

THE HIGH COURT
JUDICIAL REVIEW

2007 1166 JR

BETWEEN**N. A-U. AND T. A.****APPLICANTS****AND****THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENTS****JUDGMENT of Mr. Justice Cooke delivered the 4th day of February, 2010.**

1. By order of Clark J. of 23rd June, 2009, the applicants were granted leave to bring the present application for judicial review seeking, primarily, an order of *certiorari* to quash two decisions of the Refugee Appeals Tribunal (R.A.T.) of 27th and 26th July, 2007, which had refused their respective appeals against two reports of the Refugee Applications Commissioner (R.A.C.) under section 13 of the Refugee Act 1996 recommending that the applicants be not declared to be refugees.

2. The circumstances out of which the present application arises, including the reasons for the rejection of the applicant's claims for asylum, can be summarised as follows.

3. The applicants are husband and wife; they come from Pakistan and have two children. They are members of the Ahmadi faith. The first named applicant had worked since 1990 as a manager in a medical hall owned by his father-in-law in Gujrat. His wife was a science teacher in a secondary school. They say that since 1984 at least, members of their branch of the Islamic faith have been targeted for repression in Pakistan. Since that year Pakistan has imposed legal restraints on the Ahmadi faith and aspects of its practice have been criminalised. In particular blasphemy offences directed specifically at members of the Ahmadi faith were introduced into the Pakistan penal code.

4. The "Khatum e Nabuwat", ("K.E.N.") a militant Islamist group has waged jihad against the Ahmadi faithful. The second named applicant had become friendly with a fellow teacher who, with her husband, converted to the Ahmadi faith. When this became known the applicants were singled out for attack by orthodox Muslims who threw stones at them and warned them to stop preaching. As a result the applicants claimed to have been subjected to persecution by reason of their religion and have been forced to flee Pakistan.

5. In August, 2006, a form of police complaint or information was apparently laid against them leading to the issue of a "First Information Report" (F.I.R.) charging them with blasphemy offences under the penal code. A colleague and fellow preacher, Munawar, is claimed to have been killed leading them to fear it was no longer safe for them to stay in Gujrat. A friend of the first-named applicant's father-in-law arranged for an agent to organise their travel from Pakistan to Ireland via Muscat and Bahrain. They arrived in the State in October 2006 and made separate applications for asylum on 13th October, 2006. The applications for asylum on behalf of their two sons were included in that of the second named applicant.

6. In the case of the second named applicant a section 13 report was made by the Commissioner on 4th December, 2006 and in the case of the first named applicant the same authorised officer made a report on 28th January, 2007. On appeal separate decisions by the same Tribunal member were given in the case of the first named applicant on 27th July, 2007 and in that of the second named applicant on 26th July, 2007, (the "Contested Decisions").

7. In each of the Contested Decisions the background to the asylum applications is set out in broadly similar terms. In section 6 of each decision under the heading "Analysis of the Claim", after summarising in each case the events claimed to constitute the basis for the fear of persecution and which provoked the flight from Pakistan, the Tribunal member identifies a series of discrepancies which lead him to the conclusion that each claim is not credible.

8. In the case of the first named applicant the analysis rejects the evidence given for a series of reasons as follows:

- He could give no credible explanation for not relocating to Rabwah a city with a 92% Ahmadi population at all levels of authority including in the police force and where protection should have been available to him;
- There was no evidence that the man, Munawar who was claimed to have been shot and to be referred to in the newspaper had been a colleague of the applicants';
- Country of origin information suggests that while there is some discrimination there is no institutionalised persecution of members of the Ahmadi sect in Pakistan;
- He had not provided a full and true account of his travel to Ireland including his claim to have passed through security checks on a false passport without being queried;
- He had not substantiated reasonably his claim that Ireland was the first safe country in which he might have claimed asylum.

9. In the case of the second named applicant the following points were identified:

- She claimed her house was raided by police but only on occasions when she was not present;
- She claimed she was forced to flee but her father is still living and working in Gujrat;
- She stayed in Karachi for five weeks but claimed it was unsafe to remain although it is a city with a population of 9 million. It is over 1,000 kilometres from Gujrat;
- She passed through Karachi Airport without difficulty although she claims the authorities were keen to arrest her and her husband;
- She had not provided a full and true account of her travel to Ireland and it was incredible that she could pass through four international airports in the current security climate without presenting her own documents;
- Even if the account was true, Ireland is not the first safe country in which she might have sought refuge if she was genuinely fleeing from persecution.

10. It is well settled law that decisions of the RAT on appeal should be read as a whole and the Court should not succumb to the temptation to dissect them in order to focus upon particular incidental errors or ambiguities. If the overall conclusion reached by the decision maker is sound, reasonable and supported by the material available at the conclusion of the appeal, the Court should be slow to interfere by way of judicial review particularly where the conclusion turns entirely or predominantly upon matters of credibility. As the Court has frequently emphasised, the assessment of credibility is the function of the administrative decision maker; the High Court is concerned only to ensure that the process through which the decision has been reached is free of legal defect. It will not substitute its own assessment of credibility.

11. In these two cases the conclusion arrived at by the Tribunal member upon which the rejection of the appeals was based was largely, but not entirely, dependent upon the lack of credibility. Although an important part of the conclusion is based on the absence of proof that protection was unavailable to the applicants in Pakistan, that too is couched in terms of lack of credibility of the excuse given for not relocating to Rabwah.

12. It is to be noted that in each of the Contested Decisions the Tribunal member invoked explicitly two of the statutory considerations which are required to be taken into account when assessing credibility by virtue of ss.(b) & (c) of s. 11B of the 1996 Act. He found expressly that the applicants had failed to provide a full and true explanation of how they travelled to and arrived in the State (ss.(c) and a reasonable explanation to substantiate their claim that the State was the first safe country in which they had arrived since departing from Pakistan (ss.(b)). These were considerations which the Tribunal member was obliged to take into account under s. 11B and there is no doubt that he was justified in doing so in the circumstances of the applicant's claim. Although they claimed that the police were looking for them because of the blasphemy charges brought against them in the F.I.R., they were able to pass through Karachi Airport on false passports and then transit through Muscat and Bahrain and pass through Dublin Airport without ever having their passports in their possession. The applicants are educated people holding, respectively, managerial and professional positions in Pakistan. They claimed that they had handed over a sum of money and four passport photos to the agent and that they then travelled with him to Ireland without ever handling their own passports, tickets or other travel documents. It could not, in the Court's judgment, be considered in any sense unreasonable or illogical for the Tribunal member to conclude, having regard to the circumstances that have prevailed in matters of public security in international airports since September, 2001, that this explanation could not be believed. It is to be noted that in the analysis in the decision in the case of the first named applicant, the Tribunal member records that the travel from Pakistan arranged by the father-in-law was arranged with Ireland in particular as the destination, because the family had relatives here.

13. Section 11 B of the 1996 Act does not prescribe any specific consequence where a finding is made as to lack of credibility by reference to one or more of the matters required to be taken into consideration. It does not stipulate that the claim must be rejected as unfounded for that reason alone. Clearly, there may always be other aspects of a claim which lend credibility to the account given notwithstanding the fact that one or more of the statutory considerations is applicable. Nevertheless where one or more of the statutory credibility considerations is found to apply and discrepancies or implausibilities are also identified in the facts and events given in the personal history relied upon as the basis for the claim, the Tribunal member is clearly entitled and may even be obliged, to find that the claim is unfounded for lack of credibility. The corollary, however, is that if the findings in relation to personal history and events are shown to be vitiated by material errors of fact or misunderstandings of the evidence, the applicability of the statutory considerations may not be sufficient to sustain the decision when taken as a whole.

14. In the present case the central issue raised by the application is whether in the light of the grounds in respect of which leave has been granted, the particular mistakes, discrepancies or flaws alleged against the Contested Decisions are such as require the Court to intervene to quash the decisions as unsound notwithstanding the undoubted entitlement of the Tribunal member to make the findings by reference to ss. 11B (b) and (c).

15. It is fair to say that while, in each case, the language of the Decision indicates some scepticism on the part of the Tribunal member as to the reality of the events arising out of the conversion of the second named applicant's friend and her husband; including the stone-throwing and the raids on the house, he does not make any specific negative finding in respect of their membership of the Ahmadi faith or their proselytising activities and their particular family circumstances in Gujrat. The only specific finding is that relating to the claim in respect of the colleague Munawar said to have been killed. In effect, apart from the reliance on the two section 11B considerations, the principal finding upon which the decisions turn is that of the availability of national protection to them had they moved to Rabwah and the apparent lack of credibility in the explanation they gave for not having done so. In the case of the first named applicant in particular, a major part of the Section 6 Analysis is devoted to the question of the availability of protection to the family in Rabwah. According to the decision in that case, when it was put to him that the family would have been safe in that predominantly Ahmadi city, "he gave an unconvincing answer by saying those persecuting him knew they could move to Rabwah because that is their main city and that they would go after them". The Tribunal member states:

"The applicant has not demonstrated that there is an absence of protection available to himself and his family within Pakistan, in particular in Rabwah. It should also be noted that his father-in-law continues to live and operate his Medical Hall within Gujrat. Rabwah is the headquarters of the Ahmadi movement in Pakistan and is made up of 95% Ahmadis."

Accordingly, the grounds now relied upon and the defects alleged against these decisions must be assessed upon the basis that the Tribunal decisions rest predominantly upon the findings of lack of credibility and the on proposition that international protection is not needed in these cases because it would have been open to the family to relocate to Rabwah.

16. The essential flaws identified in the grounds for which leave was granted can be summarised as follows:

Grounds A. & B. A failure to assess "the core issue" of the claim and to comply with Regulation 5 (1) (a) of the European Communities (Eligibility for Protection) Regulations 2006 by not taking account of the blasphemy charges brought against the applicants and the penalties and consequences for them if they are prosecuted on those charges;

D. Failing to give appropriate weight to the FIR because it was a photocopy the contents of which could not be verified although the Tribunal had been informed that the original is always retained by the police;

E. The conclusion that there was no objective support for the assertion that Ahmadiis were subjected to systemic persecution in Pakistan was perverse and irrational having regard to the extensive country or origin information available to the Tribunal;

F. A failure to attach any weight to country of origin information to the effect that Pakistan state maintains a legal system which is an "effective delivery of persecution" rather than one which takes any steps to prevent it;

G. Selective reliance upon one particular report to the effect that there is no institutionalised persecution of the Ahmadi in Pakistan when the full text of the report does not support that proposition;

H. The conclusion that relocation to Rabwah was available was made in breach of the applicant's right to fair procedures in that the U.K. Home Office Guidance Note on Pakistan, 2006 and a report of the Parliamentary Human Rights group mission to Pakistan (January, 2007) state that Rabwah is not a safe haven;

I A failure to accept as reasonable the applicant's explanation as to why relocation to Rabwah was not possible;

J. A failure to have regard to evidence in respect of past persecution in the form of the incident in 2006 when the first named applicant and a fellow preacher were attacked and badly beaten;

K. Having regard to the evidence the finding that the second named applicant did not engage in preaching the Ahmadi religion was unreasonable or irrational;

L. The finding in relation to the failure to claim asylum in Muskat or Bahrain was unreasonable in that it disregarded that explanation that those were Muslim countries with intolerant views of the Ahmadi faith.

17. While these are the grounds formally pleaded and indeed addressed in the written legal submissions, in oral argument the focus turned to a series of alleged errors on the part of the Tribunal member listed in the applicants' two grounding affidavits. Thus at paragraph 27 of his grounding affidavit, the first named applicant identifies seven specific mistakes of fact or errors of understanding of the evidence alleged to have been made by the Tribunal member. Some of these had their origin in the s. 11 interview and the s. 13 report and were already identified and corrected in the notice of appeal. Thus, the argument is made that the Tribunal member never really addressed the grounds raised in the appeal and accordingly must never have given real consideration to the applicants' "core case". Some of the seven matters thus identified are probably not such as would materially undermine the decision when viewed as a whole because they may well be explained as differences between what the applicant believed he was saying in evidence and what the Tribunal member took from it. For example, that may explain the complaint made as to the reason why the K.E.N. opened the local office: whether the purpose was to stop conversions or to stop the applicants from converting people.

18. Three particular mistakes, however, are potentially more significant. In paragraph 27 at sub-paragraph (iii) an observation of the Tribunal member in the decision is quoted:

"It should be noted that his father-in-law continues to live and operate his medical hall in Gujrat".

The applicant points out that this is wrong and that it is a repetition of part of paragraph 4.7 in the s. 13 report where the following conclusion is given:

"The applicant has not demonstrated that there is an absence of protection available to himself and his wife within Pakistan, in particular in Rabwah. It should also be noted that his father-in-law continues to live and operate his medical hall within Gujrat".

19. This conclusion was expressly contested under the heading of ground 5 in the notice of appeal (page 12) as follows:

"As stated above, the applicant's father-in-law has had to relocate near Lahore due to the persistent threats he and his family had been receiving since the departure of the applicant and his wife to Ireland".

20. This error is thus of material significance because the mistaken fact was relied upon in the s. 13 report for the conclusion that there was no absence of protection for the applicant and his wife in Pakistan and the mistake is repeated verbatim in support of the same crucial conclusion in the Section 6 Analysis of the Tribunal decision.

21. The second relevant mistake identified is that at sub-paragraph (iv) where the observation of the Tribunal member is quoted:

"He was asked where his father-in-law lived and replied Lahore which is about ten minutes from where the applicant lives".

In this case the evidence includes a rough hand-written note taken of the evidence at the appeal hearing which records in a somewhat disjuncted form the relevant exchange in the cross-examination of the applicant by the presiding officer as follows:-

"P.O.: (Where does your)* father-in-law live?

Answer: Now resides (in*) Lahore.

P.O.: Then?

Answer: Gujrat.

P.O.: How far away?

Answer: Ten minutes walking."

(*Inserted to convey sense.)

The applicant complains:

"Lahore is two hours away from Gujrat. I stated to the Tribunal that my father-in-law had to relocate to a village called Kamoke near Lahore, but prior to that they all lived in Gujrat and that when in Gujrat I lived ten minutes away from my father-in-law".

22. The potential significance of this lies in the possibility that, in conjunction with the first mistake mentioned above, the Tribunal member based his assessment upon a mistaken understanding of the exact circumstances of the family in relation to the continued operation by the father-in-law of the medical hall. Thus the possibility is raised that the Tribunal member was under the impression that there was some contradiction between the applicant's claim that he lived ten minutes away from the father-in-law in Lahore, on the one hand, and the proposition that the father-in-law was still in Gujrat running the medical hall, on the other.

23. The third alleged mistake is directed at the statement in the decision quoted in sub-paragraph (vii) of the affidavit at paragraph 27:

"He claims that it was well known that they had relatives in Ireland and that his father-in-law arranged for them to travel here".

24. Again, this statement appears to have its origin in paragraph 4.1 of the s. 13 report which states:-

"He states that their home was raided on three occasions while they were in Sargodha. He then claims that it was well known that they had relatives in Ireland and that his father-in-law arranged for them to travel to Ireland and that they came to Ireland and claimed asylum on 13th November, 2006."

25. This in turn appears to derive from a passage in the s. 11 interview which appears in the translation as follows:-

"After that my father-in-law said they could catch me any time. My home was raided three times, and in September, they raided was the third Gujrat, everyone in Gujrat knew he had relatives in Sargodha. My father-in-law said that they could come to Sargodha that is why he arranged with the help of his friend, an agent to take us to Ireland."

26. (The note seems incomplete but appears to have the sense that the K.E.N. raided for a third time in Gujrat as opposed to an earlier assault which is described as being in the countryside.)

27. This matter was also addressed in the notice of appeal under Ground 5 where the sentence in paragraph 4.1 of the report is directly refuted as follows:

"The applicant does not have any relatives in Ireland and never stated that he had relatives in Ireland".

28. The possible significance of this error is that it raises the implication that the mistaken understanding has influenced the finding in the Section 6 Analysis of the decision to the effect that there was no reasonable explanation as to why Ireland was the first safe country in which the applicants could claim asylum. In other words, the Tribunal member considered that Ireland was chosen as a destination in which to claim asylum because of the presence of relatives here, thus undermining the credibility of the claim that they had genuinely fled Pakistan to seek refuge from persecution abroad.

29. As already stated, the Court should be reluctant to accede to arguments based on a dissection of a Tribunal decision by reference to particular observations or even findings alleged to be mistaken. In this case, however, the above matters do appear to be demonstrated to be factually incorrect. Because they suggest that the s. 13 report has been affirmed by the Tribunal member without regard to the actual contents of the notice of appeal, they raise the implication that a material part of the case made on appeal has not been addressed and dealt with by the Tribunal. Furthermore, as explained above, the three errors are such that they may have had a combined effect in influencing the appraisal of what the Tribunal member calls the applicants' "credulity". Exceptionally, therefore, the Court considers that this is a case in which the finding of lack of credibility has been shown to be sufficiently unsound to warrant the appeal being re-heard.

30. The separate decision of 26th July, 2007, on the second named applicant's appeal summarises in broadly similar terms the background to the couple's departure from Pakistan as in the husband's case with particular reference to their preaching activities, the conversion of the second named applicant's friend and the consequent harassment by the K.E.N. and the police raids.

31. In the Section 6 Analysis the Tribunal member again lays particular stress on the two statutory considerations already described above namely, the lack of credibility in the account of how they travelled from Karachi to Dublin by air with stopovers in Muskat and Bahrain and the failure to seek asylum in any other country.

32. The Tribunal member describes the genesis of this applicant's claim as being in a role of teaching about the Ahmadi religion and being targeted by the authorities and the adherents of the K.E.N. as a result. In particular, the Tribunal member finds that a number of these matters which were the subject of questions to her both in the s. 11 interview and at the appeal hearing cast serious doubts on the plausibility of the application.

(A) The Tribunal member refers to her earlier description of talking to others about her faith when she said: "whenever somebody asks us we tell them about our beliefs" and finds this "contradicted somewhat" at the oral hearing when she said that being an Ahmadi "means you have to preach about it".

(B) The Tribunal member considers that if the applicant did not force others into conversion but only told them about her beliefs this would not indicate that she was engaged in preaching and observes that "given the nature of the society in Pakistan it is somewhat foolhardy to engage in preaching to the non-converted and expect no fall-out from such actions".

(C) He then finds that "it is not plausible to claim religious persecution when members of a community do not subscribe to

the faith that is preached in them”.

(D) The Tribunal member appears to doubt the reality of the threats and attacks described by the applicants when he says that the applicant does not appear to have come to any harm in Pakistan and that although her house was claimed to be raided on three occasions she was not present at the first raid and by the time of the second and third she had left Gujrat. He also notes that the president of the Ahmadi’s Women’s Wing to which the second named applicant belonged, “is still living in Gujrat the applicant’s home town”.

33. The central thrust of the finding of lack of credibility in this particular decision, therefore, is directed at the reality of the claim to have suffered the persecution described in the stone-throwing, threats and police raids. In particular, the Tribunal member appears to doubt whether any of these events took place, as described, because others in a similar position in the Ahmadi faith such as the president of the Women’s Wing continue to live there. Significantly, however, in this regard the mistake of fact already identified in the husband’s decision and contradicted in the notice of appeal is again, invoked as an element in the finding when the Tribunal member says:

“Furthermore according to her evidence, her father who is also Ahmadi is still living and practising his trade in Gujrat.”

34. Although the other two factual errors mentioned above are not reiterated in this decision it is clear that the Tribunal member was effectively dealing with the two appeals together and drawing upon the evidence of both husband and wife in each case. Thus, in this decision where the Tribunal member appears to be expressing doubts as to whether the second named applicant did in fact engage in preaching to non-Ahmadis, he says: “Her husband, who also claims status, told the Tribunal that he was stopped one day whilst going up the country to preach.” The exact significance of this fact is not indicated by the Tribunal member in the decision and is not directly relied upon in the husband’s decision either, but the event in question is one in which the husband claimed to have been stopped from preaching because he was badly beaten by members of the K.E.N.

35. The Court also notes that parts of the Section 6 Analysis in this decision appear to correspond very closely if not verbatim with the text of the s. 13 report in this case. Thus the paragraph which refers to the teaching of the religious syllabus to children and to the president of the Women’s Wing still living in Gujrat, reflects almost word for word a paragraph in section 5.5 of the report. A Tribunal member is, of course, perfectly entitled to affirm in its entirety a s. 13 report and there may well be cases in which there is little more that can be said, even when the appeal has taken the form of an oral hearing. Nevertheless, where as in this case, specific errors of fact have been identified and contradicted in a notice of appeal and one or more of those facts is relied upon in support of conclusions as to lack of credibility reached in the appeal decision, an implication arises that the Tribunal member has relied upon the content of the s. 13 report without adequate regard to the challenges that were made to it in the notice of appeal. This heightens the risk that the “core claim” has not in fact been considered with the care and deliberation which the law requires and the asylum seeker is entitled to expect.

36. An order of *certiorari* will, accordingly, issue to quash the Tribunal decision of 26th July, 2007, in the case of the second named applicant as well. Because the quashing of the two Contested Decisions will involve a full re-hearing of the appeals against each of the s.13 reports (presumably before a different Tribunal member,) and because that will involve the formation of a fresh view upon the credibility and well-founded basis of the claim to a fear of persecution, it is unnecessary and inappropriate for this Court to make any ruling on the other grounds and arguments that have been raised in this case at this stage. In particular, the Court will not make any comment in relation to the grounds directed at the role played in the previous appeal hearings and Tribunal decisions by country of origin information. In view of the lapse of time, it will be open to the applicants to introduce fresh and up-to-date-country of origin information at the re-opened appeals and the Tribunal member will, in any event, be obliged by the requirement under Regulation 5 of the 2006 Regulations to consult appropriate, current information as to conditions in Pakistan relevant to the claims made.