

## THE HIGH COURT

## JUDICIAL REVIEW

[2012 No. 197 J.R.]

BETWEEN

A.R.

APPLICANT

AND

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

RESPONDENTS

## JUDGMENT of Mr. Justice Eagar delivered on the 3rd day of July, 2015

1. This is a telescoped hearing seeking an order of *certiorari* of the decision of the Refugee Appeals Tribunal to affirm the decision of the Refugee Applications Commissioner that the Applicant is not to be declared a refugee.

2. The proceedings are grounded by the affidavit of the Applicant who said that he was a national of Pakistan, he was born in Sahiwal, Punjab on the 6th May 1988. He said that he became embroiled in a family feud relating to land and business. He said his brother and nephew were killed in this dispute by another brother and he believes that he would be killed if he did not flee. He fled Pakistan on the 28th April 2011 and believed that he was going to Canada. He believed that he was going to be left in Ireland for a short time only before proceeding on to Canada. When it became apparent that he was not being collected for the onward flight to Canada, he applied for asylum on the 23rd August 2011. He was interviewed on the 13th September 2011 in relation to his asylum application by the Refugee Applications Commissioner and was notified by letter dated the 24th October 2011 that the Commissioner had refused his asylum status. The Refugee Applications Commissioner also found that the Applicant had failed to make an application as soon as reasonably practicable after arriving in the State and that as the Applicant had not provided a reasonable explanation for failing to claim asylum s. 13(6)(c) of the Refugee Act 1996 (as amended) applied to the application which is a paper only appeal. A notice of appeal was submitted to the Refugee Appeals Tribunal dated the 27th January 2012 and by letter dated the 23rd February 2012 he was notified that his appeal was unsuccessful. An application was made on the 7th March 2012 in respect of these proceedings.

3. An issue arose in relation to the grounds upon which relief was sought and I propose to set these out in full initially before dealing with the Tribunal's decision and the Applicant's case.

## Grounds upon which relief was sought

4. The Tribunal erred in law in determining the appeal of the Applicant almost exclusively on the basis that the Applicant delayed in applying for asylum.

- 1) The Tribunal further erred in law in failing to state any reason for rejecting the explanation of the Applicant for the delay, namely his expectation that his final destination was Canada.
- 2) The Tribunal erred in law in failing to consider case-specific evidence including FIR's (First Information Reports) when making adverse credibility findings and also when finding that internal relocation is available to the Applicant.
- 3) The Tribunal erred in law in finding that the Applicant has successfully relocated before departing Pakistan and failed to consider that the Applicant spent that period in hiding.
- 4) The Tribunal erred in law in making adverse credibility findings based on conjecture and relating to peripheral matters.
- 5) The Tribunal erred in law in failing to have any regard to the country of origin reports and the evidence of past persecution.
- 6) The Applicant has not been afforded an effective remedy against the first instance determination of his application for asylum before a court or tribunal within the meaning of Article 39 of the Council Directive 2005/85/EC.
- 7) The Tribunal erred in law in taking into account matters irrelevant to its determinations and/or failed to take into account relevant consideration.
- 8) The Tribunal erred in law in failing to lawfully speculate on the likelihood of the exposure of the Applicant to persecutory risk on refoulement to Pakistan in the light of his person history.
- 9) Such further or other grounds as may be adduced in due course.

5. The submissions on behalf of the Applicant state that the legal issues raised in reliefs 2 and 3 had already been resolved by the decision of the European Court of Justice in *HID* and *BA* and that ground claiming that an effective remedy was not provided, at ground 6, in the particular circumstances of this case, remains live.

6. The decision of the second named Respondent is short but commences in the analysis of the Applicant's claim with the evidence of the interview by the Commissioner on the 13th September 2011 (the section 11 interview). The Applicant in this interview locates his fear in a family dispute which occurred subsequent to the death of the Applicant's father in 1992. The Applicant recounts that his brothers began to quarrel after each had not married. At Q. 20 of this interview the Applicant stated:-

"I have a fear if I go back my elder brother Imran will kill me. After the death of my father my brothers were working together and were quarrelling. It did not involve me at that time. In 2004 my three brothers all got married. After that they quarrelled a lot with each other. In April 2008 I was coming from college. I received a phone call from home that

they were quarrelling with each other. When I reached my home it was burnt. My brother Irfan and his son were burnt in the fire. Irfan made a report to the police. My brother was running a generator for electricity and Imran threw a cigarette onto the generator. I brought them to CMH Hospital in Kharian. I brought Irfan to Ittefaq Hospital in Lahore. On the 23rd April his son died. On the 1st June Irfan died. After the police did a First Information Report the Applicant said he sent the FIR to the Governor of Punjab. He did not get a response. The FIR contained a statement before he died from Irfan that said that while he was putting petrol in the generator that his brother (Imran) threw a cigarette into the generator. I was given different dates to go to the court to make a statement. After that I went to the court and the police several times to give a statement about what happened. After that Imran started quarrelling with me. Then Imran accused me of stealing the money and jewellery from my home. After that Imran burnt his factory and he accused me of doing it. After the police started investigations they were trying to arrest me but they did not arrest me. After that I went to Imran's home and stated to him that I did not feel it was good what he was doing to me. Then he started beating me and trying to shoot me. But I shot his leg. After that the police tried to arrest me but I escaped from that place. After that I went to Lahore."

7. He was asked by the Commissioner's officer that it did not make any sense that his brother would burn down his own factory. He asked why would he burn down his own business in order to blame it on the Applicant. The Applicant answered that the factory was closed at that time. It was out of season. It was a cotton factory. He wanted the police to arrest and beat the Applicant. He was trying to close the other case of his brother and nephew by accusing the Applicant of burning the factory. He was asked what dates he lived in Lahore and he said that it was from the 17th September 2010 until the 28th April 2011 and he was asked did he have any problems in Lahore and he said that he was hiding there for about 15 months and he did not go out. He said that Imran and his brother-in-law were looking for him all the time and he decided that it was better to leave Pakistan. The first named Respondent broadly reflected these questions in his analysis of the Applicant's claim.

8. The first named Respondent said that the Applicant's case was posited on fear of certain members of his family. He said that it was difficult to dissent from the statement or question in the interview that the population of Pakistan is over 187 million people and it does not seem plausible that the Applicant's brother would be able to find him. The Applicant, it is to be reiterated, was not located in the 20 months that he lived in Lahore.

9. Despite the Applicant's account that the First Information Report was published in the local newspaper, no documentary evidence had been lodged in support of the Applicant's claim. The Applicant has produced no medical evidence that he was beaten. The Applicant remained unharmed during his séjour in Lahore.

10. The first named Respondent continued that the account that the Applicant's brother burnt his own business in order to incriminate the Applicant appeared implausible. He also said accumulatively the Applicant had not established that he held subjectively or objectively a well-founded fear and that the Applicant's fear did not relate to a Convention ground of persecution.

11. The Tribunal Member finally stated that the Applicant's narrative claims that the Applicant did not apply for asylum as he was waiting for an agent to take him to Canada. He arrived in the State on the 28th April 2011 and did not claim asylum until the 23rd August 2011. It is to be expected that a person having a well-founded fear would apply sooner than the Applicant did. The Applicant claimed that he was assaulted and he would be killed by his brother who had previously, according to the Applicant, displayed murderous intent. In these circumstances the Tribunal is of the view that the delay in applying negates the urgency which a well-founded fear can be expected to excite and negates a well-founded fear.

12. The first named Respondent referred to the "*Handbook on Procedures and Criteria for Determining Refugee Status*" and quoted para. 37 and para. 28 of the Handbook. The Tribunal took the view that the dynamic inherent in the precepts set out in these paragraphs leads to the conclusion that the Applicant if he feared violent persecution could or should have applied for asylum sooner than he did. The first named Respondent stated that the Applicant in the view of the Tribunal has not put forward a subjectively and objectively well-founded fear of persecution for a Convention reason.

13. In conclusion the Tribunal Member said he had considered all of the evidence, all the relevant documentation in connection with the appeal including the Country of Origin Information, the notice of appeal, the Applicant's asylum questionnaire and interview and he affirmed the recommendation made by the Refugee Applications Commissioner to dismiss the appeal.

14. The issue arises as to how the Refugee Appeals Tribunal should deal with the appeal conducted without an oral hearing. The Court is powerless to review or amend the Commissioner's finding that s. 13(6) of the Refugee Act 1996 (as amended) applied on the facts relied upon in the Applicant's claim unless there is an application for *certiorari* of the Refugee Applications Commissioner's decision in this regard. This Court's decision in *N.T.P (Vietnam) v. Refugee Applications Commissioner* [2015] IEHC 234, delivered on the 15th April 2015, was an application for *certiorari* of the Refugee Applications Commissioner in which the applicant was successful in obtaining relief.

15. No such application has been made in this case. Clark J. in *V.M. (Kenya) v. Refugee Appeals Tribunal & Ors* [2013] IEHC 24 highlighted the standard required of the Tribunal Member in an appeal without an oral hearing. She said:-

*"It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the Applicant as at an oral hearing."*

She further stated:-

*"The Court therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his / her claim."*

#### **Submissions of counsel for the Applicant**

16. Counsel for the Applicant having dealt with the section 11 and the section 13 report of the Refugee Applications Commissioner emphasised the grounds of appeal which were lodged with the Refugee Appeals Tribunal on or about the 27th January 2012. The decision of the Refugee Applications Commissioner's was appealed on the grounds that the Refugee Applications Commissioner erred in fact and/or in law in deciding that the Applicant does not meet the criteria set out in the 1951 UN Convention relating to the status of refugees. Ground two was that the Refugee Applications Commissioner had erred in fact and/or in law in failing to determine that the Applicant had a well-founded fear of persecution on a Convention ground. It was submitted that the Applicant has a well-founded

fear of persecution on the grounds of his membership of a particular social group (being a member of a family who has suffered persecution from his extended family as a result of a land dispute). It was submitted that the Applicant's family membership and land ownership identifies him as a member of a particular social group and his political opinions/imputed political opinion and reference is made to an Australian High Court decision, the reference of which is not available and to "*The Law of Refugee Status*" (2nd Ed.) by Hathaway and Foster.

17. Counsel for the Applicant pointed out the most obvious failure of the second named Respondent is that the second and third findings are fresh credibility findings, that is that the Applicant had not produced documentary evidence that the First Information Report which he claimed had been published in a local newspaper, a copy of which had not been lodged to support his claim. The third ground was that the Applicant had produced no medical evidence that he was beaten by his older brother.

18. Counsel for the Applicant also submitted that the other findings of the first named Respondent were repetitions of the findings of the Commissioner without regard to the details and submissions in the notice of appeal.

### **Submissions by counsel for the Respondent**

19. The main focus of the submissions by counsel for the Respondent was that the Applicant had not established a nexus to Convention ground and that this issue was determinative and if the Court agreed that no Convention nexus was established there is no need for the Court to proceed to examine the balance of the issues raised by the Applicant.

20. Counsel for the Respondent indicated that the Applicant was barred from challenging the finding that there was no Convention nexus because the issue had not been challenged in the statement of grounds nor was it expressly challenged in the written submissions.

21. Counsel for the Respondent said that the first named Respondent was correct in law in determining that the Applicant had failed to establish a Convention nexus. The Applicant's claim was that he was in danger as a result of a family dispute over land. He accepted that the membership of a particular family could constitute membership of a particular social group and that family membership would be sufficient to establish a Convention nexus, for example, where every member of particular family is subject to risk of persecution as a result of a blood feud. A crucial test was the causal link test and he cited the decision of *J.A. v. Refugee Appeals Tribunal & Ors* [2015] IEHC 342, a decision of Faherty J. delivered on the 19th May 2015. Counsel for the Respondent argued that while the Applicant may be a member of a particular social group, he was not persecuted because of that membership and the causal connection required to establish a Convention nexus is not present.

22. The written submissions of counsel for the Respondent dealt with the lack of an oral hearing, however as I have already indicated above, this is not a matter which this Court can consider in the light of the challenge posed to the first named Respondent. In relation to the findings about the failure to produce documentary evidence of the publication of the First Information Report and that the Applicant had produced no medical evidence that he was beaten, are simple statements of fact and that there is no reliability on them to impugn the Applicant's credibility.

### **Discussion**

23. Counsel for the Applicant quoted from Hathaway and Foster, *The Law of Refugee Status* (Cambridge Univ. Press, 2nd Ed, 2014)

24. It is noted that Hathaway and Foster deal with the issue of a family as a social group:

*"There is sometimes an attempt to impugn the credibility of claimants who have spent substantial time in one or more countries who have enjoyed short term status in an intermediate state and even those who have merely transited through another country, such scepticism is objectionable at the level of principle since there is no provision in the Refugee Convention requiring a refugee to seek protection in the first safe country of arrival."*

*While the quintessential case in this category involved persons from politically, socially or economically prominent or active families at risk from external forces, other examples include persecution on the basis of being related to a person with a disability and persecution on the basis of a relative's sexuality or gender identity. An emerging application of the family's social group category is evidenced by those cases involving harm within the family unit. In such cases, particularly where a child is at risk of family violence, some courts have found that the Applicant's well-founded fear of being persecuted is for reasons of family membership.*

*While most claims based on family membership are straight forward there is one category that has proven highly controversial, namely where the family members are targeted by means of seeking retribution, revenge or repayment of debt."*

25. This Court notes the European Communities (Eligibility for Protection) Regulations 2006. Section 9 of the Regulations defines acts of persecution.

*"9. (1) Acts of persecution for the purposes of section 2 of the 1996 Act must (this Court's emphasis)*

*(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or*

*(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a)."*

26. Section 9(3) states:-

*"(3) There must be a connection between the reasons mentioned in Regulation 10 and the acts of persecution referred to in paragraph (1)."*

27. The appropriate part of s. 10 is in s. 10(1)(d):-

*"(d) a group shall be considered to form a particular social group where in particular—*

*(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a*

*characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or*

*(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;*

*and, depending on the circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation. Sexual orientation shall not include acts considered to be criminal in the State: gender related aspects may be taken into account, without by themselves alone creating a presumption for the applicability of this Regulation;”*

28. The emphasis on the provisions of s. 9, in my view, is the law in Ireland. The Tribunal Member and the Court, in considering extending the concept of a social group in the way suggested by Hathaway and Foster must comply with the statutory provisions.

29. Faherty J. in her decision in *J.A.* (supra) delivered on the 19th May 2015 discussed the question of nexus to the Convention and noted that:-

*“On the question of the nexus to the Convention, insofar as the Applicant made the case at para. 12 of his written submissions that the Tribunal Member failed to consider whether the Applicant fell within membership of a particular social group by reason of “his membership of the particular family engaged in a land feud”, that ground was not pleaded in the statement of grounds. Nor was that argument advanced before the Tribunal as the basis for the Applicant’s membership of a particular social group.”*

30. The Applicant’s notice of appeal stated at ground 3.2 of the grounds of appeal:-

*“The Refugee Applications Commissioner erred in fact and/or in law in failing to determine that the Applicant has a well-founded fear of persecution on a Convention ground. It is submitted that the Applicant has a well-founded fear of persecution on the grounds of his membership of a particular social group (being a member of a family who has suffered persecution from his extended family as a result of a land dispute). The Applicant instructs that his extended family have links to the MSF organisation. The Applicant’s fears on his return to Pakistan a malicious prosecution, having been falsely accused of burning down his brother’s cotton factory. It is submitted that the Applicant’s family membership and land ownership identifies him as a member of particular social group and his opinion/imputed political opinion.”*

However this issue was not specifically pleaded in the statement of grounds nor was it contained in the submissions on behalf of the Applicant.

31. The case of *Fornah v. Secretary of State for the Home Department* [2007] UKHL 46 2007 AC412 does not in my view assist the Applicant in relation to “causal connection” to the Convention nexus.

32. The judicial review process is not a form of appeal rather its purpose is to provide a form of supervision in relation to decisions made and actions taken by the Refugee Appeals Tribunal.

33. In this case while I have some sympathy with the Applicant and the Minister may extend some sympathy subsequently. I am satisfied however that the Applicant’s challenge to the Tribunal’s member’s ruling on the issue of the Convention nexus has not been made out.

34. I will dismiss the application for certiorari.

35. I will make one remark in relation to part of the decision of the Tribunal which appears to me to be completely legally erroneous and that is “in these circumstances the Tribunal is of the view that the delay in applying negates the urgency which a well-founded fear can be expected to excite and negates a well-founded fear”. Counsel for the Respondent indicates that he is not relying on it and it appeared to this Court that it is a failure to consider to deal with the reasons given by the Applicant for the delay in applying.

36. Notwithstanding this, this is not sufficient to render the decision unlawful since the Court has found no basis in which impugn the finding that the Applicant failed to establish membership of a particular social group.

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*Counsel for the Respondent: Nap Keeling B.L. instructed by the Chief State Solicitors Office*