

THE HIGH COURT
JUDICIAL REVIEW

[2011 No. 916 J.R.]

BETWEEN**I.H. (AFGHANISTAN)****APPLICANT****AND**

REFUGEE APPEALS TRIBUNAL AND THE
MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS**JUDGMENT of Ms. Justice Stewart delivered on the 12th day of January, 2016**

1. This is telescoped hearing for judicial review seeking certiorari to quash a decision of the Refugee Appeals Tribunal not to grant the applicant a declaration of refugee status, dated 25th July, 2011, with an addendum dated 16th August, 2011, which was notified to the applicant by letter dated 24th August, 2011, and remitting the appeal of the applicant for *de novo* consideration.

Extension of time

2. The applicant was outside the fourteen-day period to bring statutory judicial review proceedings. The applicant's then solicitor swore an affidavit explaining the reasons for the delay. I accept the explanation provided therein and I am satisfied to extend the time within which to bring this application.

Background

3. The applicant was born on 12th February, 1980, in Nangarhar province, Afghanistan. His family moved to Pakistan in 1982, due to the Soviet invasion, and returned to Afghanistan in 1992. He has three children and was married. His wife died as the result of a road traffic accident on 17th August, 2012. The following is the applicant's account of the events that gave rise to the alleged persecution, which gave rise to his claiming international protection in Ireland.

4. The applicant is the son of a well-known military commander in the Hizb-e-Islami party, who is now deceased. He graduated as a medical doctor in 2005 and established a private clinic, where his wife also worked as a nurse. His father was operating from Kunar province and invited the applicant to come and provide treatment to the sick and wounded Hizb-e-Islami and Taliban fighters, particularly since he had given similar assistance whilst attending university. The applicant then went to the frontline to work as a medical doctor from July 2005.

5. In March 2006, he and forty-two Hizb-e-Islami fighters were captured as a result of a joint attack by the NATO-led International Security Assistance Force (ISAF) and Afghan government forces. He was imprisoned in Jalalabad military prison for an eleven-month period, during which he states, he was subjected to torture. He escaped prison on 23rd February, 2007, after his maternal uncle paid a prison officer a sum of US\$2,000. He then went into hiding for seven months, during which time his maternal uncle arranged for the applicant to be smuggled out of the country in exchange for US\$12,000. The applicant left Afghanistan on 20th September, 2007, travelling through Pakistan, Turkey, Greece, Italy and France. The applicant stated that he stayed one to one-and-a-half months in Greece, fifteen to twenty days in Italy and ten to twelve days in France. He arrived in Ireland on 28th February, 2008, and applied for asylum on 3rd March, 2008.

6. The applicant completed the initial ASY1 form on 4th March, 2008, and the substantive questionnaire 10th March, 2008. The applicant attended the Offices of the Refugee Applications Commissioner (ORAC) on 7th July, 2008, for an interview pursuant to s.11 of the Refugee Act, 1996 (as amended). The interview was conducted in Pashto. The applicant submitted the following documentation at that stage:-

- 1) An education certificate for twelve years from the chief of education of Nengarhar province;
- 2) An education certificate from Chaprihar district showing twelve years completed;
- 3) Certificate of participation from Fredrich Naumann Stiftung;
- 4) Kabul medical university certificate awarding MD;
- 5) Invitation letter from Hizb-e-Islami asking the applicant to work with the party;
- 6) Letter from applicant's father to the applicant asking him to return to work with Hizb-e-Islami;
- 7) Letter issued from chief officer of the police seeking the arrest of the applicant;
- 8) Letter from chief of police to the imam of the applicant's village, seeking the applicant;
- 9) Arrest letter from district official dated 29/12/1385;

- 10) Arrest letter from district official dated 10/5/1386;
- 11) Pictures of the applicant at graduation and a picture of his wife and two sons;
- 12) An initial medical report related to the applicant; and
- 13) Six medical reports from University College Dublin and one from the Mater hospital.

Further documents were submitted at later stages by the applicant, *inter alia*:-

- 14) A prescription pad with the applicant's name;
- 15) Letters from three doctors in Ireland, attesting to the applicant's character and status as a medical doctor;
- 16) A letter from the applicant's volunteer manager in the Irish Red Cross;
- 17) Nine certificate attesting to the applicant's continuing education through online courses;
- 18) Medical reports from Ireland; and
- 19) A yearbook from his medical faculty at university.

A further interview was held in relation to the applicant's claim on 16th September, 2008. The decision resulting from these interviews was quashed on judicial review and a further interview was held in respect of the applicant's asylum application on 25th February, 2010. The interview was reconvened and completed on 8th March, 2010.

7. By cover letter dated 4th June, 2010, the ORAC issued a negative decision in respect of the applicant's claim for a grant of refugee status. A form one, notice of appeal was issued to the Refugee Appeals Tribunal (RAT) on 23rd June, 2010. The oral hearing in respect of the applicant's appeal was adjourned to allow for the applicant to receive, submit and translate documents from Afghanistan. The hearing was postponed thereafter to allow the applicant to register with the Irish Medical Council. The oral hearing was then scheduled for 19th July, 2011, as the applicant was unable to complete the registration process with the Irish Medical Council.

The impugned decision

8. By cover letter dated 24th August, 2011, and decision dated 25th July, 2011, the tribunal affirmed the negative recommendation of the ORAC, not to declare the applicant a refugee. The applicant submitted an additional document shortly after 25th July, 2011, stated as being evidence of registration with the Afghan Ministry of Health. The tribunal member did not publish the decision, on request of the applicant's solicitor until said document was furnished for consideration. An addendum was added and signed 16th August, 2011, by the tribunal member.

9. The reasons for the rejection of the applicant's claim are set out at p.460 of the booklet exhibited before the court, under the heading 'analysis of the appellant's claim', and can be summarised as follows;

The tribunal member was not satisfied with the objective credibility of the applicant for the following summarised reasons:-

- 1) He could not provide details of the person to whom he had sold his private medical practice in 2005;
- 2) His subjective apprehension of government forces were not objectively well-founded based upon country of origin information;
- 3) The applicant was unable to produce a registration certificate from the Afghan Ministry of Health. The tribunal member stated: "Despite producing many items of documentary evidence, the appellant was unable to produce the one item that would be of the most probative value, i.e., his registration certificate from the Ministry of Health." As was stated above, he later produced said document and that will be dealt with in due course;
- 4) The applicant's inability to register with the Irish Medical Council, despite being given ample time to do so, was taken into account;
- 5) The psychiatric report submitted by the applicant contradicted the testimony given by the applicant to the tribunal and commissioner, namely, that report said he was captured by the Taliban and not government forces;
- 6) The applicant, despite being able to source US\$12,000 to remove himself from Afghanistan, neither he, nor his maternal uncle, had yet removed his family;
- 7) The applicant failed to claim asylum in Pakistan, Greece, Italy, Turkey or France;
- 8) The applicant's statement that he had passed through numerous immigration controls on a false passport was not plausible; and
- 9) The tribunal does make any explicit finding in relation to the applicant's identity and affords little weight to the applicant's submitted documents.

10. The tribunal member then goes on to make another finding, which is worth setting out in full:-

"Lest the Tribunal be in error in relation to the above, it also finds that the appellant admitted to being part of a proscribed terrorist organisation and engaging in offensive activities on its behalf, including engaging in armed conflict with legitimate defence and freedom forces. He said that the only coercive factors in his decision to join and engage in armed conflict with this organisation was a fear that he would be disowned by his father and that there would be societal disapproval were he not to accede to his father's request in this regard. The Tribunal is satisfied that these persuasive factors are not, either by themselves or cumulatively, such as to amount to duress or coercion such that his free will could be said to be legitimately overborne. It lacks an essential condition for a successful plea of coercion, viz. that the

appellant was motivated to commit the act(s) in question only in order to avoid grave and imminent peril. The Tribunal would adopt the International Law Commission's draft Code of Offences against the Peace and Security of Mankind, which was adopted by the New Zealand Refugee Status Appeals Authority in *Re. MSI* in this respect. Accordingly, it finds that the exclusion clause in Article 1F of the Convention (acts contrary to the purposes and principles of the United Nations-bearing in mind UN resolutions [...]) applies to this appellant lest its findings on credibility set out above be found to have been made in error."

11. The addendum added on 16th August, 2011, three weeks after the decision was finalised, states as follows:-

"The tribunal member signed this decision on the 25th July, 2011. However, for administrative reasons, that decision was not published when correspondence from the appellant's solicitors arrived at the Tribunal office on the 3rd and 9th August, 2011. This was brought to the member's attention. Despite never indicating to the Tribunal member in question that they intended to submit further documentation or make further submissions post hearing, the Tribunal has considered this documentation. It does not make any difference to the final conclusion reached by the Tribunal that the recommendation of the Commissioner should be upheld. The only potential impact it has on the credibility findings made above is that in relation to the third and fourth credibility as he has now since submitted documentation which purports to be from the Afghan Ministry of Public Health showing that he was registered as a doctor with it. Nevertheless, the finding made by the Tribunal to the effect that he had previously had ample time to furnish such documentation from the Afghan Ministry of Health corroborating the fact of his registration prior to the appeal hearing stands. The fact that it was submitted so quickly post hearing when he had been put on notice, yet again, that the absence of same despite having ample time to retrieve it, was curious to say the least and does not affect the aforesaid credibility finding. Even were the tribunal to accept that the appellant was a registered medical practitioner in Afghanistan, that does not affect the core credibility finding, which is to the effect that the appellant was not persecuted on the grounds of political opinion or membership of a particular social group as per his notice of appeal."

Applicant's submissions

12. Counsel for the applicant, Mr. Anthony Hanrahan, B.L., submitted that the 1F exclusion clause applied to the applicant is wholly unreasonable and constitutes an error of law and fact. The applicant averred that at all stages of his application for refugee status, he made it clear that he never engaged in fighting or armed conflict, and provided assistance to wounded persons solely in a medical and humanitarian capacity. The applicant, inter alia, relied upon the decision of Cooke J. in *A.B. (Afghanistan) v. Refugee Appeals Tribunal & anor.* [2011] IEHC 412.

13. The applicant further submitted that the tribunal member clearly saw the question of whether the applicant was a doctor in Afghanistan as a central issue, and, according to the applicant, notwithstanding the overwhelming evidence of the applicant's experience, knowledge and qualifications, the tribunal member's core credibility findings related to his lack of documentation from the Afghan Ministry of Health. Further, the applicant argued, when such a document was sourced and provided, the decision was not amended but rather an addendum added stating that the other credibility findings still stood, without definitively deciding whether the applicant was a doctor. This, the applicant submitted amounted to a failure on the part of the tribunal member to take core evidence into account.

14. The applicant contended that the further credibility findings were peripheral and weak findings, based upon speculation. The applicant relied upon the decision of Eagar J. in *F.U. (Afghanistan) v. Refugee Appeals Tribunal & ors.* [2015] IEHC 78, paras.18-19. The applicant argued that the decision-maker doubted the applicant's story and did not attempt to reconcile the contents of the large amount of corroboratory personal documentation with the adverse credibility findings. If the documentation was to be rejected, the applicant argued that he was entitled to reasons for the rejection of same, in line with the decisions in *Barua v. Minister for Justice and Equality* [2012] IEHC 456; *Nya v. Refugee Appeals Tribunal & ors.* (Unreported, High Court, Clark J. 5th February, 2009)

Respondent's submissions

15. Counsel for the respondents, Ms. Eilis Brennan, B.L., submitted that one of the main grounds of challenge in this case is to a conditional or secondary finding of the tribunal. The tribunal member stated that if he was not correct in his credibility assessment; then the article 1F exclusion clause would apply. The respondents submitted that any challenge to this conditional finding of the tribunal can not result in an order of *certiorari* in circumstances where the rejection of the credibility of the applicant was made on clear and sustainable grounds and such rejection of credibility forms the core basis for the refusal of refugee status. The respondents opened the decision of *A.B. (Afghanistan)* relied upon by the applicant, wherein the applicant was not granted *certiorari*, but rather declaratory relief in regard to exclusion clause only.

16. The respondents submitted that the tribunal member has made key credibility findings against the applicant and these credibility findings were based on the evidence before the tribunal. The respondents submitted that the applicant seeks to isolate some of these findings and to examine them outside the context in which they were made. The respondents argued that the key credibility findings made by the tribunal are sound in fact and in law, and fairly ground the rejection of refugee status in this case.

Decision

17. First, to deal with the 1F exclusion clause of the Refugee Convention, which states as follows:-

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

18. The applicant has stated that he is a medical doctor and was treating the sick and wounded. He has maintained throughout the asylum process that he was medical personal. These are a special category of protected persons under customary and codified international humanitarian law. The 1F exclusion clause cannot be said to apply to medical personal who themselves are not directly participating in hostilities. However, there is no clear finding that the applicant himself was in fact a medical doctor. The exclusion clause is applied based upon the evidence of the applicant that he was part of Hezb-e-Islami, without reference to the fact that his

stated capacity in the organisation was that of a medical doctor and his evidence throughout that he never participated in any attacks with the organisation. The imposition of the 1F exclusion clause was explained by Cooke J. in *A.B. (Afghanistan) v. Refugee Appeals Tribunal & anor.* [2011] IEHC 412, at para. 13 as follows:-

"The rationale of the approach to the exclusion clause adopted by the Court of Justice is obvious. A finding that the exclusion applies to an individual is a finding that the individual was at least complicit in atrocities of the most serious kind which attract universal condemnation. A finding to that effect should only therefore be made where there are genuinely serious reasons based upon specific evidence for considering that the individual in question bears a degree of responsibility for the acts alleged and ought not therefore to be entitled to evade accountability for them as a refugee. Known terrorist organisations may be splintered into a variety of factions each pursuing different means of achieving one or more common aims. Thus, mere membership of an organisation does not create a presumption that a particular individual can be fixed with the necessary degree of involvement and responsibility which will exclude him from refugee status without an examination of the nature, extent, duration and level of responsibility of his involvement."

19. Without a clear determination of the applicant's status in the organisation and the specific reference to the acts he is alleged to have carried out, the imposition of the 1F exclusion clause cannot stand. The 1F finding, according to the respondents, was severable from the credibility findings made by the tribunal member. I cannot accept this submission. It is obviously from reading the decision as a whole, the 1F finding had an affect throughout the decision; however, it is impossible to pinpoint that effect, and I would therefore, not be satisfied to find that it is severable.

20. Whether the tribunal member accepts that the applicant is a medical doctor, who had been treating Hizb-e-Islami and Taliban fighters, is clearly central to the applicant's claim. The applicant submitted numerous documents that were, *prima facie*, capable of supporting this claim. The decision-maker failed to state whether they accept these documents and if not, to state reasons for their rejection. The statement that a certificate of registration with the Afghan Ministry of Health would have been of most probative value, while later dismissing receipt of the document, was neither rational nor reasoned. Further, the tribunal member appears to accept that the applicant was a member of Hizb-e-Islami because of his testimony and the documents the applicant himself produced. However, his testimony and documentation in regard to his medical qualifications, it would appear, are not afforded similar probative value. The probative value to be attached to evidence is, of course, a matter for the decision-maker; notwithstanding, the applicant is entitled to clear and discernible reasons as to why parts of his evidence and some documents are accepted and others dismissed.

21. In light of the tribunal member's failure, in my opinion, to deal with the core aspects of the applicants' claim, and to make findings in respect of those core aspects, I am satisfied to grant leave and to further grant an order of *certiorari* quashing the decision of the tribunal member. I will further make an order remitting the matter to the tribunal for a *de novo* consideration by a different tribunal member.