

**THE HIGH COURT  
JUDICIAL REVIEW**

2006 924 JR

**IN THE MATTER OF SECTION 5(2)(a) OF THE ILLEGAL IMMIGRANTS  
(TRAFFICKING) ACT, 2000 AND IN THE MATTER OF SECTION 5(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT,  
2003**

BETWEEN

A.I.M.Z.

APPLICANT

AND

**THE REFUGEE APPLICATIONS COMMISSION AND THE OFFICE OF THE REFUGEE APPEALS TRIBUNAL AND IRELAND AND THE  
ATTORNEY GENERAL**

RESPONDENTS

AND

**THE HUMAN RIGHTS COMMISSION**

NOTICE PARTY

**Judgment of Ms. Justice Clark delivered on the 7th day of November, 2008.**

1. The applicant, A.Z., seeks leave to judicially review by way of certiorari the decision of the Refugee Appeals Tribunal ("the RAT") dated the 29th June, 2006, and received between the 3rd and 5th July, 2006. The original case against the Office of the Refugee Applications Commissioner ("the ORAC") was not pursued.

2. The main thrust of the legal arguments advanced by counsel on behalf of the applicant is that:-

(i) In upholding the decision of the ORAC not to recommend that refugee status be awarded to the applicant, the R.A.T. failed to consider a document, which, if accepted as true could confirm the applicant's membership of the Komala party, whose members are persecuted.

(ii) That insufficient regard was paid to the applicant's illiteracy when viewing discrepancies in his evidence relating to the contents of a document produced by him and relied upon in his application, which led to adverse findings of credibility.

**The background facts**

3. The applicant relies on the following assertions: - he was born in 1983 and is of Kurdish/Iranian origin, he lived all his life with his mother in a small Kurdish village close to the border with Iraq. His occupation there was a farm worker and the village in which he lived consists of approximately twenty houses and about two hundred inhabitants. The inhabitants are generally agricultural workers, traders or informers. Most of the villagers are illiterate as is the applicant. In mid 2004 he was introduced by S., another villager, to the Komala or Communist Party of Iran. His role in the party was that of a supporter reporting to his friend S. who, though not educated, had some reading ability.

The applicant's function was to receive leaflets which he would then nail on to the walls of the village at night. He also received and stored party newsletters. The disadvantage of common illiteracy was cured by the reading ability of the few who could translate for the others.

4. One day in mid 2005, soldiers came and surrounded the village while he was on his way to work on the farm. He feared for his life when he realised that Komala literature could be found in his house so when he saw the soldiers coming, he took refuge in a nearby village. Here, he contacted his uncle who told him that literature had been found in his room and that S. had been arrested.

5. The applicant said that many opponents of the regime are arrested, tortured and killed in Iran. His uncle, who was of means, advised him to leave Iran and arranged for him to travel overland through Turkey. He eventually arrived in Ireland by land and sea without documents. He sought asylum at the Office of the Refugee Applications Commissioner on the 12th July, 2005.

**Findings before the ORAC**

6. Aspects of this narrative were found not credible by the Refugee Applications Commissioner, who in particular found that the applicant's profile did not tally with reports of those at risk of persecution in Iran, such as Kurdish Democratic Party/Komala leaders, militant activists or high profile dissidents described in reports from Amnesty International, the British Home Office and the UNHCR. This information confirmed that the regime in Iran deals ruthlessly with Communist Party of Iran/Komala leaders and its militant supporters but the Commissioner found that the applicant had never reached the level of notoriety as those described in the reports which would put him at risk of persecution. The claim that he posted party literature on the walls of his village was found to be neither coherent nor plausible and the ORAC interviewer had difficulty with the concept of an illiterate person posting propaganda for other non readers in a village where the person disseminating such literature could be identified. In addition, his travel arrangements were found not plausible and it was doubted that Ireland was the first safe country he reached.

**Appeal to the Refugee Appeals Tribunal**

7. The applicant appealed this decision to the Refugee Appeals Tribunal. He was represented by counsel, instructed by the Refugee Legal Services. It was clear that some of the same credibility issues arose before the Tribunal as the applicant was asked by the Tribunal member why he took the risk of putting up posters when he knew that there were informers in the village. He replied that before he was made aware of the situation, he was ignorant and backward, that many villagers were also kept in the dark and that he wanted others to learn what he had learned. When asked how illiterate persons could understand the information on the leaflets which he himself could not read, he replied that the leaflets were designed in such a way that readers would be able to recognise the party logo, and educated people could explain to others so that they all were aware of and discussed the information therein.

8. At the appeal, the applicant presented three documents which purported to support his case that he was a member of Komala and thus subject to persecution:-

(i) A very lengthy leaflet which the applicant said was typical of Komala leaflets posted in the village. This leaflet was said to have been distributed by Komala in his village and had been sent to a friend in the refugee hostel by his uncle in Iran.

(ii) A photograph of the charred remains of a person who the applicant said was his uncle who had helped him. He said that his family had sent him the photograph and that his uncle was shot at because he passed through a checkpoint without stopping as he was afraid the authorities may have found out that he had helped the applicant. When he was shot at, his car overturned and caught fire. There was writing on the back of the photograph which was translated to say that the medical report on the body established that the person had been shot. The photograph of the victim had a piece of white paper over the name on the hospital gown so that the victim's name was concealed.

(iii) A letter stated to be from the Swedish representative of the Komala party:-

"Representation of Komala Abroad No. 1180, date 10/03/06,

*To whom it may concern*

We hereby certify that Mr. A.M.Z. was born in 25/06/83 in Sardashi (Kurdistan, Iran) has been politically active against the Islamic Republic regime of Iran.

A. was an active militant of the revolutionary movement of the Kurdish people in Iran. He has supported actively Komala and more specification has been an active sympathiser in propaganda the party's programme among the Kurdish people in his home town.

His activities were exposed to the regime and his life was in danger. He escaped the persecution danger of his life.

He is now in your country as a person seeking political asylum. We hope you will help him to get the status of political refugee.

Yours sincerely,

Representative of Komala Abroad

Signed: S. Ileidari"

The letter has a P.O. Box number and postal code for Norsborg in Sweden and also has a fax number.

9. The applicant was questioned about the three documents furnished. It was explained that the Komala leaflet needed to be translated twice as the first translation was not accurate as it had not named him. It was said that the document described the incident which took place when the soldiers searched the village. The original translation stated:-

"Thus on the 20/06/2005, the equivalent of the solar dated the 30th quadrant 1384, the regular forces of the army, with the co-operation of the institution of terrorism Iranian secret services in the village of Dolamei in the region of Darmanawa have detained the comrade S.A., who is within the folds of our Komala, while carrying some party literature which included leaflets, magazines and other publications of the Komala. A large quantity of pishraw, which is the central organ of Komala, has also been captured. From that place, and in a very inhumane and brutal manner they tormented and tortured him. Another comrade, who had recently joined the organisation of Komala through S., seized an opportunity and escaped detention fortunately despite the attempts of the thugs of Itilaat.

Comrade S. was transferred to the prison of Razaiya and in an inequitable and unfair court he was sentenced to life imprisonment. We the central committee of Komala express our rejection of the decision of the criminal Islamic regime. We also express our shock and condemn this regime."

The second version which the applicant claimed was the more accurate stated:

"On the date 20/06/2005 the police helped the secret agency in the village of Abolabe area of Darmanawa. Our member S.A.Z. was captured with a set of our leaflets. Newspapers from that area have treated him against his human rights, a friend (A.M.Z.) he was recently a member from the S.A.Z.. He escaped from them and the authorities could not catch him.

After that S.A.Z. was transferred to the Rzaya prison (where they treated him unfairly and he will be held for life in prison). We the Komala party we condemn this trial decision. We hope our members be strong and survive all the persecution and corruption in this country."

10. The applicant was questioned about the contents of the leaflet by the Tribunal member. As he was named in the second translation, he was asked why the Komala party would mention his name on a notice as it would put his life in danger, especially as he had escaped. It was also suggested to him that membership of the Komala party was secret. The applicant explained that from Komala's point of view, the Government already had this information as he had already been exposed so there was no point in keeping it secret.

11. He was then asked why the document made no reference to the police raid on his home as it did for S.. He replied that this information was on the Kurdish version and that he felt its absence was a translation problem. When asked whether the Kurdish version indicated that newspapers were found in his house, he responded that "it did not say that but it did say that two particular members were arrested and one had escaped." He said that "generally, leaflets in Iran tell what happened and describe the nature of members' activities but do not go into specific details; they keep the information general. The party would not tell that a member of their party was exposed and that documents were found in the house as this would scare others from engaging in activities. The documents would give information about how a particular member helped the party and what happened to him, where and how. It does not go into how many leaflets they had."

12. The applicant was questioned about the letter from the Swedish representative of Komala and in particular he was asked how someone in Sweden would be aware that he was active in the party in Iran. He responded that the party would have a record of his name and his friend's name and that his friend, who was important in the party, reported to senior members of the central committee.

13. He was also questioned about the photograph and how he received it. However, as the Tribunal findings in relation to this

document were not challenged, it is not necessary to go into this aspect of the case save to note that there was nothing on the photograph to authenticate the applicant's evidence that the remains were those of his uncle.

14. At the conclusion of the hearing, the appellant asked to be heard and he referred generally to the unhappy situation of Kurds in Iran and the fact that they were discriminated against and did not benefit from education and were marginalised. He said that his uncle lost his life because of the assistance his uncle gave him and that he was in Ireland because of what the regime in Iran did to his country and to him.

15. The applicant's appeal failed. In her decision, the Tribunal member accepted that members of the Communist party of Iran were subject to persecution and that discrimination against Kurds was recognised. However, she found the appellant's contradiction of his own evidence in relation to the contents of the purported leaflet sent from his village difficult, and this contradiction was material to her finding of want of credibility. She described the leaflet as a document which went to the very heart of his claim, namely that he was at risk for the reason of being a member of the Komala party and for the activities he maintains that he carried out in his village. She attached great weight to the fact that the leaflet made no mention of the finding of documents and leaflets in his house when it was searched, as he had originally claimed that it would before changing his testimony. She expressed doubts concerning his explanations as to why the leaflet would name him, especially as he had escaped.

16. There were a number of other negative findings of credibility in the decision. The Tribunal member had difficulty in accepting the appellant's evidence as to why, when it was known that there were informers in the village, he would take the risk of putting up posters when the majority of the people there did not read. She found it difficult to accept that he had been able to carry out this activity for one year without detection, given the presence of the informers. She took these particular facts into account, together with the discrepancies in his evidence relating to the contents of the leaflet. She also made findings in relation to the applicant's demeanour which clearly cannot be reviewed by this Court.

17. The document which alleges to be from Komala was described as:-

"not proof of anything other than that someone in the organisation, or a representative of Komala was asked to write a letter to certify that the appellant had been politically active against the Islamic regime of Iran. The person writing the letter had no personal knowledge of this. ....This was confirmed by the appellant who claims that his friend in the central committee of the party spoke with a representative of Komala for the purposes of having this letter written."

18. The Tribunal member also described the appellant's evidence in relation to the policies of the Communist party of Iran, which she found did not coincide with the organisation's policies as described in their website. All of these factors raised doubts in her mind over the appellant's alleged claim that he was connected with the party. Generally, she was not satisfied from the evidence before her that he was at risk if returned to his country of origin for the reasons he alleges. While she accepted that the applicant was, as a Kurd, subject to discrimination, she was not satisfied on the evidence disclosed that there was a danger of persecution for a Convention reason.

#### **Arguments on behalf of the applicant**

19. Counsel for the applicant argued that as the Tribunal member had attached so much credence to the leaflet, which was possibly a self serving document of uncertain reliability with no possibility of authentication, she should then have placed at least the same level of credence on the document purporting to come from Komala Abroad, which named the applicant, said that he was an activist and contained a verifiable fax number and address. Counsel for the applicant argued that the Tribunal member had rejected this document on a misinterpretation of the applicant's evidence. In support of this contention, he relied on the Refugee Legal Service ("the RLS") Law Agent's note of the appeal proceedings which recorded the applicant's response to the question how the Komala party in Sweden would know of his existence. This photocopy note, which was an exhibit to Ms. Breda Byrne's sworn affidavit, recorded that the applicant explained that the Komala authorities were aware of his existence because he *"reported to S. who in turn reported to senior members of central committee"*. The decision recites a quite different response which is referred to in paragraph 17 above and in the applicant's current solicitor's affidavit.

20. Mr. Brian Leahy BL on behalf of the Applicant argued that the Tribunal member had been unfair to the applicant who was an illiterate man of no education, in not making allowances for that disability when personally questioning him about the discrepancies in his answers relating to the contents of the leaflet. In these circumstances, it was unfair to reject his application on the basis of what he thought might be in the document.

21. He also argued that the applicant should have been warned that the Tribunal member intended to reject the evidential value of the letter from Sweden. He argued that the applicant should, at the very least, have been offered an opportunity to establish the provenance of the information contained in the letter from the writer. He was not given this opportunity and the letter was dismissed as being of no evidential value.

#### **Respondent's arguments**

22. In response, Mr. Anthony Moore BL, counsel for the Minister, argued that the applicant, at the appeal stage, has the burden of establishing what he asserts. He was aware that his membership of the Komala party was not accepted by the Refugee Commissioner and it was then incumbent on him at his appeal to seek to strengthen his claim to be such a member. Through the R.L.S. who represented him, he could or should have obtained some evidence to assist in establishing the authenticity of the Swedish letter. He pointed out that assessors of documents in asylum claims are rarely in a position to say whether a document is authentic, so generally the documents are considered in the round with the other evidence in an assessment of credibility. In this case, the applicant's explanations for some of the detail in the leaflet were at variance with other explanations provided, thus casting doubt on his credibility generally. The RAT member looked at all the evidence as a whole and found the evidence of the applicant not credible for many reasons which were detailed in the decision. Although the applicant now complains of unfairness in receiving no indication that the Swedish letter would be considered of no evidential value, he at no stage sought an adjournment to call evidence in support of the Swedish letter nor did the applicant seek an opportunity to establish how the Komala Abroad organisation knew of his membership of or activities of the party.

#### **Conclusions**

23. Firstly, it is necessary to reiterate that this judicial review process is not an appeal of the decision of the Tribunal member or a substitution of my views for those of that member who heard and observed the appellant who had availed of the opportunity to personally address the tribunal. A court engaged in judicial review hearings looks to see if there has been any abuse of power on the part of the decision maker or whether the process was flawed by fundamental error of fact or natural justice. A court cannot therefore easily disregard any credibility assessment made by a tribunal member or reverse findings made unless cogent identified substantial grounds are established sufficient for leave to be granted.

24. Having carefully reviewed the decision made and the arguments presented by the applicant and the State, it seems to me that there has been some glossing over of some of the findings and a concentration instead on a part of the decision which might, on an isolated basis, be vulnerable to attack. The decision should not be viewed in this way but rather as a whole. The same issue was very adequately dealt with by Peart J. in *T v. The Minister for Justice, Equality and Law Reform*, [2007] I.E.H.C. 287 where he stated that:

"It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon have been clearly misunderstood or mis-stated by the decision maker. The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion."

25. When viewing the decision in this way, it is clear that the core reason why the appeal failed is the finding that the applicant's rehearsal of the events leading to his asylum application in Ireland was simply not credible. The basic premise, from which all the credibility assessments and findings flow, is that the applicant was an illiterate member of the communist party in a village of 20 houses of mainly uneducated people but which included government supporters or informers. It is in this context that all assessments were made.

26. The applicant's case relied on the contents of what was presented as a typical poster informing villagers of Komala Party activity and distributed by Komala members in his village. The translation refers to the arrest of his mentor S., the recovery of party literature on S. and the applicant's own escape.

27. The decision indicates that while the Tribunal member had difficulty with the credibility of the fundamental premise, she nevertheless examined the contents of the leaflet against the applicant's explanations. In other words she approached the leaflet as an assessor viewing a *bona fide* document emanating from the Komala party and intended for clandestine distribution in a small village of persons of limited education. As the leaflet was presented to establish that A.Z. was forced to leave his country because of events described in the leaflet, she asked him about the contents and particularly why the leaflet provided so much detail about S. and so little about A.Z.. The explanations provided and the changes in the applicant's evidence cast doubt in her mind of his claim to be a victim of persecution as the only reference to A.Z. was that he was a recent member of the Komala and had escaped. There was no reference to the finding of any party documents in his house or on his person as had been detailed in S.'s case.

28. In relation to the claim that no allowance was made for the applicant's alleged illiteracy I observe that at no stage did the applicant say that his illiteracy placed him at a disadvantage or that he was relying on what others told him was contained in the documents. He gave fulsome explanations to the effect that leaflets generally did not provide details but rather provided general information. This response was considered to be at variance with the details provided relating to S.. The applicant's responses to the question of why he was named in the document were also found to be lacking in credibility. A review of the appeal process indicates that these are findings based on evidence, which the Tribunal member was quite entitled to make.

29. While it is unfortunate that there is nothing in the decision to indicate that the discrepancies in responses were weighed against the background of the applicant's claimed illiteracy or whether the Tribunal member believed the illiteracy claim at all, it is clear that she did not find his replies convincing. It may have been preferable if the decision had made some reference to whether this disability played any role in her assessment of credibility but the failure to refer to the asserted illiteracy is not significant when viewed against the reasons given for finding him not credible. The Tribunal member personally asked questions and observed the applicant's demeanour. Her assessment of his responses included a finding that "*he did not address the issue directly*" contributed to a negative finding that the applicant was not credible in the essence of his claim to be at risk of persecution for being an active member of the Komala party. She relied on the inconsistencies of the applicant's responses and on the inconsistencies in the leaflet itself.

30. The court has examined this document described as a typical Komala leaflet with care and notes that although not mentioned in the decision, the document does not have the appearance of a leaflet; it bears no logo and could not be described as written in language accessible to persons of limited education.

31. While Mr. Leahy on behalf of the applicant admits that the leaflet and photograph could be viewed as self-serving and not capable of authentication he argues that if his case rested on the findings made on these two documents, he would have no cause to complain. His case is grounded in the treatment afforded to the letter from Sweden from the organisation Komala Abroad. This letter has also been scrutinised by the Court. It was presented to add credence to the applicant's claim to be a member of the Komala Party of Iran. It was written after the negative report of the Refugee Applications Commissioner had been delivered and when it was clear that doubts had been raised as to the applicant's membership of the Komala party. It was the last document in a series of three documents produced at the appeal and which were not available to the Commission.

32. In the context of an appeal it is clear that the leaflet was presented to indicate the police/army search of the village and the finding of communist literature leading to the arrest of S. and the escape of the applicant; the photograph was to show that the applicant's uncle, who provided the financial means to escape, had been killed; and the letter was to establish that the applicant was a militant member of Komala and that his life was in danger and he should therefore be granted refugee status. It follows that when these documents were assembled for the appeal, the appellant was aware that the burden was on him to establish that he was indeed a refugee. The applicant should have been in a position to verify the source of the information contained in the letter from Komala Abroad. When he was questioned about the source of the information contained in the letter, it was open to him to seek an adjournment in order to provide such specific information to the Tribunal.

33. Although the applicant based his case on the unfairness of the process surrounding the treatment of this letter and the failure to give him an opportunity to authenticate the provenance and contents of the letter, the decision itself is not based either loosely or generally on this letter. The decision is based on all the cumulative evidence including the s. 13 report, set against the backdrop of the incongruity of the distribution of prohibited leaflets in a small village where the inhabitants were mainly illiterate and where known informers resided. The Tribunal member accepted that the letter was from Komala in Sweden but attached no evidential value to the contents. She did not deal with the letter as being from a doubtful provenance but rather that its contents were unreliable.

34. It is appropriate here to deal with the arguments made relating to any obligation on the part of the Tribunal member to warn the applicant that his appeal might fail on a particular point and to allow him to call further evidence. This in my view is to confuse the application process with the appeal process. The onus is on the applicant when appealing a recommendation not to declare him a refugee to make his case fully before the Tribunal. It is not a shared burden at this stage as outlined in paragraph 196 of UNHCR handbook which refers to the first stages of the refugee process. Paragraph 196 states:

"It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

The appeal process is determined by s. 11A (3) of the Refugee Act 1996, as inserted by s. 7 of the Immigration Act, 2003, which states that:

*"(3) Where an applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee."*

35. This very issue has already been dealt with on numerous occasions, not least by the Supreme Court in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135, which predates the change in the law, and by Peart J. in *J.B.R. v. Refugee Appeals Tribunal & Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 288, in July of 2007. The general consensus among academic writers is that at the appeal stage, the burden of proof shifts to the applicant. As Ursula Fraser notes, at p. 109 of Fraser and Harvey (eds.), *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (Dublin, 2003), that, before the Tribunal,

"it is for the asylum applicant to show that the Commissioner's recommendation was wrong and that he or she is entitled to refugee status."

Similarly, Ciara Smyth, in "Refugee Status Determination of Separated Children: International Developments and the Irish Response Part I—The Refugee Definition", (2005) I.J.F.L. 15, states that "*the burden of proof is placed entirely on the applicant at the appeal stage.*"

36. In view of these decisions and opinions, it was surprising that the Refugee Appeals Tribunal member referred to the shared burden in the UNHCR Handbook in her decision. I accept that the correct position is that which was argued by the respondent that the burden is on the appellant to establish to the Tribunal that he is a refugee and there is no obligation on the part of the Tribunal member to warn the applicant of any doubts she may have as to the evidential value of a document furnished, provided that the hearing is fair. It cannot be argued that the Tribunal member kept her doubts as to the contents of the "Swedish letter" to herself as the applicant was questioned by her about the source of the information contained in the letter. The Tribunal member has a duty to approach the facts with an open mind and to raise queries on unresolved facts or on issues which are unclear. Thereafter she applies wisdom, experience and common sense in assessing the evidence presented within the confines of a fair hearing.

37. The Tribunal member in this case did not approach the Swedish letter on the basis of a *purported* letter or an *alleged* letter but rather on the basis that the contents were written by someone in the Komala organisation in Sweden who did not know the applicant and who was asked to furnish the information. She attached no weight to the contents of the letter and made her decision on the basis of other evidence presented. While it is a little odd that there was no reference in the decision to the s. 11B criteria or how an illiterate villager was able to find his way from Iran to Ireland, it seems to me that there was enough evidence for the Tribunal member to make her assessment of credibility in accordance with legal principles and fair procedures. No substantial grounds have been made out to take this application further and leave is refused.