostile atmosphere which the ethnic adult Serb encountered in Croatia in *G.V. v. Refugee Appeals Tribunal* [2011] IEHC 262, (Unreported, High Court, Ryan J., 1st July, 2011). If, moreover, the applicant is denied that right it will not be by reason of a lack of resources – such as might be the case in extremely poor countries in sub-Saharan Africa – but rather by reason of the official indifference, intolerance and hostility of which we have already spoken.

[25] While the present case certainly falls outside the classic types of persecution envisaged by the Geneva Convention involving violence and threats of violence, it nonetheless seems impossible to avoid the conclusion that the denial of even basic education amounts to a severe violation of basic human rights (to adapt the language of reg. 9(1) of the Regulations of 2006). In that respect, therefore, the denial of basic education in such circumstances amounts to persecution within the meaning of the s. 2 of the Act of 1996.

Information sourced by the first respondent

[26] Even though I am quashing its decision, it is appropriate to record my sincere gratitude to the first respondent for the exceptional care which it took with this difficult case. The first respondent went to the trouble of sourcing its own country of origin information regarding the treatment of Roma, Ashkali and Egyptians in Kosovo. It is clear from this information that the European Union has endeavoured to assist these communities by assisting them with registration and the provision of additional teacher training. Nevertheless, as the applicant's solicitors noted in their reply, this material relates to *Kosovo* and not Serbia. While I appreciate that the Preshevo municipality is right on the borders of Kosovo and the Republic of Macedonia, it is nonetheless in Serbia. In these circumstances, I cannot see how this additional material is of direct relevance to the applicant's case.

Conclusions

[27] In conclusion, therefore, I have concluded that, having regard to the country of origin information, the first respondent erred in law in its construction of what constitutes persecution. In other words, since it found – and, in view of the relevant country of origin information, could only have found – that there was a real risk that the applicant would not get a basic education if he were returned to Serbia, it was bound to find that this amounted to persecution within the meaning of s. 2 of the Act of 1996.

[28] In these circumstances, I will accordingly quash the decision of the first respondent of the 19th August, 2009.

[*Reporter's note*: On the 20th December, 2011, the High Court granted the second respondent leave, pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, to appeal to the Supreme Court. The appeal was granted priority by the Supreme Court but had not been heard at the time of printing.]

Solicitor for the applicant: *John Gerard Cullen.*

Solicitor for the respondents: *The Chief State Solicitor.*

Caitríona McDonagh, Barrister
