

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2009 / 949 J.R.

Between:

R. B. D.

AND

R. R. B. R. M. [MALAYSIA]

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND DENIS LENIHAN ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 22nd day of January, 2014.

1. The applicants in this case are a Malay married couple from Malaysia which is not usually a refugee generating State. They seek to set aside by an order of certiorari the decision of the Refugee Appeals Tribunal which refused their appeal from a decision of the Refugee Applications Commissioner recommending that they should not be recognised as refugees. The telescoped hearing was heard in June, 2013 and the Court delivered its judgment *ex tempore*. This is the reasoned judgment.

2. Mr Colm O'Dwyer BL appeared for the applicants and Ms Harnett-O'Connor appeared for the respondents.

3. The application for judicial review was slightly out of time but the Court was satisfied that the delay was due to circumstances which were adequately explained and which were outside the control of the applicants. The respondents do not have an issue with the time delay. The Court therefore extended the time for the bringing of the judicial review proceedings.

Background

4. The applicants married in 1990 and have six children who are with them in Ireland and were included as dependents in their asylum claim. They applied for asylum in July, 2007 claiming to fear persecution at the hands of the Malaysian State by reason of their political opinion. The first applicant (hereafter *the husband*) claimed involvement in politics all of his adult life. In his youth he was involved with the Islamic Youth Organisation and he ran for election in 1987 and 1996 as an independent. Later he was involved in setting up the *Parti Keadilan Rakyat* (PKR) political party. The brother of the second applicant (*the wife*) was friendly with the party's then *de facto* leader Anwar Ibrahim who in 1998, while Deputy Prime Minister of Malaysia, was charged with and convicted of corruption and sodomy. The wife was then practising as a lawyer and lecturing in law. She and her husband were outraged by the prosecution and conviction of Anwar which they believed to be without foundation and politically motivated. They joined with other lawyers to challenge the conviction and to seek Anwar Ibrahim's release from prison. Their group was accused of starting a riot and some of their friends were sent to prison for inciting opposition to the government. In May, 2000 and February, 2001 the husband was arrested and interrogated by the authorities. On each occasion he was released after one day. Then in April, 2001 a number of their friends were arrested. The couple avoided arrest on that occasion but they were advised by a senior policeman friend that they were not safe and so they decided to leave Malaysia. The family went to the United Kingdom (UK) and claimed asylum. There, the wife completed a Master's degree in law while awaiting a decision on their claim. Their application was rejected and in 2006 they were deported from the UK.

5. At first the family lived and worked under the radar in rural Malaysia but in May, 2007 the wife's name and photograph were printed on four successive days in national newspaper articles which called for her to come forward to help with a police investigation into "crooked" lawyers alleged to be engaged in criminal breaches of trust. The wife says she had no involvement in the alleged events as she had sold her law practice before going to the UK in 2001. She believes her identification in the newspaper was politically motivated as some of the other lawyers named were also supporters of Anwar Ibrahim. She fears being arrested, prosecuted and possibly convicted if she is returned to Malaysia. The husband also fears being arrested and detained for 20 or 30 days under the Internal Security Act (ISA) if returned to Malaysia. They travelled to Thailand with the assistance of friends who were members of the police force and then on to Ireland. At first they obtained a one-month tourist visa and in July, 2007 they applied for asylum. They submitted their marriage certificate, birth certificates, passports, UK asylum papers, educational certificates, travel receipts, newspaper articles relating to the alleged breach of trust, photographs of political associates, and country of origin information (COI) in support of their application.

6. Of particular significance to this judgment, both applicants told the Commissioner and the Tribunal that they have faith in the Malaysian legal system and that if prosecuted, they believed that they would eventually be vindicated by the higher courts. This was the course eventually taken in the case of Anwar Ibrahim but not before he served an extensive sentence and suffered severe health problem for maltreatment in jail. They both expressed fears for the safety and welfare of their children in the event of their joint arrest and detention as there would be nobody to look after them and they might be sent from one place to another. They fear in particular for their youngest daughter who was born in the UK in 2002 with a severe heart condition and she needs fulltime care and attention. She had an operation in the UK before the family was deported in 2006 and is now awaiting a heart transplant.

7. When the Refugee Applications Commissioner rejected the applicants' claims they appealed to the respondent Tribunal. Of significant relevance to this challenge is the fact that on the eve of their joint appeal hearing held on the 1st July, 2008 they submitted newspaper articles relating to the wife's alleged criminal breach of trust and evidence of the husband's participation as a candidate in elections.

The Impugned Decision

8. The Tribunal delivered its decision on the 30th July, 2009 affirming the Commissioner's negative recommendation. In his analysis the Tribunal Member essentially made three findings relating to (i) credibility; (ii) state protection; (iii) prosecution as distinct from persecution. In brief:

i. *Credibility*: the Tribunal Member identified a number of credibility issues regarding the husband's knowledge of politics in Malaysia and he noted the (apparent) absence of documentary evidence relating to the newspaper article in which the wife was identified. He said a number of those credibility issues also applied to the wife. He later also noted their evidence that policemen helped them leave Malaysia and found this inconsistent with their evidence that they were "blacklisted" or sought by the authorities.

ii. *State protection*: he noted the applicants' evidence that they could seek justice through the courts and referred to COI regarding the independence of the judiciary and the right to a fair trial in Malaysia. He noted that they had not sought the protection of the judicial system in Malaysia and that they had not come to any harm between 2006 and 2007. He said their concerns about who would mind their children whilst the court process was being dealt with "is not a satisfactory reason for failing to seek protection within their own country." He was not satisfied with the reason given by the wife – a lawyer – for failing to invoke the judicial system.

iii. *Prosecution v. Persecution*: he found that if the wife had indeed been named in the newspaper as claimed, she could be fleeing a prosecution as distinct from persecution.

Submissions

9. Mr Colm O'Dwyer B.L., for the applicants, argued that the Tribunal made several factual errors of fact in finding that the applicants had furnished no documentary evidence of the husband's participation in elections in Malaysia and the wife's identification in a newspaper article bearing her picture. Those documents had been submitted to the Tribunal on the eve of the appeal hearing, both by fax and by courier, and a receipt was obtained and is exhibited. It is clear that the Tribunal considered it relevant that he had not received such documents and that this finding is significant to his decision Regulation 5(2) (b) of the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) requires that such information must be considered. As he erroneously held that he had not received the documents, he clearly did not consider them.

10. Mr O'Dwyer also argued that the Tribunal Member ought to have engaged in additional analysis of country of origin information (COI) before concluding that the applicants would receive a fair trial in Malaysia. He failed to properly consider the COI submitted concerning *inter alia* political interference in the Malaysian judiciary. A separate though connected argument was that the Tribunal erred in finding that the applicants fear prosecution, not persecution. The possibility of eventual vindication by an appellate court does not mean that selective prosecution for political purposes does not constitute persecution. Reliance is placed, in this regard, on the UK Immigration Appeal Tribunal judgment in *M.I. (Fair Trial – Pre-Trial Conditions) Pakistan CG* [2002] UKIAT 02239.

11. The respondents accept that the Tribunal Member was in error in relation to the documents in that they had clearly been submitted and accepts that he did not consider them. However Ms Ann Harnett O'Connor B.L., for the respondents, argued that that this oversight was immaterial since the Tribunal Member made other findings of substance which remain valid. She pointed out that this claim is about what happened to these applicants after they went back to Malaysia in 2006 since the UK authorities had rejected their claim relating to the events preceding that date. No charges have been brought against the wife in Malaysia and all of the documents submitted to the Tribunal indicate that the Bar Council of Malaysia brought certain alleged breaches of trust to the attention of the police and in those cases where charges were brought, they were to be considered by the Commercial Criminal Court rather than in any lower court where the applicants feared political interference. The lawyers whose names were published were simply asked to come forward to offer assistance – they were not being charged. In the respondents' contention, the applicants' own evidence was that state protection is available to them so there is no need for international protection. No state protection is required to be perfect as was decided in *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489. The applicants' fears relate to the welfare of their children and not to their own prosecution and punishment. What might happen to their children is a humanitarian rather than a persecutory issue.

DECISION

12. As noted when delivering its *ex tempore* decision in this case, the Court is satisfied that the Tribunal decision was infected by a number of interconnected errors and that the Tribunal Member simply failed to understand the claim made.

13. The first and perhaps most obvious error is that the Tribunal Member failed to have regard to key documents submitted by the applicants' lawyers before their appeal hearing. The errors clearly affect the validity of the decision as the absence of the documents was specifically noted a reason to doubt the credibility of the claim. If their authenticity had been accepted, and that was a matter for the Tribunal member, it is entirely possible that the newspaper articles could be determined as corroborative of the claim that the wife was identified in alleged criminal breaches of trust and the election results could confirm the husband's participation in politics as he had claimed. The Tribunal Member pointed out the absence of such evidence both in his summary of the applicants' claims and in his analysis of their evidence. When summarising the husband's claim he said, "*he does not have any documentary evidence to show that he competed in ... elections*" and that "*[h]is wife's name was published in a newspaper He does not have a copy of the newspaper*". Turning to the wife's claim he said "*[s]he was unable to furnish a copy of the newspaper article that contained her picture*." In his analysis he reiterated in relation to the husband that "*[h]e said his wife's name and photograph were published in a newspaper but no documentary evidence has been furnished in relation to that*" and regarding the wife he said, "*she claims that her photograph was published in a newspaper in the context of alleged fraud charges. We have not been furnished with any copy of that newspaper or any evidence as to its existence*". The Court is satisfied that the assessment of the applicants' credibility was fundamentally flawed by these errors.

14. The alternative findings which are defended by the respondents are that state protection is available to the applicants in Malaysia and that if she is telling the truth then the wife appears to be fleeing prosecution, not persecution, and is therefore not entitled to refugee status. An examination of those two findings indicates a basic misunderstanding of the applicants' claim and the copious COI submitted by them and a fundamental error as to the distinction between prosecution and persecution.

15. The applicants' claim was quite nuanced and based on widely reported and accepted international opinion that the prosecution of Anwar Ibrahim was a maliciously motivated political prosecution to remove him from power and blacken his reputation with the mainly Malay and Islamic followers. They, as supporters, feared the same fate because of their support for Anwar Ibrahim as many other of his supporters were arrested and detained under Malaysia's Internal Security Act powers. The applicants say they have faith that –

like Anwar – if they are prosecuted they will eventually be vindicated by the courts. The problem, however, is that they may be imprisoned pending trial and such imprisonment may endure for weeks, months or even years while their trials and any subsequent appeals are processed by the courts. The applicants fear for the safety and welfare of all their children and in particular for the health of their youngest daughter if they are imprisoned pending trial.

16. The Tribunal Member misconstrued their faith that ultimately the higher courts would vindicate them as evidence that state protection is available to them and that because the wife fears relate to the children's welfare and not to the outcome of any criminal charge brought against her, her fear is of prosecution and punishment rather than persecution. These conclusions do not flow from the premises on which they are based. The possibility or even probability of eventual vindication on appeal does not mean that a malicious, selective or political prosecution is not persecutory. In *The Law of Refugee Status*, the author James Hathaway states at p. 172, "Where ... the decision to prosecute ... is politically manipulated, the refugee claim should not be dismissed as raising a simple issue of 'fear of prosecution or punishment', but should instead be examined on its merits". Hathaway further states at p. 179 that, "In such cases, involving ... interference with an otherwise legitimate criminal process by selective prosecution ... it cannot accurately be said that the claimant faces a risk of prosecution, rather than persecution". A similar approach was taken by the UK IAT in *M.I. (Fair Trial – Pre-Trial Conditions) Pakistan CG* [2002] UKIAT 02239, where Storey J. held that care must be taken to avoid a fragmented approach and to focus on the criminal justice process as a whole. He held that "Whichever parts of the process are being examined, be it the initial laying of information, the bringing of charges, the arrest, the detention, bail, then trial itself ... the refugee decision maker must be alert to how these stages interact and what safeguards apply at each stage".

17. The wife in this case does not simply claim to fear being convicted of a crime she did not commit; she fears being selected for a politically-motivated, unfounded prosecution as retribution for her political activism in a State where the prosecution and eventual quashing of the conviction of Anwar Ibrahim - the deputy leader of the ruling party and a married man with six children - was followed by a second arrest and prosecution on fresh charges for sodomy. She feared the initial stages of a malicious prosecution where her family would suffer severe consequences before her ultimate and perhaps distant vindication. The Tribunal Member does not seem to have properly understood that aspect of her claim and it seems to the Court that his categorisation of her claim as a fear of prosecution rather than persecution is unsustainable in the light of COI before him on the so called Anwar affair. As Mr O'Dwyer submitted, a prosecution may in fact be a disguised persecution. The Tribunal Member failed to consider possibility into his analysis.

18. It is also probable that a selective reliance on COI occurred in the conclusions on state protection as the only report referred to in the decision is an extract from an undated US Department of State report on "Denial of Fair Public Trial" which was appended to the Commissioner's Section 13 report. This extract states that the independence of the judiciary is constitutionally protected and that there exists in Malaysia a secular common law system featuring the presumption of innocence and an appellate system. This seems to have been preferred as evidence that the Malaysian State operates "an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm" within the meaning of the Protection Regulations, without mentioning that part of the same USSD report states that while the Government generally respects the constitutional provisions providing the basis for an independent judiciary, "other constitutional provisions, legislation restricting judicial review, and additional factors limited judicial independence and strengthened executive influence over the judiciary". No reference was made to the many COI reports furnished by the applicant which highlight political interference with the judiciary and concerns about the independence of the judiciary. For example, a Human Rights Watch report entitled *Malaysia: Anwar Verdict "A Step Backwards"* dated 2000, submitted to the Tribunal in 2008, suggests that the Malaysian judiciary had already been widely criticised for its lack of independence before the prosecution of Anwar, which was seen to undermine the integrity of the judiciary. The report states that "The Malaysian human rights organisation SUARAM ..., the International Bar Association, and representatives of the European Parliament and the United States, among other international observers, have questioned the fairness of the Malaysian legal system". A later HRW report dated 2003 states that the trial of Anwar was "marred from the outset by the lack of presumption of innocence, an essential judicial principle" and that the fairness of the proceedings were put in doubt by the use of the Internal Security Act to arrest Anwar and some of the witnesses, among other factors. A Freedom in the World report on Malaysia (2007) states that anti-corruption and police reform efforts had largely stalled and that "Judicial independence has been significantly compromised over the past two decades by increasing influence of the executive. Many instances of arbitrary or politically motivated verdicts, selective prosecution, and preferential treatment of lawyers and litigants have occurred".

19. It is difficult to understand why the bulk of COI which indicates worrying interference with the judiciary was ignored in favour of a selective passage which was quoted out of context and contrary to its general meaning. If he did consider the COI as he is obliged to do, then the Tribunal Member's conclusions on state protection are irrational. The unreasonableness of his conclusions is underscored by the wife's evidence at her Section 11 interview which dealt specifically with the suggestion put to her that COI suggests that the Malaysian Constitution provides for an independent judiciary and that the Government generally respected this. She said "In the constitution they are independent but in reality it is different, sometimes the executive interfere with the judiciary, the chief justice was sacked when he tried to get more independence, the executive usually get their way, they replace the judiciary with a puppet who says as they say". All the COI is strongly supportive of her response and accords with the proviso in the USSD report relied by the Tribunal. The Tribunal decision provides no reason for preferring the COI sourced by the Commissioner to the COI furnished by the applicants and to the evidence given by the wife, which in the circumstances is inexcusable.

20. For these reasons the Court granted an order of certiorari quashing the Tribunal decision and remitting the applicants' joint asylum appeal to the Tribunal for fresh consideration.