

THE HIGH COURT
JUDICIAL REVIEW

[2008 No. 1063 J.R.]

BETWEEN

B. A. O. [Iraq]

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 11th day of July 2012

1. By order of the Court (Hogan J.) of the 17th January, 2012, the applicant was granted leave to apply for judicial review of the decision of the Refugee Appeals Tribunal upon his application for asylum dated the 22nd July, 2008, including an order of *certiorari* quashing that decision. Leave was granted upon two grounds as follows:

(a) In finding that the death of the applicant's father could not be verified as having occurred in a targeted attack, the Tribunal erred in law in failing to have any or any adequate regard to the fact that the applicant's family were in hiding and were seeking to escape from potential revenge attack; and country of origin information containing accounts of the targeting of Ba'athists in Iraq following the removal from power of the Ba'athist administration; and the Tribunal thereby acted *ultra vires* and unreasonably;

(b) In circumstances where the Tribunal did not make any adverse credibility findings on the applicant's claim, it erred in law in failing to give the applicant the benefit of the doubt, and thereby acted *ultra vires* and unreasonably.

2. The applicant is a national of Iraq and a Kurd. He claimed to have been obliged to flee that country in the autumn of 2007 following the killing of his parents when a grenade was thrown at their car as they returned from a market. Central to the claim expressed by the applicant is the proposition that this was a targeted attack upon his father and a revenge killing because the father had been a senior member of the Ba'ath party during the Saddam Hussein regime.

3. He claimed that following the killing of the parents he and his siblings went to live with an aunt who subsequently arranged with an agent for the applicant to be taken via Syria to another safe country. He then was taken through Turkey where he was placed in the back of a lorry and driven for a long time. At some point he was transferred into another lorry and when he was finally let out, he found he was in Dover and he was arrested by the British authorities. He was asked at a police station to complete certain documentation which he did not at the time understand, but now accepts was an asylum application.

4. Shortly afterwards he met an Arab man who helped him leave the United Kingdom by travelling first to Belfast and then to Dublin. He claimed asylum here on the 6th December, 2007.

5. Although the applicant had made a previous application for asylum in the United Kingdom, the respondent Minister accepted to examine the application made in this jurisdiction because it was considered that the applicant was at the time 17 years of age and therefore a minor.

6. The essential basis for the claim to be a refugee was that the applicant, if returned to Iraq, would face persecution for imputed political opinion in that, since the fall of the Saddam Hussein regime in 2003, former members of the Ba'athist party and their families have been the subject of widespread attacks and revenge killings. As the son of an important Ba'athist party official who had already been killed in 2007, he claimed to fear that he too would be at risk of persecution.

7. In a report under s. 13 of the Refugee Act, 1996, dated the 25th April, 2008, a negative recommendation was made on the application. The Authorised Officers cited information from the Immigration and Refugee Board of Canada on violence and acts of revenge by the general population against the officials and families of the Hussein regime, but concluded that the information "did not indicate that family members of former Ba'ath party members were, or would be targeted". They noted that the applicant had accepted that he had never personally been harmed in Iraq, although he said that "this was because he stayed in most of the time". They also noted that despite the fact that the father had stated that he was under surveillance, there had been no attack on the family house and this indicated that if people were intent upon taking revenge on the applicant's father, they have in fact done so and "there is no evidence to indicate that they would have any further interest in the remaining members of the applicant's father's family". The report contained no negative findings as regards the credibility of the personal history which the applicant had given and observed: "Given that that applicant claims his father was a member of the Ba'ath party, the former ruling political party in Iraq, it is considered that the applicant's claim does have a nexus to the Convention on the grounds of political opinion". The report also contained a finding for the purposes of s. 13(6)(d) of the Act of 1996, based on the prior application for asylum in the United Kingdom, with the result that the appeal which was then initiated was determined by the Tribunal without an oral hearing.

8. Notice of appeal to the Tribunal was lodged on the 15th May, 2008, accompanied by three documents by way of country of origin information. The s. 13 Report as put before the Tribunal was also accompanied by an extract from a US State Department "Country Report on Human Rights Practices in Iraq" dated March 2008 and a "Country of Origin Research" document of the Immigration and Refugee Board of Canada dated the 15th January, 2004.

9. By a letter dated the 22nd May, 2008, the Refugee Legal Service on behalf of the applicant forwarded to the Tribunal another copy of the above Report of the 15th January, 2004, together with an IRIN Report "Iraq: Families in south displaced as former Ba'athists

targeted" dated the 30th July, 2007.

10. The Tribunal Report dated the 22nd July, 2008, follows the usual format of the appeal decisions in which the grounds for appeal are first summarised and the essential content of the applicant's claim is then set out. In part four of the decision, headed "Submissions" the Tribunal member records that the submissions have referred to three particular documents namely, *Refugees Magazine* issue 146; a BBC news report and a United Press article. These are the three items that were attached to the notice of appeal.

11. As already indicated above, the essential feature of the analysis of the claim made by the Tribunal member which is the focus of the first of the grounds on which leave was granted is the consideration given to the grenade attack on the car in which the applicant's parents were killed. The Tribunal member says:-

"There is no evidence that a hand grenade attack that killed both his parents in a public place was anything other than a random attack. While I appreciate that the applicant's heightened fear and indeed his family's suspicions, may have led them to the conclusion that his father was targeted, I find it somewhat surprising that if people really wanted to target the applicant's father, given that he was allegedly under surveillance, that they would not have done so, or have had ample opportunity of doing so between 2003 and 2007, a considerable period of time.... To clarify, there is no objective evidence that the applicant's father was killed on account of his political opinion, the applicant merely speculates that what would appear to have been a random attack, was in fact a targeted attack."

12. As indicated in ground (a), this assessment is challenged upon the basis that it fails to give due regard to other aspects of the applicant's account and also that the Tribunal member has failed to give proper weight and consideration to country of origin information which, it is claimed, amply demonstrates the plausibility of the attack having been targeted at his father. In particular, at the hearing, counsel for the applicant pointed out that the Tribunal member records the reliance placed upon the three particulars documents listed in part four of the decision but makes no mention of either of the two documents submitted with the letter of the 22nd May, 2008, by the Refugee Legal Service. Counsel suggested that this raised a possible inference that the Tribunal member might not have consulted these two sources of information or had them before her. It must be pointed out, however, that if any such inference was material, it would apply only to the IRIN document as the second document enclosed with that letter was already attached to the s. 13 Report which was clearly before the Tribunal member and considered by her. Essentially, therefore, the applicant's argument is that this conclusion reached by the Tribunal member would have been impossible or irrational had the Tribunal member given due consideration to all of the country of origin information relating to the persistent campaign of revenge attacks in Iraq from 2003 onwards targeted at former Ba'athist party members and their families.

13. In considering these arguments it is important, once again, to repeat that it is not the function of the High Court in judicial review to decide whether the Tribunal has made a correct decision, whether a better decision might have been made or whether the decision is justified on the merits of the claim (*McCarron v Kearney* [2008] I.E.H.C. 195). The Court is concerned only with the legality of the decision and the lawfulness of the process by which it has been reached. Has the appeal been decided in accordance with the requirements of the relevant legislation namely the Act of 1996 and the European Communities (Eligibility for Protection) Regulations 2006? Have the material conclusions upon which the outcome of the appeal rests been arrived at taking account of all of the relevant considerations and uninfluenced by irrelevant matters? (See *State (Melbarien Enterprises Ltd) v Revenue Commissioners* [1985] I.R. 706 and *State (McMahon) v Minister for Education* (Unreported, High Court, 21st December 1985). Are the material conclusions untainted by any irrationality or unreasonableness having regard to the facts found or accepted and the evidence and information before the Tribunal member? (See *The State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v An Bard Pleanála* [1993] 1 I.R. 39).

14. When the contested decision in the present case is approached on that basis, it is important to bear in mind that the immediate question before the Tribunal member was not the character of the fatal attack on the car as random or targeted. The essential question for the Tribunal member was whether, in 2008, there was good reason to conclude that this applicant, then eighteen years old, would face a real risk of persecution for the reasons he claimed if returned to Iraq having regard to the evidence he gave and the relevant country of origin information before her?

15. In the judgment of the Court the criticism or complaint of the Tribunal member's analysis embodied in ground (a) is based upon a misreading of part six of the Tribunal decision and on a misplaced significance attributed to the character of the grenade attack on the car. It is important, in the view of the Court, to have regard to the manner in which the Tribunal member approaches the argument made in the appeal on behalf of the applicant in this regard.

16. The Tribunal member accepts that the applicant's parents had been killed in a grenade attack on their car as they returned from a market. She then notes, however, that the Ba'ath regime fell in early 2003 and that it was not until 2007 when this harm befell them. She points out that since 2003, the family had moved to a different neighbourhood and had not experienced any problems, although, it was said, the father had been under surveillance. She acknowledges that they claim to have stayed indoors most of the time but notes that they did not appear to have suffered any harassment or persecution. She effectively raises a query as to whether if the father had been under surveillance in this way and those determined to eliminate Ba'athist officials had been determined to do so, is it not surprising that the event of an attack would not have occurred earlier? The Court does not read the particular passage as containing an explicit finding that the attack was not a targeted attack. Rather, the Tribunal member had before her "ample evidence of ongoing strife and insecurity in the country, daily bombings, grenade attacks and shootings" with the result that she "simply cannot conclude that an attack on his parents was designed to kill them specifically". She says "without any independent objective evidence I would be engaging in speculation".

17. In the view of the Court, the approach of the Tribunal member could usefully be paraphrased as follows: "The applicant's parents were killed in a hand grenade attack on their car. Available information shows that random terrorist incidents of the kind are extremely common in Iraq. Without some independent evidence suggesting that it was indeed a targeted and not a random attack, I have no basis for concluding that the purpose of the attack in question was to kill the applicant's father on account of his political opinion namely, his official position in the Ba'athist party". In the judgment of the Court, it cannot be said that this was an assessment which the Tribunal member was precluded from making on the basis of the evidence and information before her. She points out that this attack was the only incident experienced by the family in the four years since the Ba'athist regime had been toppled. Furthermore, other members of the family appeared to have continued living in Mosul without experiencing difficulties. Accordingly, she does not find as a fact that the attack was not targeted. She merely reasons that given the evidence of the prevalence of incidents of random terrorism and the absence of any previous attack or threat to the family she would not be entitled, without some other element or evidence pointing towards the targeting of the father, to conclude that the applicant's family had been the subject of the pattern of revenge upon the former regime.

18. Quite independently, however, of that reading of the assessment of the attack on the applicant's parents, it is clear to the Court that at the end of the analysis in part six of the decision the Tribunal member directly and correctly addresses the central issue before her on the appeal, namely whether, in 2008, the applicant himself, on a forward looking basis, faced a genuine risk of persecution if returned to Iraq as the son of a former Ba'athist official killed in 2007? She concluded:-

"Put simply, the evidence produced by the applicant does not satisfy the requisite standard of proof, low though it is, to show that there is a reasonable likelihood of persecution should he be returned to Iraq. The analysis is a forward looking one, while I accept there may be other grounds upon which this applicant should not be returned to Iraq, given his young age, that is not a decision for me to take. I am confined to considering whether the applicant comes within the refugee definition, I find that he does not."

19. There remains the argument advanced on behalf of the applicant that this conclusion as to the absence of forward looking risk to the applicant as the returning son of a former member of the Ba'athist regime is contradicted by the available country of origin information and could not rationally have been reached if the Tribunal member had properly appraised the documentation relevant to reports of revenge attacks on ex-members of the Ba'ath party and their families.

20. In the light of this submission the Court has looked in detail at the entirety of the documentation in question available to the Tribunal member and particularly at the two items submitted with the letter of the 22nd May, 2008, referred to above.

21. There can be no doubt that the overall effect of the information in question is to paint a picture of widespread violence throughout Iraq instigated and perpetrated by a diversity of militant groups and particularly of attacks and counter attacks between Shia and Sunni gangs or death squads. There is also evidence of extreme difficulty encountered not only by Iraqi security forces but also by the US and British occupying forces to control or contain such violence.

22. The Canadian research document referred to above, collates information from a wide variety of news sources in 2003 and 2004 on the subject of acts of revenge by the general population against officials and families of the Ba'athist regime. While the news reports do refer to incidents where mobs attacked the houses of former regime officials and there are undoubtedly records in 2003 and 2004 of some individuals including family members being killed alongside the Ba'athist officials targeted in the attacks, the overall thrust of the news information thus collected appears to be that the attacks were primarily directed at recognised party officials and especially those at whose hands members of the population had suffered torture, ill treatment or murder. The quotations include for example: "The killings are targeting anyone from the previous regime and not only senior figures connected with ousted leader Saddam Hussein"; and "Some of those who have been slain by vigilantes were low level bureaucrats".

23. Nevertheless, the recorded incidents in which family members of party officials have died appear to be the exception rather than a deliberate part of the pattern of revenge attacks. For example, in the IRIN report, upon which considerable reliance is placed, the emphasis is upon the experiences of widows and children of ex members of the Ba'ath party who have suffered particularly where the members in question were at a very low level in the organisation and had invariably joined because they had no choice in order to obtain employment.

24. Accordingly, the Court is not satisfied that a case has been made out that the totality of the information available to the Tribunal constituted a compelling demonstration that family members, as such, had been targeted and, more importantly, were still being targeted in 2007 -2008. Thus, it is not irrational for the Tribunal member to have reached the conclusion that, even if it was accepted that the applicant's father had been a Ba'athist party official and had been killed for that reason, the applicant would face a real risk of persecution on that basis if returned to Iraq.

25. It follows that the Court could not conclude that ground (b) has been made out either. The reference to the "benefit of the doubt" which had not been given to the applicant is, the Court understands from para. 13 of the judgment of Hogan J. of the 11th January, 2012, a reference to the doubt as to whether the grenade attack was targeted or random. As the Court has endeavoured to explain above, that issue does not appear to be essential to the validity of the Tribunal decision. As Hogan J. acknowledged in that paragraph, the reasons for the attack will probably never be known. Thus, its characterisation as targeted or random is not a question of believing or disbelieving the applicant. The real issue is, given that his father had been killed and may have killed because he was a member of the Ba'athist party up to 2003, does the applicant face a real risk of persecution if returned to Iraq as the son of such a deceased official? For the reasons given above, the Court does not consider that the Tribunal member erred in confirming the negative recommendation of the Commissioner and rejecting the appeal.

26. This application for judicial review must therefore be refused.