THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 / 789 J.R.

Between:

M. A. [IRAN]

APPLICANT

-AND-

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MR. JUSTICE HANNA, delivered on the 31st day of January 2013.

1. The applicant seeks judicial review of the decision of the respondent Tribunal dated 27th May 2009 to make a negative recommendation in relation to his asylum application. It was agreed between the parties that the Court may treat the application for leave as if it were the hearing of the application for judicial review as is envisaged by Order 84, Rule 24(4) RSC, as amended, and the respondents duly furnished the Court with a draft statement of opposition. The telescoped hearing took place on 23rd January 2013. Mr Robert Haughton S.C. with Mr Mark White B.L. appeared for the applicant, instructed by KOD Lyons, Solicitors, and Mr Nap Keeling B.L. appeared for the respondents, instructed by the CSSO. The proceedings were issued some 11 days outside of the narrow time limit set by s. 5(2) (a) of the Illegal Immigrants (Trafficking) Act 2000 but in the particular circumstances of this case the respondents did not object to the Court granting an extension of time.

Background

2. The applicant applied for asylum in Ireland on 26th May 2006. He told the agents of the Refugee Applications Commissioner that he had entered the State illegally the previous day. He said he was born in 1977 in Iran but because he is of Kurdish ethnicity he does not hold Iranian citizenship. In 1980, at the start of the Iran-Iraq war, he and his family were among thousands of ethnic Kurds forced to flee Iran. For some months they lived in the border region of Iraq. The applicant's father died in a car accident at that time. Some months later he and his mother and two brothers were transferred to *Altash* refugee camp in Iraq, which was run by the UNHCR. He furnished documentary evidence of his residence at that camp. He says he attended informal classes in the camp but left after sixth grade and from 1997 to 2003 he worked to provide for his family, selling clothes they bought from traders to Arab villages. In 1999 he became a member of the *Democratic Party of Kurdish Kurdistan* (KDPI) and joined their struggle against the Iranian regime, fighting for the rights of Kurds. He worked publicly for that party in the *Altash* camp, participating in meetings, arranging special events and ceremonies, and distributing newspapers. He was involved socially with a group, helping and meeting other Kurdish families. There was a KDPI committee in the camp which tried to establish education, sports and political meetings in co-operation with other groups. However, in 2002 he resigned from his work with the party as he was tired.

3. His resignation coincided with UNHCR confirmation that, owing to the Ba'athist regime in Iraq, they could not longer protect refugees at the *Altash* camp. In May 2002 the applicant, then aged 22, moved to Turkey. He says he could not return to Iran because of his KDPI activities. He provided documentary evidence of his recognition as a refugee by the UNHCR in Turkey in December 2003. While in Turkey he was given a hard time by police; he was relocated from one city to another by the UNHCR; he was not permitted to work; he had to sign on daily; he did not enjoy freedom of movement and could not even visit friends in another city; and he was not permitted to leave Turkey. He was not involved with the KDPI while in Turkey as he feared being deported, but he remains a supporter.

4. The applicant's mother and brothers did not move with him to Turkey. In 2003 his older brother left Iraq for Jordan and in 2005 he came to Ireland where he applied for refugee status. Meanwhile in or about 2004 his mother and second brother returned from Iraq to Iran because of the war in Iraq. In May 2006, tired of waiting for resettlement promised by UNHCR, the applicant left Turkey and came to Ireland where his brother had been granted political asylum arising from his KDPI activities. The applicant's travel on a truck was funded by an uncle and other family members.

5. The applicant told the Commissioner that while he has not been an active KDPI member since 2002 and has never been arrested or detained by any authorities, he remains a member in the eyes of the Iranian government. He said there may have been agents of the Iranian regime living in *Altash* camp where he was actively involved with the KDPI and if he returned to Iran, he could be considered a spy because he lived for so long in Iraq. His mother and brother are under surveillance in Iran because they lived in Iraq for so long and because the applicant and his brother abroad. He said he fears persecution, torture, prison or being forced to work as an agent for the Iranian regime. It would be impossible for him to live in Iran with his mother and brother because he has been involved in an illegal political party and he would get into trouble with the regime if he returned because of that involvement.

6. In August 2006 the Commissioner made a negative recommendation in relation to the applicant's claim. It is noteworthy that the applicant's credibility was not impugned. Instead, in the s. 13 report, the Commissioner's agents referred to country of origin information (COI) documents to the effect that while Kurds face discrimination and in some cases persecution in Iran and that leaders and militant supporters of the KDPI are at risk of persecution, it was unlikely that the Iranian authorities would demonstrate interest in an individual of Kurdish ethnicity or a low-level supporter of the KDPI unless that individual had come to the direct attention of the authorities. It was concluded that because the applicant is no longer a KDPI member and was never arrested or detained in Iran, Iraq or Turkey and because his mother and brother are living in Iran since 2004, "*it does not appear the Iranian authorities would have an interest in him*".

7. The applicant appealed to the respondent Tribunal. In his notice of appeal it was argued *inter alia* that if he was returned to Iran, he would be seen as an aligned militant supporter of the KDPI and that anyone who was even suspected of being a KDPI supporter is dealt with harshly by the Iranian authorities. It was also submitted that it did not follow from his mother and brother's return to Iran

that they were safe, or that it changed the situation for him as his mother and brother were not active in politics. He furnished a number of COI reports and four previous RAT decisions. He also furnished a letter from the KDPI in Paris dated 8th July 2006 which confirms that he is a member of the party, that he was forced to leave Iranian Kurdistan as a result of the oppression exercised by the Iranian regime, and that his life would be endangered if he was returned to Iran.

8. In his notice of appeal the applicant indicated that his brother could give evidence at the oral hearing of the applicant's political activities. However, at his oral hearing in March 2009 it was submitted that his brother could only give evidence in relation to the fact that the applicant was in *Altash* camp, which was accepted, and so he was not called. At the hearing the applicant confirmed that he had never been arrested and was not currently a member of the KDPI. His legal representative resubmitted his notice of appeal and the COI relating to Iran. It was submitted that he would be suspected of pro-Kurdish sentiment if returned to Iran, which would place him at risk. The Presenting Officer who represented the Commissioner at the hearing identified discrepancies between the letter from the KDPI in Paris and the applicant's account, and submitted that the applicant came within an exclusion clause because he was clearly registered as a refugee in Turkey.

9. By decision dated 27th May 2009 the applicant's appeal was refused. Again, no negative credibility findings were made against the applicant. The Tribunal Member summarised his claim and the submissions made at the oral hearing, and she found that the previous RAT decisions furnished were not relevant on the facts. Her analysis of his claim is of such extraordinary brevity that it merits reproduction in full:

> *"Analysis of the Applicant's Claim*
>
> *The Applicant fears returning to Iran, a country where he only spent the first 3 years of his life. The Applicant is not a member of any political party, although he was a member of the KDPI within the Al Tash Camp in Iraq. He submits a KDPI letter, which contradicts his own evidence, and states that he was a member in 2006, and furthermore states that he is fleeing from Iran, Kurdistan, neither of these statements apply to the Applicant, and thus I disregard this piece of evidence.*
>
> *The Applicant has not been persecuted in Iran in the past, I accept that that does not preclude the possibility of him being persecuted in the future, however I point out that the Applicant does not come within any risk category.*
>
> *In any event, this Applicant has already been afforded refugee status by the UNHCR, and he provides documentation in this regard, thus pursuant to (Article 1D) being a person already receiving United Nations protection or assistance, he does not come within the definition of refugee."*

10. The decision concludes with the formulaic recitation that the Tribunal has considered all relevant documentation including the Notice of Appeal, COI, the questionnaire and the replies given in response to questions asked on behalf of the Commissioner.

The Applicant's Submissions

11. In the applicant's submission the Tribunal made its decision on two grounds: (1) that the applicant did not come within a "risk category" and (2) that the claim is excluded by virtue of Article 1D of the *Convention relating to the Status of Refugees 1951*. The applicant contends that the Article 1D finding was an error of law and it has coloured and tainted the entire decision. In his contention, Article 1D relates to the position of the Palestinian people after the setting up of the State of Israel. The UNHCR has stated that the UNRWA provides protection and assistance to the Palestinian people and it is to them alone at the present time that Article 1D applies. This interpretation of Article 1D was adopted by the Grand Chamber of the Court of Justice of the EU in its judgment in *Bolbol* (Case C-31/09, 17th June 2010). The Tribunal Member misconstrued its applicability.

12. In the applicant's submission, the Article 1D finding was fundamental to the decision and cannot be severed. It was a material error of law and so the decision ought to be quashed. Counsel for the applicant argued that the courts have long moved beyond the situation where it was only an error of law made outside of jurisdiction which could warrant the grant of an order of certiorari. He relies on an unapproved, undated judgment of Birmingham J. in *A.B. v. The Tribunal & Others* (Unreported, High Court, July 2007), where leave was granted to a national of Guinea who had been an active opposition party member. The Tribunal Member emphasised that he had not been singled out or individually targeted. Birmingham J. was satisfied that there was a substantial argument to be made that "*in placing this degree of emphasis on the fact that the evidence does not suggest that he was individually targeted, the member may have applied the wrong test*." He was also satisfied that there was substance in the argument that the Tribunal Member failed to consider whether, on the evidence before him, the applicant was at heightened risk of attracting the attention of the authorities if returned to Guinea. That matter did not proceed to a substantive hearing.

13. The applicant also challenges the Tribunal Member's finding that he does not fall within a "risk category". In his submission, despite the fact that he is no longer a member of the KDPI and has never been arrested or detained, the Iranian authorities might potentially consider him a supporter of the KDPI. Supporters of the Iranian regime were present in Altash camp where he was active with the KDPI. He might potentially have been identified as a militant, prominent and active member. It is a matter of perception. The Tribunal Member ought to have considered his evidence more thoroughly and she ought not to have disregarded the KDPI letter from Paris, despite its flaws. Asylum applications must be fully and properly considered and such consideration is not apparent from this decision.

The Respondents' Submissions

14. Counsel for the respondents was careful not take a position on the applicability of Article 1D which, he contends, is as yet undetermined. He says that in any event it does not matter whether the Tribunal Member erred in law or not in relation to Article 1D because there is a freestanding and correct finding that the applicant does not fall within a risk category, which is not challenged. Moreover if the Tribunal Member did err in law, it did not go to jurisdiction.

15. The respondents point out that the grounds on which leave were sought do not relate to the finding that the applicant is not within a "risk category". They essentially constitute a collateral attack on the decision. Grounds (I) to (IV) relate to the Article 1D finding, and ground (V) relates to the KDPI letter. The applicants have not established that the 'risk category' finding is irrational on the basis of the *O'Keeffe / Meadows* test. The applicant did not give evidence that he is a leader or a prominent member of the KDPI. His evidence does not suggest that he would fall within the risk categories identified in the COI reports consulted. He has never been arrested and it is not clear how he might have come to the attention of the Iranian authorities. His KDPI membership is not disputed but the level of his involvement was low on his own evidence.

DECISION

16. This being a telescoped hearing, the Court is satisfied not only that the applicant has established substantial grounds for the contention that leave should be granted on grounds (I) to (V) set out at paragraph (e) of the applicant's statement of grounds, but also that the impugned decision of the respondent Tribunal ought to be quashed by reason of a material error of law.

17. Dealing first with ground (V), the Court is satisfied that there is substance in the applicant's submission that the Tribunal Member acted irrationally insofar as she disregarded the authenticity of the KDPI letter furnished by the applicant. As noted above, the Tribunal Member found that the letter contradicted the applicant's own evidence that he was no longer a member of the KDPI and that he was fleeing from Iran. The minor contradictions identified by the Tribunal Member between the KDPI letter and the applicant's evidence were at most marginal and in any event do not appear to have been rationally based. The letter which was dated June 2006 says that the applicant is a member of the KDPI. At first glance this would appear inconsistent with the applicant's evidence that he is no longer a member. However, it is important to consider precisely what he told the Commissioner at his s. 11 interview when asked "*Are you still a member of the Party?".* His answer was that "*I stopped activities in Turkey. I was having fear of deportation. I reduced my activities. I do not work as a member. I am still a supporter. If you are a member and stopped for some time you are no longer working for the party. I am recognised party as working for them. But not as a member anymore. I am entitled to ask them for support*." Thus it is not at all clear at what point his membership might be considered to have lapsed. It is not the case that he renounced his membership on a particular date; he simply reduced and then ceased his activities. It cannot be stated in the absence of evidence to the contrary that the applicant was not considered a member in 2006 when the Paris office of the KPDI furnished the letter. Additionally the Court finds that the Tribunal Member acted irrationally insofar as she placed emphasis on the statement in the letter that the applicant is fleeing persecution in Iranian Kurdistan. In fact, according to his account, that is precisely what he and his family have been doing since he was three years of age. The letter does not state that he came directly from Iran or that he had lived there recently. The Court is therefore satisfied that the manner in which the letter was considered does not admit of the special care and scrutiny required in relation to documentation furnished in support of an asylum application.

18. Grounds (I) to (IV) of the applicant's statement of grounds relate to the finding made by the Tribunal Member in relation to Article 1D of the *Convention relating to the Status of Refugees* (1951), which provides:-

> *"D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.*
>
> *When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention." (The Court's emphasis)*

19. Article 1D is essentially replicated in s. 2(a) of the Refugee Act 1996 which provides that a person who "*is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance*" is not a refugee (emphasis added). Equally Article 12(1) (a) of Directive 2004/83/EC provides that a third country national or stateless person is excluded from being a refugee if:

> *"(a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive." (The Court's emphasis).*

20. The Court is satisfied that the Tribunal Member erred in law insofar as she found that pursuant to Article 1D, the applicant did not come within the definition of a refugee because he had already been afforded protection and assistance by the UNHCR. Article 1D of the Refugee Convention applies exclusively to special categories of refugees for whom separate arrangements have been made to receive protection or assistance from organs or agencies of the UN "*other than*" the UNHCR. Such special arrangements are currently in place, for example, in relation to stateless persons of Palestinian origin who are under the protection of the *UN Relief and Works Agency for Palestine Refugees in the Near East* (UNRWA) which was established by a UN General Assembly Resolution in 1949 in the light of the specific situation of Palestinian refugees. This was confirmed by the Grand Chamber of the CJEU in *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal* (the BAH) (Case C-31/09, judgment of 17th June 2010, at para. 44) where the applicability of Article 12(1) (a) of the Qualification Directive was considered. Moreover, the CJEU more recently held in *Abed El Karem El Kott & Others v. the BAH* (Case C-364/11, judgment of 12th December 2012, at para. 48) that at present, UNWRA constitutes the *only* UN organ or agency other than the UNHCR which is referred to in Article 12(1) (a) of the Qualification Directive or Article 1D of the Refugee Convention. This is also implicit from a number of UNHCR documents furnished to the Court, namely its 2002 *Note on the Applicability of Article 1D, its 2009 Statement on Article 1D issued in the context of the preliminary ruling reference to the CJEU from the Budapest Municipality Court regarding the interpretation of Article 12(1) (a) of the Qualification Directive and its 2009 Revised Note on the Applicability of Article 1D to Palestinian Refugees* which was issued subsequent to the finding of the CJEU in *Bolbol*.

21. Hence, Article 1D presently has no applicability other than to Palestinian refugees. Article 1D expressly does not apply to persons such as the applicant herein who, on his own undisputed evidence, was under the protection of the UNHCR and no other UN agency. The Tribunal Member clearly misconstrued the applicability of Article 1D. The question for the Court is whether this finding was material to her ultimate decision to affirm the Commissioner's negative recommendation or whether, as the respondents suggest, the Article 1D finding can be cleanly severed from the Tribunal decision which is, it is suggested, based on the freestanding finding that the applicant "*does not come within any risk category*."

22. Upon careful examination of the Tribunal decision, the Court finds itself obliged to reject the approach suggested by the respondents. The Tribunal Member's analysis in this case was extraordinarily terse and lacking in detail and it seems to the Court that her finding in relation to Article 1D may well have been the mainstay of her decision. It seems possible that she may have considered it unnecessary to give appropriately meaningful consideration to the other matters arising in the case, drawing comfort from her view that the applicant could not be considered a refugee even if a well founded fear of persecution was established, owing to the perceived applicability of Article 1D. The Article 1D finding would appear to be the foundation of the decision, and cannot be considered immaterial to its validity.

23. Furthermore the Court is not satisfied that the finding that the applicant "*does not come within any risk category*" was reached in compliance with the requirements of fair procedures and natural and constitutional justice, or the statutory requirements established under the Refugee Act 1996 and S.I. No. 518 of 2006 which transposes Directive 2004/83/EC. Insofar as she found that the applicant does not come within any risk category, she did not identify the categories which may be at risk. She did not refer back to the findings made by the Commissioner. She made no reference to country of origin information or any other objective yardstick by which the risks faced by the applicant as a formerly active KDPI supporter might be measured. She did not examine his evidence in

relation to his political activities with the KDPI in the UNHCR-run camp in Iraq, or the possibility that supporters of the Iranian regime were present in the camp and reported his activities back to the regime. For reasons that are unclear to this Court she considered that she did not need to hear the proposed evidence of the applicant's brother, who has been granted a declaration of refugee status in Ireland on the basis of his KDPI activities, in relation to the applicant's KDPI activities in the camp. Despite her assertion that she had considered his Notice of Appeal, she did not consider or evaluate the argument, clearly made in that succinct document, that he would be perceived in Iran as an aligned militant supporter of the KDPI and that anyone who was even suspected of being a KDPI supporter is dealt with harshly by the Iranian authorities. She did not assess whether that claim might be credible in light of what is objectively known about the treatment of KDPI sympathisers, supporters, members, activists, militants and leaders in Iran and she did not determine into what category the applicant might fall as a result of his activities or what degree of prominence might be attributed to him. It is impossible to know on what basis she reached her conclusion. The Court is therefore satisfied that the option of severing the error of law is not open in this particular case.

Conclusion

24. The Court will therefore grant an order of certiorari quashing the decision of the Tribunal dated 27th May 2009 on the grounds set out at paragraph (e) (I) to (IV) of the applicant's statement of grounds, and remit the appeal for fresh consideration by a member of the Tribunal who has not previously dealt with the case.