

**THE HIGH COURT
JUDICIAL REVIEW**

[2012 No. 1021 J.R.]

BETWEEN

F. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 8th day of November 2013

"Where a finding is made on credibility, an appeal decision of this kind should show clearly the process by which it is reached and identify the salient points or issues on which an applicant has not been believed."

1. That statement by Cooke J. in *S.B.E. v. Refugee Appeals Tribunal* [2010] IEHC 133 (Unreported, High Court, 25th February, 2010) provides important advice to protection decision makers, not least because asylum decisions will be considered in a variety of subsequent processes.

2. Those introductory comments are relevant to these proceedings because I am required to review a decision made by the Minister on an application for subsidiary protection which re-uses credibility findings made by the Refugee Appeals Tribunal. Narrowly stated, the applicant in these proceedings argues that the Minister unlawfully dis-applied a rule requiring consideration of the applicant's home country circumstances (Regulation 5(1)(a) of the EC (Eligibility for Protection) Regulations 2006) because of a finding that the applicant lacked credibility. The respondent answers this complaint by saying that the Minister was entitled to dis-apply the Regulation because the applicant's credibility was rejected. The issues for decision therefore are whether the Minister lawfully rejected the applicant's credibility and if so, whether Regulation 5(1)(a) of the EC (Eligibility for Protection) Regulations 2006 can be dis-applied.

Background

3. The applicant is a Bangladeshi national who says that the relevant background facts are as follows. He was born on 20th July 1993, and is an only child. He has no relatives in Bangladesh. His father is missing and his mother is dead. The basis of his claim for asylum and subsidiary protection is that his father's political opinions and activities attracted negative attention from opponents. His father sent the young teenager to live with a guardian for about 6 months. The guardian decided that the applicant was in danger and arranged for his departure from Bangladesh. The applicant arrived in Ireland in October 2007 as an unaccompanied minor, then aged fourteen.

4. One of the controversies which arose in this case concerns the evidence the applicant gave at various stages regarding his own knowledge of his father's political involvement. In accordance with s. 11 of the Refugee Act 1996, the applicant was interviewed and a report was prepared based on that interview for the Office of the Refugee Applications Commissioner. The relevant parts of that interview as reported to the Commissioner are reflected in the following questions and answers:-

Q36: You say your father is involved in politics in Bangladesh. What party is your father involved in?

A: I don't know the name of the party.

Q37: How long has your father been involved in politics?

A: I cannot tell about his political life but it is along time he is doing politics.

Q38: Is your father involved with the current government in Bangladesh?

A: I cannot tell but the present government is not a political government.

Q39: Has your father ever been involved with the ruling party in Bangladesh?

A: He may have been connected with the government but I don't know. Maybe not.

Q40: From reading your file, it appears that your problems are related to your father's political involvement. It is very important that I know what his political involvement is. Can you tell me anything you know about his politics?

A: I cannot tell the name of the party. Some people were looking for him to kill him. Sometimes they beat him. That is the problem. Now there is the same threat to me also.

Q41: Was your father a leader in his political party?

A: Yes.

Q42: Did you ever see his party's banner, t-shirts, emblem anything like that?

A: No, nothing.

Q43: I am aware that you are young but I would expect you to be aware of your father's political party if that is the reason you were taken out of Bangladesh?

A: Yes."

5. At the end of the interview, on a clarification sheet, further information in respect of Question 42 was given as follows:-

"My father kept all of his political documents in a box. Sometimes he would bring out some documents and read them. Then he would lock them again. I would never see the documents. It may be political or private documents."

6. The decision of the Commissioner is set out in a report made pursuant to s. 13(1) of the Refugee Act 1996, and the author of the report notes as follows:-

"When assessing the applicant's credibility, the following points are considered relevant-

The applicant claims his father is a political activist in Bangladesh. When asked which party his father was a member of, the applicant replied, "I don't know the name of the party"...

While the applicant's young age is taken into account, his ignorance of which party his father represents and his failure to give any detail about his father's political activities question his credibility."

7. Other matters are assessed by the author of the s. 13 report including the applicant's knowledge of the geography of the area he claims to come from and the narrative of his travel from Bangladesh to Ireland. The s.13 Report concludes by stating:

"Given the numerous credibility issues outlined above, it is considered reasonable to conclude that the benefit of the doubt cannot be afforded to this applicant, therefore this applicant has not demonstrated a well founded fear of persecution in Bangladesh."

8. After the negative decision of the Refugee Applications Commissioner the applicant says he was advised by his lawyers (the Refugee Legal Service) to find out more about his father's political involvement. The applicant swears to this fact in his grounding affidavit and this evidence is uncontradicted.

The Decision of the Refugee Appeals Tribunal

9. In respect of the applicant's state of knowledge about his father's politics, the tribunal member records the applicant's testimony at the oral hearing conducted by the Tribunal as follows:-

"The Applicant stated that he did not know what political party his father was involved with but he stated that he had heard from his father's mouth the name of "Khaleda Zia" and he stated that later when he looked on the internet he remembered that his father was working with posters and photographs of her (Khaleda Zia) party. He stated that his father belonged to this party and that it was called the BNP. The applicant was unaware of what political grouping his father's political opponents belonged to."

Further, the tribunal member noted the exchange between the presenting officer and the applicant at the oral hearing as follows:-

"In reply to the Presenting Officer the Applicant confirmed that he had seen posters of Khaleda Zia in his home. It was put to the applicant that during the interview he had stated that he had never seen his father's party's t-shirts or emblem and that he had stated that he had never seen anything like that. The Applicant said he had not seen a banner or t-shirt but that he had seen photographs. When asked why he had not given this information to the interviewer, the Applicant stated that he did not understand that he had to tell every detail. It was put to the Applicant at page 7 of the interview he had stated that he had not known what political party his father belonged to but that he was able to say that his father was a member of the BNP at the appeal hearing. The Applicant said that the people from the RLS had told him that if he had evidence he could check it on the internet. It was put to the Applicant that a Q40 on page 8 he had an opportunity to tell the interviewer about details of his father's political involvement and he had informed the interviewer that he had not seen anything. The Applicant stated that at that time he thought he was being asked what political party his father belonged to. The Applicant confirmed that when he had seen the poster in his home, he had known who the person was as she was a well known person in Bangladesh. It was put to the Applicant that information about this poster would have assisted the interviewer and the Applicant said that the interviewer had asked him about the politics of his father and had not been asked about the leader's name. It was put to the Applicant that if his father was involved with Khaleda Zia that this was important information and the applicant stated that after he was advised by the RLS to find out about his father's political party, he later became sure it was the BNP."

10. In a further description of the exchange between the representative of the Refugee Applications Commissioner and the applicant, the tribunal member notes as follows:-

"In reply to Mr. Horgan, the Applicant confirmed that when he had seen the poster in his home he was aware that it was a poster of the Prime Minister. He stated that he had known that she was the Prime Minister but he had not known what party his father belonged to. It was put to the Applicant that at Q38 of the interview he had stated that he could not tell if his father had been involved with the current government and that surely he should have told the interviewer that he had seen posters of the PM. The Applicant explained that he did not know that his father had belonged to her political party but that he had seen these posters in his father's hands and that then he saw newspapers in Ireland. When asked if it was reasonable to assume that his father had supported the Prime Minister if he had her posters, the Applicant said he had no interest in politics and that he did not know."

11. Section 5 of the decision of the Tribunal is entitled "Analysis of the Applicant's Claim" and in relevant part it states as follows:-

"The Applicant stated at the appeal hearing that several times he heard the words applicant had indicated that his father worked with posters and photographs of the Prime Minister but not with the photographs and posters of the Prime Minister's party.]

In reply to Mr. Horgan, the Applicant said that when he had seen the poster of "Khaleda Zia" he had been aware that she had been the Prime Minister. The applicant was asked during the interview if he had ever seen his father's party's banner, tee-shirt or emblem or "anything like that" and the Applicant replied "No nothing" (page 8, interview). The applicant stated at the appeal hearing that he did not tell the interviewer about the photographs he saw as he had not understood that he had to provide every detail. During the interview at Q40, page 7, the Applicant was informed that it was important to know about his father's political involvement and at Q38 the Applicant was asked if his father had been involved in the current government. The Applicant is an intelligent and articulate person and has some education (page 4, Questionnaire). He states he studied social science at his school in Bangladesh. The Applicant was aware that Khaleda Zia had been the Prime Minister and he recognised her image on the posters/photographs in his home. The BNP were in government until October, 2006 and a caretaker government took over until the elections on 29th December, 2008. After the elections the Awami League came to power although the results were rejected by Khaleda Zia of the BNP. Serious questions arise in relation to the Applicant's failure to tell the Commissioner that he had seen poster/photos of Khaleda Zia in his family home despite a number of opportunities provided to the claim and, even taking into account the Applicant's age, the Applicant's failure to provide this information during his interview in August 2008 raises credibility issues with the Applicant's account."

12. In the decision of the Tribunal the applicant's account of how he travelled to Ireland is analysed and the tribunal member says that "it is difficult to believe that the applicant could have travelled through three international airports with such limited knowledge of his travel documents and travel itinerary".

13. In the third paragraph of the analysis of the applicant's claim the tribunal member notes: the ease with which the applicant's father was able to live at his home and go to work during his troubles; that the applicant's father's enemies had ample opportunity to kill him if they wished; that the applicant's father met with his enemies on two occasions; that the applicant is not a member of any political party; and that he stated that he had no interest in politics. The tribunal member then concludes:-

"Considering the foregoing, the Applicants fear of his [father's] political enemies is not objectively well founded."

Accommodating typographical errors and the like, it is clear that the basis of the rejection of the applicant's claim for asylum is that the tribunal member finds that based on the narrative as recounted, there is no threat to the applicant in Bangladesh and therefore the applicant's circumstances did not entitle him to refugee status in Ireland. My reading of the first paragraph of the analysis by the tribunal member of the applicant's claim (quoted in full at para. 11 above) is that the inability of the applicant, during the section 11 existence of posters bearing the image of the Prime Minister of Bangladesh in his father's home "raises credibility issues". However, the tribunal member does not expressly reject the applicant's credibility, though doubts in respect thereof are expressed.

The Subsidiary Protection Decision

14. Following the rejection of his asylum application, the applicant applied for subsidiary protection. By letter of 12th September 2012, an Executive Officer in the repatriation unit wrote to the applicant informing him of the negative outcome of the application. The letter asserts that the application "was considered in accordance with the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006)". The letter also says that the report setting out the Minister's determination is enclosed. That report, said to be the Minister's determination, is signed by the same Executive Officer and endorsed by a Higher Executive Officer. In order to determine the legal and factual questions in these proceedings it is necessary to consider the report in some detail. Its introductory remarks are entitled "Serious Harm Claimed" followed by text which describes the applicant's narrative.

15. The first italicised subheading in the report is as follows:-

"Applicant's credibility and whether benefit of doubt should be given (Reg. 5(3))"

The reference to Regulation 5(3) of the 2006 Regulations is misleading because that provision has nothing to do with the assessment of the applicant's credibility and whether the benefit of the doubt should be given, as indicated in the italicised sub-title in this report. Regulation 5(3) is addressed to circumstances where aspects of the protection applicant's statements are not supported by documentary or other evidence and the confirmation. The report then quotes the text from the decision of the Refugee Appeals Tribunal (set out at para. 11 above). The report then states:-

"The foregoing quotation from the Decision of the Member of Tribunal indicates, *inter alia*, that the Member of Tribunal did not consider credible the applicant's explanation for the discrepancy between his account at ORAC and his testimony before the RAT, in relation to his father's claimed political affiliation. The Member of Tribunal's doubts as to the veracity of the applicant's claim in this respect, were based on the amount of opportunities he had to clarify the matter at his interview at ORAC, as well as his level of education, and moreover, the finding by the Member of Tribunal was made notwithstanding the young age of the applicant."

16. It is recalled that at ORAC the applicant did not know the name of his father's political party and he did not mention seeing photographs in poster format of the former Prime Minister of Bangladesh in his home or being handled by his father. By the time he gave his evidence at the Tribunal he was able to name the political party and had recalled seeing the poster/photographs of the former Prime Minister. He provided a detailed explanation as to why he gave information to the Tribunal which he had not given to ORAC. Contrary to what is asserted by the author of the Subsidiary Protection Report, the Tribunal member did not reject the explanation given by the applicant for the difference in testimony. On any reading of the position of the Tribunal, no comment is made at all about the explanation provided by the applicant as to this difference in testimony.

17. A supplemental submission dated the 8th July, 2009, was made on behalf of the applicant in support of his application for subsidiary protection which points out that the applicant was thirteen at the time of the events giving rise to his application for international protection; that he was fifteen at the time of his ORAC interview; that he was advised after the ORAC decision by his lawyers to try to remember anything in relation to his father's political activities; and that he did not think about the posters and photographs of the former Prime Minister at the ORAC interview.

18. The Subsidiary Protection Report then says:-

"Having examined both the credibility findings of the RAT as well as the [supplemental] submission of the applicant, it should be noted that the Member of Tribunal was, in fact, explicit in taking the applicant's age into account when reaching her finding, and in any event, it is not accepted that there are any clear errors of fact arising which would vitiate the findings."

In light of the foregoing, it is reasonable to consider that the applicant's statements in relation to his claimed fear of returning to Bangladesh, are not credible. As a result, I am satisfied that the applicant's claim is not credible."

The author of the Subsidiary Protection Report clearly considers that the Refugee Appeals Tribunal rejected the credibility of the applicant. This never happened.

19. The author of the Subsidiary Protection Report notes that the Tribunal member took the applicant's age into account. The implication is that this had been weighed in the balance when credibility was rejected by the RAT and that the author of this Report is not required to repeat the exercise. Thus, one can see that the author of the report, having erroneously concluded that the Tribunal rejected the applicant's credibility, then builds upon that mistake by failing to weigh the applicant's minority and the fact that he was an unaccompanied minor in Ireland when assessing his claim.

20. The final sentence in this section of the Subsidiary Protection Report is as follows:

"In light of the foregoing, it is reasonable to conclude that the applicant's statements in relation to his claimed fear of returning to Bangladesh, are not credible. As a result I am satisfied the applicant's claim is not credible."

21. The credibility assessment in the decision of the Refugee Appeals Tribunal is the sole basis for the credibility findings in this report. Unfortunately, as indicated above, the author of the Report mischaracterises the credibility finding in the decision of the Refugee Appeals Tribunal.

22. Having commenced the assessment of the applicant's claim for Subsidiary Protection by reference to Reg. 5(3) of the 2006 Regulations, the Report then reverts to Reg. 5(1) of the Regulations. The title of this section of the Report is "Assessment of facts and circumstances" which is the margin text of Reg. 5 of the Regulations. An italicised sub-title then appears in the decision as follows:

"(i) - Relevant facts relating to the country of origin, including laws and regulations and the manner in which they are applied (Reg. 5(1)(a)) including the availability of 'protection against serious harm' as defined in (Reg. 2(1))"

23. A short conclusion in this section of the Report is as follows:-

"... as noted earlier in this submission, [sic] the applicant has been found not to be credible. As a result, consideration of Regulation of 5(1)(a) ... is not applicable.

24. Regulation 5(1)(a) is as follows:-

"The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied."

25. The provisions of Regulation 5(1)(a) are expressed in mandatory terms. The other notable feature of the rule is that the country of origin facts which are to be considered are those which pertain, not at the date of the matters on which an applicant makes complaint or bases a claim, but at the date of the taking of the protection decision. In other words, it is clear that the rule is designed to apply what is referred to as the forward looking test to see whether the applicant's fears about what will befall him should he return to the country of origin are borne out by the current circumstances in that country. I accept the submission by counsel for the Minister, Mr. Conlan Smyth S.C., that though the provision is expressed in mandatory terms, the only facts concerning the country of origin which have to be considered are facts about the country which are relevant to the claim and where a claim is rejected as false, there are no relevant facts about the country of origin to be considered. In other words, I find that where credibility has been fully rejected, the mandatory nature of Reg. 5(1)(a) falls away and the decision maker is not required to consider circumstances in the country of origin as no relevant circumstances or facts could add to or assist a consideration of an applicant's claim for international protection.

26. In this context, the dicta of Cooke J. quoted above come back into focus. Where part of an applicant's narrative is believed and part is rejected as untruthful, this will have a bearing on a protection decision maker's duty under Reg. 5(1)(a). The extent of rejection of credibility will govern to the extent of enquiry pursuant to Reg. 5(1)(a). Obviously, a comprehensive rejection of credibility will remove the enquiry requirement. Not finding the applicant's narrative of travel to the State credible but accepting that an applicant had been tortured, for example, would trigger the enquiry as to whether the country, at the date of the decision, engages in torture.

27. I accept that in this case, the respondent would have been entitled to dispense with a Reg. 5(1)(a) enquiry had there been a lawful and comprehensive rejection of credibility by the respondent. Leaving aside the question of whether the subsidiary protection decision maker is entitled to borrow RAT credibility findings, I have found that the RAT did not reject the applicant's credibility and applying the dicta of Cooke J. as set out at the beginning of this judgment, there is no lack of clarity in the finding of the RAT. Had the Tribunal Member wished to reject general credibility, she would have done so in terms. Had she wished to disbelieve parts of the narrative, this too would have been expressly stated. Instead the clear decision of the Tribunal is that based on the facts established by the applicant, he is not found to be at risk of persecution. In these circumstances I find that that the subsidiary protection decision was made in breach of the requirements of Reg. 5(1)(a) of the Regulations. The decision is therefore ultra vires and must be quashed.

28. Other grounds of challenge stand adjourned pending the decisions on similar points raised in unrelated proceedings. I will hear the parties as to whether the adjourned grounds still require to be heard.