Neutral Citation no. [2007] NIQB 41 | *Ref:* **WEAH4757.T**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **14/05/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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

WEATHERUP J

[1] This is an application for leave to apply for judicial review of a decision of the Immigration & Nationality Directorate by a decision letter of the Minister of State at the Home Office dated 25 September 2006 on a review of the applicant's request for asylum. By that decision the applicant was refused asylum in the United Kingdom and it was indicated that a direction would issue for his removal to the Ukraine. The proposed respondent has indicated to the Court that while the applicant's wife awaits medical treatment for gallstones, no directions will be made for removal of the applicant or his wife. The applicant appeared in person and Ms Connolly appeared for the proposed respondent.

[2] Since the issue of the proceedings in this case a further decision has been taken by the proposed respondent on 20 April 2007. I direct that the judicial review office records in the Order 53 Statement that the applicant's challenge is directed not only to the decision of 25 September 2006 but also that of 20 April 2007. In addition, certain documents were handed into Court and I request the proposed respondent to file an affidavit exhibiting first, the written response that the applicant made to the letter of 20 April 2007, secondly, the fax dated 14 May 2002 and thirdly, the entry in the Foreign & Commonwealth Office website in relation to the Russian Federation.

[3] The stated reasons for the decision of 25 September 2006 referred to the earlier written decisions on the application for asylum on 24 February 2004 and the adjudicator's decision on 7 July 2004. First of all, I refer to the applicant's affidavit which states that he was born on 29 February 1960 and his country of birth, origin and citizenship was the Union of the Soviet Socialist Republics. He continued -

> "From the very first day of dealing with UK immigration authorities I asserted that I was a person without citizenship (nationality) since country of my former citizenship - USSR did not exist anymore. I am not regarded as a national by any state under the operation of its law. My situation corresponds with the definition of STATELESSNESS as is set forth in IND National Instructions (general information section) and in the Convention relating to the Status of Stateless Person."

[4] The decision of 24 February 2004 set out the reasons for refusal of asylum to the applicant in the United Kingdom. There was a reference to him having a well-founded fear of persecution in "Ireland", although it was indicated by the proposed respondent that this was a mistake and that that was intended to be a reference to a well-founded fear of persecution in "Ukraine". In any event the reasons for refusal gave consideration to the terms of the 1951 Geneva Convention relating to the Status of Refugees and to humanitarian protection under the European Convention on Human Rights.

[5] The decision set out something of the background of the applicant. It stated the applicant's claim that in 1980 he was called to perform compulsory military service, to which he objected and went into hiding. He was travelling around the former USSR when the USSR broke down and separate countries were formed. He claimed that as a result of his constant travelling and due to the fact that he did not register his residency, he was left in a position where he was unable to obtain nationality in any of the new countries and so became stateless. He further claimed that that position resulted in him being denied access to education, employment and other State benefits given to nationals of any particular country. As a result the applicant left the USSR territories and travelled to Iceland. He was awarded temporary residence in that country, but he was not awarded indefinite leave to remain and as his rights were limited he left Iceland and travelled to the Republic of Ireland. He claimed asylum in Ireland, but subsequently withdrew his application. As a consequence the Irish authorities withdrew support and he travelled to the United Kingdom and claimed asylum. The applicant claimed that the treatment received in Iceland and in the Republic amounted to torture as defined in the 1951 Geneva Convention relating to the Status of Refugees.

[6] The decision letter stated that the applicant was born in the former Ukrainian Soviet Socialist Republic, which then formed part of the USSR. The Republic of the Ukraine was described as the modern successor State and it was considered that, although the applicant claimed to be stateless, it was appropriate to remove the applicant to the Ukraine. The decision maker stated that it was not considered that the applicant had experienced persecution in any of the countries in which he claimed to have resided and nor was there any credible reason to believe that he would face persecution in any of the countries in the future should he return to them.

[7] The decision referred to the Bradshaw determination as being important (this being a reference to R v Secretary of State for the Home Department ex parte Valentina Bradshaw [1994] Immigration Appeal Reports 359). This was stated to have ruled that "for a person to be regarded as stateless there must have been an application made for citizenship of those countries with which the person was most closely connected, and those applications must have been refused." It was noted that the applicant had not provided evidence of any such refusal to accept the applicant by any of the countries concerned.

[8] The objective information available to the decision-maker indicated that those who formerly had USSR citizenship and resided in former USSR States and had not become citizens of those States may apply for Russian citizenship at a Russian diplomatic mission or consular institution outside the Russian Federation This suggested to the decision-maker that the applicant may have had an avenue to Russian citizenship. Furthermore, consideration was given to rights of citizenship under the laws of the Ukraine, formerly the Ukrainian Soviet Socialist Republic within the USSR, and the applicant had connections with Ukraine. Ukrainian nationality could be obtained through birth, as children with a parent who was a Ukrainian national automatically acquired the nationality of the parent, if born in Ukraine. The applicant's mother was stated to be of Ukranian ethnicity. The applicant was considered to have an avenue to Ukranian citizenship.

[9] The decision letter concluded –

> "You have stated that if you are removed from the United Kingdom you will be discriminated against on the basis of your lack of nationality in your enjoyment of the rights and freedoms under the Convention. As highlighted ....you would face removal to the Republic of Ukraine.
> It is not accepted that you would face discrimination on the basis of your lack of nationality. This is due to the fact that it would be possible for you to obtain Ukrainian nationality on your return. The fact that there are such legal avenues of 'stateless' persons to claim nationality within the Republic of the Ukraine is a clear indication that you would not face treatment contrary to Article 14 of the ECHR.
>
> In the light of all the evidence available to him, it has been concluded that that you have not established a well-founded fear of persecution and that you do not qualify for asylum.

> Furthermore, it is not accepted that, on the information available that removal would be contrary to the United Kingdom's obligations under the ECHR."

[10] The decision of 24 February 2004 was appealed and the adjudicator issued his decision on 7 July 2004. The decision traced the history of the matter and referred to the legislation in the Ukraine and considered that it was open to the applicant to make an application for citizenship in either the Russian Federation or the Ukraine. Reference was made to the Bradshaw decision and it was concluded that the applicant could not consider himself to be a stateless person because he had not applied for nationality in any country in respect of which he was connected. It was stated that the applicant was, in reality, an economic migrant who had manufactured a claim of persecution in order to gain entry into the United Kingdom. Consideration was given to the issue of asylum under the 1951 Convention and it was found there was no basis for the applicant having a well-founded fear of being persecuted and there was no breach of obligations under the 1951 Convention. The human rights issues were considered and it was found that if the applicant were returned to the Ukraine there was not a real risk that he would suffer a breach of his rights. Thus in 2004 the applicant was denied asylum in the United Kingdom.

[11] R (Bradshaw) v Secretary of State for the Home Department [1994] Imm. App. Rep. 359 concerned an applicant for judicial review who was a citizen of the former USSR who had married a British citizen. The applicant asserted that following the new nationality laws of Russia and the Ukraine she was stateless. She had not, however, made an application for citizenship in either Russia or Ukraine and it was held that before a person could be regarded as stateless there must be an application made for citizenship to those countries to which the person was most closely connected and those applications must have been refused. Lord McClean gave the judgment in the Outer Court of Session in Scotland and referred to the United Nations Convention relating to the Status of Stateless Persons (1954) which provides –

> "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."

[12] Ms Bradshaw had been born in Kiev, then part of the Soviet Union and now the capital city of Ukraine. The Soviet Union was formally dissolved on 26 December 1991. The Ukraine declared itself a sovereign State on 16 July 1990. It proclaimed its independence on 24 August 1991. On 8 October 1991 it passed its nationality law which was published on 14 November 1991. The Russian Federation adopted its own nationality law on 28 November 1991 which was published on 6 February 1992 on which date it came into force. These details were taken from the United Nations High Commission for Refugees publication of July 1993, "Nationality Laws in Former USSR Republics." Lord McClean concluded at page 366 –

> "…. before a person can be said to be stateless in terms of the definition in the Convention, he or she would have to apply to those states which might consider her to be and might accept her as a national."

[13] Further to the present application for judicial review the Home Office agreed to review the application for asylum and having done so they issued a further decision letter of 20 April 2007. The letter set out the history of the application and referred to paragraph 353 of the Immigration Rules which states that where a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision-maker will consider any further submissions and if rejected will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content has not already been considered and taken together with the previously considered material create a realistic prospect of success notwithstanding its rejection.

[14] The 2007 decision-maker considered the correspondence since 2004 and the grounds of the application for judicial review and stated that some points raised were considered when the earlier claim had been determined and they had been dealt with in the earlier consideration of the applicant's claim and there were other points to be considered. It was concluded that taken together the applicant's submissions would not have created any realistic prospect of success. The decision considered the status of the applicant and his response to the earlier decisions and dealt with Articles 3, 9 and 14 of the European Convention on Human Rights. The Home Office decided not to reverse the earlier decisions and determined that the applicant's submissions did not amount to a fresh claim and stated that the applicant had no further right of appeal. The asylum claim had been reconsidered on all the evidence available, including the further representations, but it was decided not to reverse the decisions of 24 February 2004 or 7 July 2004. Accordingly, the immigration authorities have confirmed the earlier decisions refusing asylum to the applicant and have ordered that the applicant be returned to the Ukraine, such removal being postponed pending medical treatment of the applicant's wife.

[15] The judicial review grounds are, first of all, that the decision to designate Ukraine as a destination was a breach of the Immigration Act 1971 Schedule 2 paragraph 8(1)(c) which deals with directions for removal of persons from the United Kingdom; secondly, that the decision was reached without affording the applicant an opportunity to present an explanation and evidence; thirdly, that the decision maker misinterpreted IND National Instructions and the Convention relating to the Status of Stateless Persons; fourthly, that the decision was a violation of the Human Rights Act 1998 and fifthly, that the decision was irrational.

[16] The letter of 20 April 2007 drew a written response from the applicant. By the text of that response he set out the terms of the Home Office letter and he interposed his own comments. He took issue with a number of points made in the Home Office letter. He adopted a number of themes in his response. While formerly the applicant made reference to being treated as a stateless person, the emphasis in his response letter is that he would wish to be identified as a citizen of the former USSR and not as a stateless person. Further, he asserts freedom of choice of nationality as a human right and that he does not choose to be a citizen of the Ukraine. Further, he emphasises the legal bond between a citizen and the State and that he does not recognise the State or the institutions or the constitution of Ukraine. Further, he challenges the conclusion that he had been born in Ukraine as Ukraine did not come into existence as a separate State until many years after the applicant's birth. Many of the themes in the applicant's response were relied on in earlier exchanges with the immigration authorities.

[17] There is debate about the applicant's citizenship or nationality. First of all, he was born in the former USSR and he contends that he is a citizen of the former USSR. The area where he was born has now become what is known as Ukraine, but the applicant has not lived in what is now Ukraine since the break up of the USSR and he disassociates himself from the Republic of the Ukraine. Further, the applicant does not accept citizenship or nationality in the Ukraine. He states his opposition to the constitution and the State and the institutions of the State of Ukraine and would deny any connection with them.

[18] On the other hand the proposed respondent states that the applicant cannot choose his status. Citizens of the former USSR became citizens of the areas of the USSR with which they are most closely connected. The applicant is connected by birth with the area that is now Ukraine and it has been found that he has an avenue to citizenship of Ukraine. The proposed respondent says that disapproval of the constitution or the State is not a basis for denying citizenship in the State.

[19] In effect the proposed respondent imposes on the applicant a requirement that he apply to Ukraine for documents to establish whether he will be accepted as a citizen of the Ukraine. The applicant states that it is for the proposed respondent to demonstrate that the applicant will be admitted to Ukraine. Indeed, he asserts that inquiries have been made by the Icelandic authorities and must have been made by the UK authorities in relation to his status in Ukraine and the applicant asserts that the results of those inquiries have not been declared.

[20] The applicant has claimed that he is stateless. He claims to be a citizen of the former USSR. Bradshaw indicates that an applicant who claims to be stateless is required to apply to the authorities of the State with which he is most closely connected and that if he fails to do so he cannot claim to be stateless. I adopt the approach of Lord McClean that the onus is on the applicant who makes such a claim to establish his status by applying to the country with which he has been found to be most closely connected. There is some parallel with those cases where an applicant is

directed to be removed from the UK to a particular destination and that applicant claims that he ought to be sent to a third country instead. When that happens the onus is on that applicant to establish his entitlement to be admitted to the third country. It is not sufficient, whether one claims to be stateless or whether one claims citizenship in a third country, to refuse to make an application to the country with which there is found to be connection, or to that preferred third country, as the case may be. In the present case the applicant claims to be a citizen of a former State and thus to be in a different position to those who are stateless and to those who might prefer removal to a third country. I do not accept that there is any difference in principle. The applicant has been found to be closely connected to a State, although he does not accept the connection and does not desire the connection, and is liable to be removed to that State, unless he can establish that he has been refused admission by applying and being refused.

[21] I have taken into account all of the matters that have been written and said in relation to this case, although I have not repeated all of them. In relation to the applicant's grounds, he relies on a breach of the Immigration Act 1971, Schedule 2 paragraph 8(1)(c), which deals with removal directions. I am satisfied that there is no arguable case in relation to a breach of the 1971 Act. In relation to the explanations and representations, the applicant had the opportunity to make representations in connection with the decisions made in 2004 and has had a further opportunity to do so in connection with the review decision in 2007 and there is no arguable case on this ground. In relation to the Convention on the Status of Stateless Persons and the IND National Instructions, I am satisfied that there is no arguable case that there has been any misinterpretation. In relation to the issues about the Human Rights Act 1998, the decision makers have addressed the human rights issues and I am satisfied that all relevant considerations have been taken into account and that there is no arguable case that there has been a breach of the Convention. Further I am satisfied that there is no arguable case that the decision of the immigration authorities is irrational. Accordingly, I am refusing leave to apply for judicial review on the basis that none of the applicant's grounds is arguable.