

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 265 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)

BETWEEN

N.A.D.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 19th day of November, 2013

1. The applicant is an Iraqi national, born on 8th February, 1982. He is single and has no dependents. Although he claims to have a Sunni name, he maintains that he is a Shia Muslim.

Background

2. The applicant claims that on 20th July, 2006, he and his brother were walking on a street near his home which is in a predominantly Sunni area, when a car containing three armed men approached. The men got out of the car and began shooting at the applicant and his brother who died of his injuries later in hospital. The applicant claims that they were attacked because they were Shia. The applicant escaped from the attack. He went to the Al Bayaa District Court and was given papers to facilitate his attendance at a police station in Saydia. He was furnished with a police report which he brought to the hospital before being issued with a Death Certificate for his late brother. At his brother's funeral, his sister claimed that shots were discharged from a car similar to that driven by his assassins which drove by the house. The family fled the area.

3. The family then split up. The applicant, his father, brother and sister in law then moved to Al Karada, a predominantly Shia area of the city, and he worked there in a local market. His three sisters went to live in a mixed neighbourhood with his aunt. He acknowledges that no harm came to his family there; however, after his departure from Iraq, his remaining brother was badly injured in a random sectarian bomb attack. His family continue to live in Iraq.

4. He claimed that after he moved to Al Karada, and in the 14-month period before leaving Iraq, he limited himself to working four instead of seven days a week due to a fear that he and his surviving brother would be targeted by Sunnis because they were a Shia family.

5. The applicant also had a continuing fear that he would be stopped by Shia militants at roadblocks in the city and asked his name which was a Sunni name and that he would be the subject of attack for that reason by Shias.

6. At the time of his brother's murder, he was a student working in an electrical shop and studying Fine Art at college, having completed three years of a five-year course. He claims that he left Iraq on 20th September, 2007, and travelled to Syria where he remained for six days before transiting through Jordan and on to Turkey where he remained in transit for 12 to 14 hours before arriving in Ireland on 28th September, 2007, where he was arrested at Dublin Airport and conveyed to Cloverhill Prison.

7. On 1st October, 2008, he made an application for asylum from prison. That application was considered by the Refugee Applications Commissioner who recommended that he be refused refugee status. That decision was appealed to the Refugee Appeals Tribunal which, following an oral hearing, affirmed the recommendation of the Commissioner on 23rd February, 2009.

8. His claim for refugee status is based on a fear of persecution on religious grounds. He claims that he and his brother were attacked because they were Shias and that he and his family moved from their home due to a threatening letter. They claimed that they could no longer reside in their home suburb because of religious cleansing of Shias from that area. For the following fourteen month period he complains that he feared further targeting as a Shia by the group that shot his brother and the more generalised violence by Sunnis against Shias, including random shootings and bombings. He claimed to be in fear of being stopped by his own community's Shia militias and that if interrogated as to his name he would be obliged to reveal his Sunni name which would render him liable to random violence from the Shia militia. He claimed that there was no state protection available to him because of the general inability of the government to protect the population from these random attacks.

Section 11 Interview

9. In his s. 11 interview, he gave a more detailed account of his brother's shooting. He stated that though a threatening letter is usually sent before such shootings, one was not sent in this case. In this account he said that he (not others) took his brother to the hospital. The hospital asked for a police report. He went to the local District Court which gave him papers and told him to go to the police station in Saydia. The police completed a complaint form and wrote a report which he brought to the hospital after which he was issued with a death certificate. He said that following his brother's burial, he went into hiding in Al Karada. He acknowledged that Al Karada was much safer for the family but he had an additional problem because of his Sunni name, though a Shia.

10. Though he considered his Sunni name to be a major problem leaving him open to a threat of violence from the Shias because they would presume he was a Sunni, he never sought to change his name or use another. He stated that he had no problems until 2006 when sectarian strife erupted in his own area following the bombing of Shia shrines.

11. The majority of people in the area where the family originally lived, were Sunni. Many people were killed in the neighbourhood for no reason. He presumed that the people who shot at him and killed his brother were Sunni.

Tribunal Hearing

12. In oral evidence to the Tribunal on 4th December, 2008, the applicant stated that he did not know why he and his brother were attacked. He stated that they lived for many years in a mixed area but that the Sunni tried to drive the Shia out. He stated that passers by took his brother to hospital and that he reported the attack to the police.

13. He claimed that the attackers had been in a black car and that on the day of the funeral he was informed by his sister that a similar car drove by the house and that shots were fired in the air.

14. Following the funeral, his sisters went to live in his aunt's house in a mixed area of the city in which Shia, Sunni and Christians live. His aunt continues to live there with his two sisters and a disabled sister. He went with his father to the Al Karada district with his brother and sister-in-law and remained there from July 2006 until September 2007.

15. His father, brother and sister-in-law still live in Al Karada. His brother was injured in an explosion in March, 2008 after the applicant left Iraq following an explosion in Al-Suwierah. He stated that he was frightened that he would be killed if he returned to Iraq and that the people who killed his brother might kill him. The bombing in which his brother was injured occurred in a Shia area and he believed was planted by Sunnis.

16. He worked for a year between July 2006 and September 2007 while living in the Al Karada district. His father suggested that he leave and "live his life".

17. The applicant arrived in Ireland having been assisted by a smuggler to whom he paid a sum of money which he claimed was US\$21,000: he subsequently claimed that he paid a much lesser sum. He obtained a passport, a copy of which he was able to produce, but the original of which was apparently taken by the smuggler. He was able to produce a National Identity Card for his brother and for himself, his brother's passport, his sister's passport, a threatening letter, a police report, a death certificate, a letter from the Al Karada District Council and a photograph of his brother. He explained that he never mentioned the attack on his house on the day of the funeral in the earlier stages of his application because he did not have a document to prove it. He told the Tribunal that he now had the threatening letter which he claimed proved the attack. This and a number of other documents were contained in a DHL envelope on which there was no address. He explained that he received the documents before the interview when an envelope with no name and no address was handed over to him at the Spire in Dublin city centre by a man whom he believed to be a Jordanian. His family had telephoned and told him to meet this man.

The Tribunal Decision

18. The analysis of the applicant's claim carried out by the tribunal member focused on the murder of the applicant's brother. The decision states:

"By all accounts, it would appear that the attack on [him] and his brother was an opportunistic one, there was certainly no evidence that the applicant and his brother were targeted. They do not fall into any particular risk category, for example, they are not working for the occupiers, they are not medical professionals, they are not members of a minority religion. The applicant can provide absolutely no evidence linking the death of his brother, and the attack upon them, to any Convention ground. Country of origin information is very clear in stating that violent attacks are commonplace throughout Baghdad and indeed Iraq. Bombings occur on a daily basis, we see it everyday on the news, shootings are unfortunately part of everyday life. The applicant provides no evidence that he fits into a particular risk category, there is no evidence that the shooting in the air by a car going past a house in his area, was in any way directed at him or his family. While the applicant submits a threatening letter, this was directed to having him and his family move out of the area, given that it was predominantly Sunni, as most other Shias had already left the area - according to his own evidence. This is part of the religious cleansing that is occurring in parts of Baghdad, Shias move out of Sunni areas and Sunnis move out of Shia areas, the city is becoming increasingly polarised."

19. The facts of the applicant's case which appear to have been accepted are that he is an Iraqi Shia Muslim living in an area in which the predominant religious sect was Sunni. He lived there for a number of years with his family without any difficulty until an eruption of sectarian violence. His brother was murdered in an attack in which an attempt was made to murder him. His credibility in that regard is not questioned. While it is indicated that the applicant can provide "absolutely no evidence linking the death of his brother and the attack upon them, to any Convention ground" and that he can provide "no evidence that he fits into a particular risk category", the threatening letter which he produced was clearly calculated to force him and his family to move out of the area. The tribunal member stated that this was part of religious cleansing occurring in Baghdad and that as a Shia, he is someone who was caught up in generalised violence taking place in Iraq today.

20. It is clear, on the Tribunal's finding that Sunnis fear persecution by Shias and Shias fear persecution by Sunnis, particularly if they are in a minority in a particular area. They fear being driven out of their homes. In fact, this family left the area because of that fear and it is acknowledged that most Shias had already left by the time the applicant and his family were driven out. The Tribunal appears to accept that religious sectarianism and intolerance are the cause of much of the violence in Baghdad and shifts in the population within the city. There was little evidence of state protection against such violence and intimidation. The tribunal member accepts that random sectarian attacks are commonplace throughout Baghdad and, indeed, Iraq. However, the Tribunal did not accept that the murder of the applicant's brother, during which the applicant was also fired upon, was established as a targeted sectarian attack by Sunnis upon the applicant and his brother because they were Shias. The Tribunal was entitled to arrive at that conclusion on the evidence available to it. I am not satisfied that this conclusion can be characterised as unreasonable or irrational.

21. I am satisfied that the conclusion that there is no Convention related reason evident from the threatening letter and movement of the entire family from their home where they had lived for many years is unreasonable. It is clear that the applicant and his family felt compelled to leave the area in which they lived because they were Shia as part of the cleansing of Shia. The question then arose as to whether at the time when the applicant left Iraq, some 14 months after these events, he could be said to have a fear of persecution on the same grounds bearing in mind the subjective and objective components of the test and that the test is forward-looking. He spent the intervening period living with his family in relative safety in Al Karada.

22. The Tribunal Member thought it particularly significant that the applicant went to live with other members of his family in the predominantly Shia area of Al Karada and lived there incident-free for 14 months, and concluded that the applicant left Iraq because his father suggested that he should go and "live his life". It was considered to be important that he also stated that he wanted to be able to pursue his education which, she concluded, was a completely understandable goal but not a ground for granting refugee

status. It was clear that the applicant's education was cut short and that many people were forced to abandon important parts of their lives in the current climate in Iraq. It was clear from his evidence that the remainder of his family lived safely in the Al Karada area, save for one incident in which his brother was injured in a random bomb explosion in which many other people were injured and a number killed. The tribunal member concluded:

"What is particularly significant in my view is the fact that this applicant went to live with other members of his family who are living in the Al Karada area, a predominantly Shia area, he was able to live there incident free for fourteen months, the reason he left was that his father suggested that he should go and live his life, it is telling in my view that this applicant stated that he wanted to be able to pursue his education, a completely understandable goal, but not a ground for granting refugee status. This applicant's education was unfortunately cut short by virtue of the circumstances, however this does not constitute persecution. Many people have been forced to abandon important parts of their everyday life in the current climate in Iraq. He has given evidence that the remainder of his family still live safely in the Al Karada area, and that the only incident that befell them was an injury to one of his brother's in a random bomb which of course injured many other people, but killed a number.

This applicant is simply someone in my view who was in the wrong place at the wrong time, and was caught up in the generalised violence that is taking place in Iraq today. The fact that he was able to live safely in the Al Karada district with his family suggests strongly in my view that there is no Convention basis for him to fear remaining living in Iraq. I can understand perfectly why he chose to leave, however, there must be a Convention nexus in order to justify a grant of refugee status. I believe that in this case there is none."

23. It was submitted on behalf of the applicant that, having been obliged due to a well founded fear of persecution for a Convention reason (religious cleansing) to relocate internally, he escaped harm but limited his movements in the Al Karada area. However, he still felt insecure there and decided to flee the country altogether. It was submitted that the decision of the tribunal member failed to take any adequate account of country of origin information in respect of the reasonableness of expecting a person to internally relocate in Iraq. She failed to examine whether it would be "unduly harsh" to expect the applicant to return to the site of internal relocation. In that regard, the applicant complains that the tribunal member failed to consider the fact that his remaining brother had been seriously injured in a bomb blast aimed at the Shia community by the Sunnis, and that country of origin information indicated that internal flight relocation was not available "because of the overall ability of agents of persecution to perpetrate acts of violence with impunity in the absence of state protection". The tribunal member has, instead, characterised the applicant as a person who made a life choice to seek a better life outside Iraq and it is submitted that this is an unreasonable or irrational conclusion.

24. The applicant contends that he left because he feared persecution as a Shia by Sunnis intent on carrying out random bomb and shooting attacks on Shia communities. He organised his life in an effort to protect himself to the maximum degree by limiting his working week. His fear was clearly heightened by the fact that he and his family had been forced to move from their home from which they were "cleansed". He clearly had no faith in the ability of the state to offer him any protection in that regard, a position that would appear to have been supported by subsequent events when his brother was injured in a sectarian bomb attack aimed at Shias. Though the tribunal member was entitled to come to the conclusion that the murder of his brother was a random act of violence and not established as a sectarian killing by the applicant, the question arises as to whether the tribunal member properly assessed the issues of internal relocation arising in this claim having accepted the applicant's story in many respects as to what happened to his family in the wake of the shooting and the threatening letter and in the context of the country of origin information available. The applicant contends that the tribunal member failed to apply a forward looking test and to consider whether, if returned, he had grounds for fear that he would suffer persecution as defined by the Convention. However, the obligation to consider that matter must have some basis in and connection to the circumstances of the applicant (see *MAMA v. Refugee Appeals Tribunal* [2011] 2 I.R. 729 at 737).

25. The court is satisfied in this case that the tribunal member took into account the circumstances of the applicant, including how he and his family came to move home because of sectarian unrest. His circumstances were considered in full and particular attention was paid to the reasons for which he left Iraq. It is clear that though the applicant had not freely relocated to another area of the city, the move brought a certain stability to his and his family's life for the period of fourteen months for which he remained in the city. He was employed, his sisters lived with his aunt in a mixed area and he, his brother, his sister in law and father accommodated themselves to their new circumstances which remained difficult. There were no further incidents prior to his departure. Therefore, the court is satisfied that it was open on the evidence for the Tribunal to conclude that his departure was not for a Convention reason. The conclusion reached was based on the facts recounted by the applicant in interview and in evidence. His departure was not caused by any immediate act of persecution against him or his family, all of whom were part of the majority Shia community. I do not regard the determination that he left Iraq for personal reasons concerning his future quality of life as unreasonable or irrational, based as it is on the material and evidence before the Tribunal.

26. Another important aspect of the case concerns the random attack in which his remaining brother was injured. This was not a bombing in which his brother or family were directly targeted. It was open to the Tribunal to regard this as a random attack and one which was not part of a series of acts of persecution against him and/or his family, although it was clearly an act of terrorism.

27. The forward looking aspect of the test must bear some relation to a fear of persecution founded on the circumstances of the applicant. However, once the conclusion was reached that the applicant did not flee for a Convention reason, the court must consider what other evidence existed in relation to that issue relevant to the applicant's circumstances and whether it was considered appropriately by the Tribunal. This is not a case in which the credibility of the applicant is in issue: it is a case in which many of the facts advanced by him have been accepted. The Tribunal came to the conclusion that he did not flee Iraq because of a fear of persecution as defined under the Convention. Apart from his own evidence, country of origin information was also taken into account by the Tribunal when assessing the overall state of religious strife between Sunni and Shia in Iraq and, more particularly, in and around Baghdad. However, he was considered not to be in a particular risk category. He was, like many others, obliged to live under difficult circumstances, but not such as by their nature and intensity were sufficient to justify a conclusion that his flight from Iraq was based on a subjective and/or objective fear of religious persecution.

28. Accordingly, I am satisfied having considered all of the evidence and the grounds upon which this application was made, together with counsels submissions, that the applicant has not established "substantial grounds" to justify a grant of leave to apply for judicial review and, even if had, for the reasons set out above I am satisfied that the applicant has failed to establish any fundamental flaw in the Tribunal's decision that would justify it being quashed.

29. There remains an issue in relation to the fact that as a Shia, the applicant bears a Sunni name and that consequently, he is in danger from his own Shia community if stopped at one of the many Shia militia roadblocks in and around the capital. The Tribunal concluded that there was no evidence to suggest that the applicant ever suffered any difficulties on account of his name prior to

leaving the country. The evidence available to the Tribunal in this matter was based, once again on what the applicant said and also on country of origin information which was considered. I am satisfied that there was a sufficient evidential basis for the Tribunal to reach a conclusion that the applicant was not in any particular risk category on the basis of his name and her assessment that the evidence available did not offer a basis for concluding that there was a risk to the applicant on Convention grounds and, indeed, was speculative, was one which she was entitled to make. I do not consider there is any basis upon which to seek relief in relation to this matter.

Conclusion

30. This is not a case in which it could be said that the decision reached was not open to the decision maker on the basis of the evidence available. The courts jurisdiction in these matters is limited to a consideration of the legality and lawfulness of the decision and does not extend to a consideration of the merits of the decision in respect of the factual matters, save where a conclusion reached can be regarded as unreasonable or irrational. In the circumstances, the court will not extend the time for the bringing of this application, will refuse leave to apply for judicial review on all the grounds advanced for the reasons set out above. It is clear that notwithstanding the accepted credibility of much of the applicant's account, it has been determined that he has not established a fear of persecution within the meaning of s. 2 of the Refugee Act 1996, as amended, but this, of course, does not preclude an application for subsidiary protection or humanitarian leave to remain in the state. The application is dismissed.