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Judgment: approved by the Court for handing down | *Delivered:* **23/11/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY OLEG FEDOROVSKI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McLAUGHLIN J

[1] This application arises from a decision of the Minister of State at the Home Office dated 25 September 2006 by way of review of the applicant's request for asylum in the United Kingdom. The application was refused and all relevant administrative and judicial procedures were exhausted. In consequence the applicant has no right to remain in the UK and in the ordinary course of events removal directions would have been drafted and ultimately executed. In response to the decision of 25 September 2006 however he sought leave to apply for judicial review. That application was heard before Weatherup J who issued a written judgment on 14 May 2007 – [2007] NI QB 41 – in which he refused leave. The applicant appealed the refusal and the matter was the subject of a hearing in the Court of Appeal. In the course of those proceedings the respondent made a single concession resulting in the Court of Appeal granting leave to the applicant to apply for judicial review but confined to a single ground, namely –

> "That the respondent erred in law in concluding that the applicant's birth in the territory of the former Soviet Republic of the Ukraine in 1960 gave reason to believe, pursuant to paragraph 8 of Schedule 2 of the Immigration Act 1971 that the applicant would be admitted to the state of the Ukraine as a Ukrainian national under the Ukrainian law of Citizenship."

These words were chosen by the Court of Appeal because they follow closely the wording of the relevant provision of the 1971 Act under which the Minister asserts jurisdiction to order the removal of the applicant from the United Kingdom following on the failure of his asylum application.

[2] The matter then came on before me for determination restricted to that ground and was heard on 14 November 2007. The applicant appeared personally and the respondent was represented by Dr McGleenan of counsel.

[3] The decision dated 25 September 2006 was issued by way of review of an earlier decision dated 24 February 2004 and which appears at page 157 of the bundle of papers prepared for the hearing by the respondent. It contains a mistake in that there is a reference to a fear of persecution in Ireland and it was acknowledged that this ought to refer to Ukraine. Nothing turned on that point. The decision of 24 February 2004, which sets out the reasons for refusal of asylum, contains a summary of the background and early life of the applicant in the following terms :–

> "27. Furthermore, consideration has been applied as to your right to citizenship under the laws of Ukraine, formerly the Ukrainian Soviet Socialist Republic within the USSR. Within your Asylum Interview Record, you have stated that you were born in the city of Kirovogard or Dnepropetrovsk, which lay within the former Ukrainian SSR (Answer 2 of the Asylum Interview Record (AIR). You have stated that when you were a young child, your family relocated to the city of Kremenchug which also lay within the former Ukrainian SSR where you remained until 1980 (Answer 7 of AIR). However, it is noted that Ukrainian nationality can be obtained through birth. According to Article 13 of the law, children both of whose parents are Ukrainian nationals automatically acquire the nationality of their parents, regardless of the place of birth. This is also the case for children of a Ukrainian national and a stateless or unknown person (Article 14.3). Children of a Ukrainian national and a foreign national acquire Ukrainian nationality automatically, if born on Ukrainian territory. Such children may also acquire Ukrainian nationality automatically if, at the time of birth, one of their parents is permanently residing in Ukraine.
>
> 28. In response to questions fourteen and fifteen of the AIR, you claim to be unaware of the nationalities of your parents, but were able to state their ethnic origins. You have clearly stated that your Mother was of Ukraine ethnicity. You further claim that you were born in a town which now lies within the borders of Ukraine, and you remained there until

> 1980. As such it appears highly likely that Article 13 and Article 14 of Ukraine law would apply and that you have an avenue to Ukrainian citizenship.
>
> 29. Moreover it is noted that in response to question twenty seven of the AIR, you have clearly stated that your wife was also rendered 'Stateless'. However, during her Asylum Screening Interview, your wife appears to have obtained a Russian passport in 1998 (Q15) and was of the opinion that she would be able to obtain a Ukrainian passport, should she choose to apply for such (Q21). She also mentioned that a house fire burnt her documents (Q16). This would imply that your wife is undocumented rather than stateless and raises the question whether this also applies to you. In view of these doubts, the criteria laid down in the Bradshaw determination becomes of great importance. You have not provided the required proof that you have been denied citizenship by either the Ukrainian or the Russian Federation authorities. Consequently it is not accepted that you are without an avenue to the citizenship of any country and are stateless."

[4] Having regard to the single ground of challenge authorised in the order of the Court of Appeal it is clear that this court must consider the laws relating to citizenship and nationality of the Republic of Ukraine. The applicant did not produce the opinion of any expert on the matter but relied upon a document which he had downloaded from the internet and which is contained in the bundle at page 66 et seq. This purports to be an information document posted on the website of the Ministry for Foreign Affairs of the Ukraine and is entitled *Law on Citizenship of Ukraine*. It contains the following statement (page 68 of the bundle):-

> "**Article 3. Belonging to the citizenship of Ukraine.**
>
> The citizens of Ukraine are:
>
> 1. All citizens of former USSR permanently residing within the territory of Ukraine at the moment of declaration of independence of Ukraine (24 August 1991);
>
> 2. Persons, irrespectively of their race, color of their skin, political, religious and other beliefs, sex, ethnic and social origins, material status, place of

> residence, language of other characteristics, who were residing in Ukraine at the moment of entry into force of the Law of Ukraine "On Citizenship of Ukraine" (13 November 1991) and who were not citizens of other states;
>
> 3. Persons who came to Ukraine for permanent residence since 13 November 1991 and who had "the citizen of Ukraine" inscription inserted into their 1974-type passport of the USSR by the domestic affairs authorities of Ukraine, as well as the children of such persons who arrived to Ukraine together with their parents, provided that they had not attained their majority before the entry to Ukraine;
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> 4. Persons who have acquired the citizenship of Ukraine in accordance with the laws of Ukraine and the international treaties of Ukraine;
>
> The persons referred to in the paragraph 1 of part 1 of this Article are the citizens of Ukraine since 24 August 1991; those referred to in the paragraphs 2 are the citizens of Ukraine since 13 November 1991; those referred to in the paragraph 3 are the citizens of Ukraine since the insertion of inscription about their citizenship of Ukraine."

[5] Although this document was not part of the opinion of any expert its broad accuracy has not been challenged by the respondent and I shall proceed on the basis that it is reliable. In any event it accords with the general tenor of the expert evidence filed by the respondents in the form of an affidavit sworn by Ms Kavita Khanna, Immigration Official, which is contained at tab 7 of the bundle and to which I shall refer later.

[6] It is common case that the court is not required to consider the qualification conditions for citizenship set out at headings 1, 2 or 3. Paragraph 4 makes reference to a general category of persons who have acquired citizenship of Ukraine in accordance with the laws of the Ukraine and the international treaties of Ukraine. The first point which I remind myself of at this stage is that the applicant states that he has not "acquired the citizenship of Ukraine". This is a matter which is a subject of debate because it is clear citizenship of some states may be acquired merely by the place of birth, or by the citizenship of parents of the person involved. It does not necessarily imply a process of application and subsequent "acquisition" of citizenship on foot of such an application. I also remind myself that I do not have any evidence before me of the status of international law, or international legal instruments,

within the constitution of the Republic of Ukraine. In some systems international law and norms are adopted as part of the Constitution or municipal law and have direct application whereas other systems do not enforce international law save to the extent to which it is permissible by municipal law to give effect to the rules of international law or treaty provisions.

[7] In her affidavit Ms Khanna states that she had been invited to consider the issue as limited by the Court of Appeal and she states the following in paragraphs 3 and 4 of her affidavit.

> "3. I have been invited to consider this issue in order to assist the Court. I can state that the Ukrainian Parliament adopted the Law on Introduction of Amendments to the Citizenship Law of Ukraine on 16th June 2005. Article 6 of the Amended Law of 2005 outlines grounds for the acquisition of citizenship of Ukraine by birth. It provides that a person whose parents, or one of whose parents, were (was) the citizen(s) of Ukraine at the date of that persons birth, shall be treated as the citizen of Ukraine. A person that was born in the territory of Ukraine from any stateless person, lawfully residing at the territory of Ukraine, shall be treated as the citizen of Ukraine.
>
> 4. Pursuant to Article 8 of the Law of 2005 citizenship can be acquired by way of territorial origin. Thus, if a person himself/herself, or one of his/her parents, or his/her grandfather or grandmother, (full or half) blood brother or sister, a son or a daughter, or a grandchild, was born or permanently resided before August 24, 1991, at the territory that became the territory of Ukraine in accordance with the Law of Ukraine On Succession of Ukraine (1543-12), or if the person himself/herself, or, at least, one of his/her parents, or his/her grandfather or grandmother, (full or half) blood brother or sister, was born or permanently resided at any other territory, which was at the time of his/her born or permanent residence thereat a part of the territory of Ukrainian People's Republic, West Ukrainian People's Republic, Ukrainian State, Ukrainian Socialist Soviet Republic, Transcarpathian Ukraine, or Ukrainian Soviet Socialist Republic

> (Ukr.S.S.R.), and if such person is stateless, or is a foreigner, and has filed an obligation of renunciation of foreign citizenship and an application for Ukrainian citizenship acquisition, such person, as well as his/her underage children, shall be registered as a citizen of Ukraine. I to refer to a copy of the amended Law of 2005 (pages 5-7) in the exhibited bundle marked KK1 and signed by me."

[8] This summary is not challenged as being the applicable law of Ukraine. It states that anyone who was born before August 24, 1991, or who permanently resided before that date, or whose parent or parents were born or permanently resided before that date, in the territory that became the territory of Ukraine, shall be registered as a citizen of Ukraine. Whether an actual application is required or not it seems to me to be beyond argument that the applicant has at least "an avenue to citizenship" and that fact bears on the existence or not of reason to believe he would be admitted to the State of Ukraine as a Ukrainian national under the Ukrainian law of citizenship.

[9] It appeared to me in the course of the hearing that Mr Fedorovski had difficulty in understanding the subtleties of the distinction between a decision by the United Kingdom authorities that he was in fact a citizen of the Ukraine, or that he was a person who was entitled to be granted citizenship of Ukraine, as opposed to someone the UK authorities *had reason to believe* would be admitted to the State of Ukraine as a Ukrainian national under the Ukrainian law of citizenship.

[10] The description of the laws of nationality and citizenship set out in the affidavit of Ms Khanna appeared to me to fit entirely within the general principles of citizenship understood in international law, or as it is some times described, the Law of Nations. In his treatise *Principles of Public International Law, 5th Edition,* Professor Ian Brownlie, QC, at page 390 gives the following analysis of the current state of nationality rules commonly adopted by states –

> ***"3. The Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws***
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> At the Hague Codification Conference of 1930 the First Committee stated in its report that although nationality `is primarily a matter for the municipal law of each State, it is nevertheless governed to a large extent by principles of international law'. In spite of the fact that the committee could not agree on the principles to which they referred, the Conference did produce a Convention of some interest, though of

limited importance. Article I thereof provides: 'It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality'. It will be at once apparent that the antithesis between autonomy in legislation and the limited duty of recognition, which is evident in the replies governments, recurs. The antithesis, taken together with the independent force of the second part of the article, deprives the principle of autonomy of its integrity. However, the antithesis might perhaps equally be said to make the provision a legal curiosity, of little strength, and not giving respectability to any proposition. Article 18, paragraph 2, provides in part that the inclusion of the principles and rules stated in the Convention 'shall in no way be deemed to prejudice the question whether they do or do not already form part of international law'. In relation to Article I this takes one neither forwards nor backwards. But, with its limitations, Article I remains a useful authority for the view that international law sets limits to the power of a state to confer nationality.

4. Nationality rules Commonly Adopted by States

Certain principles concerning conferment of nationality are adopted in the legislation of states often enough to acquire the status of 'general principles'. It is proposed to give a relatively short exposition of these principles while postponing a general consideration of their precise legal status. Without prejudging too much the question of their legal status, account will be taken of the existence of a sufficiency of adherence to a principle to establish the principle as 'normal' though not necessarily adopted generally in the sense of either a simply or absolute majority.

The two main principles on which nationality is based are descent from a national *(jus sanguinis)* and the fact of birth within state territory *(jus soli).*

Jus sanguinis. Weis remarks that *jus sanguinis* and *jus soli* are 'the predominant modes of acquisition of nationality'. In 1935 Sandifer concluded that legislation in forty-eight states followed the *jus sanguinis* principally and referred to 'the 'widespread extent of the rule of *jus sanguinis,* and its paramount influence upon the law of nationality throughout the world'. There is no reason to think that this assessment is out of place today. The Harvard Research survey polled seventeen states with law based solely on *jus sanguinis;* two equally on *jus sanguinis* and *jus soli;* and twenty-six principally on *jus soli* and partly on *jus sanguinis.* Experts commonly regard the two principles as permissible criteria, but do not always indicate an opinion on their precise legal status. Van Panhuys considers the two principles to be sanctioned by customary law.

In regard to the modalities of the *jus sanguinis,* Sandifer calculated that forty-seven states had rules under which the status of the father governed (conditional in fourteen cases); thirty-five had rules under which the status of either parent or both governed (conditional in twenty-two cases); and twenty-nine, including the United States, had rules under which the status of the unmarried mother governed.

Jus soli. The role of *jus soli* will be evident from what has gone before. However, it may be remarked that, as a principle, it has a relative simplicity of outline, with fairly clear exceptions, when compared with *jus sanguinis.* Indeed, in terms of adherence to a particular system, with a minor degree of dilution, *jus soli* seems to have predominance in the world. Except in so far as there may exist a presumption against statelessness, it is probably incorrect to regard the two most important principles as mutually exclusive: in varying degrees the law of a very large number of states rests on both, and recent legislation gives no sign of any change in the situation. However, the Harvard draft provided in Article 3 that states must choose between the two principles. Of particular interest are the special rules relating to the *jus soli,* appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its

> application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from the legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'"

[11] A fundamental argument of the Applicant is that he is currently a stateless person because he does not have citizenship of the Republic of the Ukraine, as presently constituted, or of the Russian Federation. In the course of the hearing he indicated he had once held a passport and he referred to a document contained at 76 of the bundle. This is part of a three page document which contains pictorial presentations of the various passports that were issued to persons resident in the territory of Ukraine in recent times. When I asked him which passport he had possessed he referred to that shown on the second of the three page document under the heading "Passport of the citizen of USSR", it shows a passport with the letters CCCP at the top and then cyrillic script at the bottom with the legend to the side:

> "Valid for travel to Russian Federation and the Republic of Belarus. The passport was issued by former USSR Ministry of Interior till 1991 and by Ministry of Interior of Ukraine till 1994."

[12] The break up of the former USSR into a number of states, most of which were coextensive with the territories of the former individual socialist republics making up the Union, has given rise to international obligations, many of which have been succeeded to by either the Russian Republic, the individual republics, including Ukraine. The availability of a potential second avenue of citizenship has no bearing on the outcome of this case however because the decision which is under review is based upon a conclusion that there is reason to believe that he would be admitted to the State of Ukraine, etc. It does provide important background information about the applicant

however in the context of the question raised in the order of the Court of Appeal granting leave to bring this judicial review. It is also no doubt relevant in the context of the presumption against statelessness in international law. The applicant also showed me a document which he referred to as a birth certificate which he has held (page 75 of the bundle). Plainly the applicant did hold documents of citizenship relating to the former Union of Soviet Socialist Republics. He was unable to say whether either contained any endorsement indicating actual or potential citizenship of Ukraine.

[13] It was evident throughout the hearing that the applicant was adamant that he was a Stateless person. I am satisfied however that his claim is not based upon his having been excluded from citizenship by the laws of any of the countries who are potential candidates for granting it to him. Rather, his assertion of statelessness appears to arise from feelings or beliefs that those potential candidate states are unacceptable to him by virtue of their history or reputation. The United Nations Convention on the Status of Stateless Persons – adopted on 28 September 1954 and which came into force on 6 June 1960 defines a stateless person as follows:-

> "Art 1. For the purposes of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law".

This definition makes it clear that a person cannot be stateless unless he is excluded from being considered as a national by a potential candidate state, it is not a condition that can be wished upon one's self. If that were permissible international order would be prejudiced as persons might opt for statelessness in order to secure the benefits of obligations placed on host states by the Convention.

[13] In R v. Secretary of State for The Home Department, ex p Valentina Bradshaw [1994] Imm.A.R.359 Lord MacLean, sitting in the Outer House of the Court of Session considered the case of a person who claimed to be stateless following the break up of the USSR and the establishment of the states of the Russian Federation and the Ukraine. The person was a citizen of the USSR prior to these events and lived in the United Kingdom when they occurred. She had refused to apply for citizenship of either state, even though they were the states with which she was most closely connected, and, in the circumstances invited the court to consider her a stateless person. At page 366 of his judgment Lord MacLean stated:

> ". . . it seems to me that before a person can be said to be stateless in terms of the definition in the Convention, he or she would have had to apply to

those states which might consider her to be and might accept her as a national."

[14] In the circumstances I a satisfied that, whether by virtue of Lord MacLean's formulation, or by my interpretation of the Convention, the applicant cannot at this stage be considered a stateless person and that issue cannot be used to render the determination of the Minister unlawful.

[15] The history of the territory of Ukraine in the 20th Century has been a turbulent one. The ravages of war, invasion, annexation, totalitarianism and communism, have hindered the political, social and economic development of the modern day territory which is the Republic. Whilst political uncertainty has continued since independence the Ukraine is an established democracy with an independent judiciary and is a member of Council of Europe. Further, the government of the Ukraine is conducted in accordance with international norms and citizenship is determined according to national laws which are in conformity with the broad general principles, long recognised by civilized nations, described by Professor Brownlee in his treatise referred to earlier. As a member of the Council of Europe, the Ukraine accepts of necessity the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms as that is an essential condition for admission to membership.

[16] The ultimate decision about grant or refusal of citizenship to any person is entirely within the remit of the administrative and judicial authorities of the Republic of Ukraine. For me to make any determination of citizenship would be an unauthorised trespass upon the jurisdiction of its courts and the sovereignty of the Republic of Ukraine and I repeat I make no attempt at such a determination. The function of this court is to inform itself of the relevant citizenship laws and to consider the factual circumstances surrounding the personal, social and family history of the applicant for asylum. On the basis of the facts available to me, and reading the law of the Ukraine as explained to me by the document from the Ministry of Foreign Affairs and the evidence of Ms Khanna, an expert whose evidence is unchallenged and which I accept, I am satisfied that the decision of the immigration authorities of the United Kingdom to remove the applicant from the United Kingdom to the Ukraine is entirely rational and legal. I am satisfied there are strong reasons to believe the applicant would be admitted to the state of Ukraine as a Ukrainian national under the Ukrainian law of citizenship. The Minister was therefore entitled to come to the same conclusion and his decisions of the 25 September 2006 and 24 February 2004 were lawful. No persuasive ground of challenge has been put before me and I therefore dismiss the application for judicial review.

[17] I have been assured by Dr McGleenan on behalf of the Home Office that no removal directions have been prepared in this case as yet and that compassionate temporary leave to remain in the UK has been granted to the

applicant and his wife due to her state of health and pending medical treatment. I am also assured that before such removal directions are prepared or implemented the Ukrainian authorities will be made aware of the legal processes which have taken place within the United Kingdom, and this jurisdiction in particular, and that he will be transferred to the Ukraine in circumstances which are humane and appropriate.