

THE HIGH COURT

2007 1050 JR

BETWEEN

H. H. M.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 13th May, 2009

1. By order of Birmingham J. of 28th of January, 2009, leave was granted to the applicant to make the present application for an order of *certiorari* (together with other ancillary reliefs) to quash the decision of the first named respondent, ("the Tribunal,") which rejected the applicant's claim to be declared a refugee, thereby confirming a report and recommendation of the Refugee Applications Commissioner under s. 13 of the 1996 Act. The Tribunal decision is referred to in this judgment as the "Contested Decision".

2. Leave was granted to seek those reliefs on four grounds but, as argued before the Court on this application, they can be consolidated in effect into two grounds as follows:

(i) the Contested Decision is contradictory and unlawful in that it fails to reach and to give reasons for a conclusion on the applicant's claim to fear persecution on return to Iran because he would there be regarded as an Iraqi: and

(ii) the first named respondent acted in breach of s. 16, (8) of the Refugee Act, 1996 and in breach of fair procedures by referring to and relying upon a report entitled, "Iranian Refugees at Risk (Unsafe Haven) Iran Kurdish refugees in Iraqi Kurdistan" when that report was not disclosed to the applicant.

3. The background to the case and to the applicant's claim to refugee status is set out in detail in the Contested Decision of 10th July, 2007, but so far as relevant to this judgment can be summarised as follows:

- The applicant was born in Iran to Iranian Kurdish parents in 1982 but was only a few days old when his parents fled during the earlier Iran/Iraq war and arrived at the Al Tash Camp in Iraq where such refugees were housed.
- He lived in that camp all his life until he left Iraq and arrived in the State in 2006. He had no education, cannot read or write, speaks only Kurdish and worked as a shepherd while in the Al Tash Camp.
- In the camp, he met and fell in love with a Muslim girl who became pregnant by him and who was subsequently killed, as a result, in an honour killing. Out of fear of her family, he fled Iraq.
- His claim to fear of persecution, as made in support of his asylum application, was that if returned to Iraq and to the Al Tash Camp in particular, the relatives of that girl would kill him.

4. It was acknowledged on behalf of the applicant that in so far as the Contested Decision finds that return to Iraq might expose the applicant to such revenge by the girl's relatives, the applicant's claim is not based upon a fear of persecution which has a basis in the Convention. Thus, no challenge is raised to the analysis of the applicant's claim as set out in section 6 of the Contested Decision, where it states that it is unnecessary to decide whether the Commissioner's doubts as to the credibility of the applicant's account of his personal history was correct. The Tribunal member stated, "It is irrelevant whether or not I believe the applicant's account, as I conclude that the basis for persecution he fears in Iraq is non Convention related".

5. In effect, the difficulty in this case and the significance of the two grounds now raised, lie in the uncertainty attached to the applicant's nationality or at least to his ability to establish the Iranian nationality he claims.

6. As indicated, he is a Kurd who claims to have been born in Iran but fled that country as an infant and has lived in the camp ever since with no papers. In his application for asylum he stated, "I do not have citizenship of any country." (Question 7(a): and, "We have no citizenship, therefore no country has accepted us yet". (Question 26(b).

7. The arguments advanced in support of the two grounds, therefore, focus on the treatment of this problem as set out in section 6 under the heading, "Analysis of the Applicant's Claim", in the Contested Decision. This analysis comprises three steps, set out in the three paragraphs of that section. These steps have their basis in the definition of "refugee" in section 2 of the 1996 Act, which is as follows:

"In this Act, a "refugee" means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it..."

8. Thus, in the first paragraph of the analysis, the Tribunal member points out that the only evidence of Iranian nationality is the applicant's own statement to that effect. The Tribunal member states:

"If this applicant is entitled to Iranian citizenship, it is simply not possible for me to analyse this case by reference to his

country of former habitual residence, namely Iraq, as this is only applicable where the applicant has no citizenship and that would not appear to be the case here."

9. Counsel for the applicant agrees that this was an entirely proper and rational conclusion for the Tribunal member to reach, having regard to the definition of "refugee". If the applicant had Iranian nationality, then his claim to fear persecution in Iraq is irrelevant because recourse to his place of habitual residence is only possible where the applicant has no nationality.

10. In the second paragraph of the analysis, the Tribunal member then examines the claim on the basis that the applicant is an Iranian national who claims that, if returned there, he would be arrested and thrown in jail. The Tribunal member then states that as the applicant provided no information or objective evidence to support the proposition that an Iranian refugee, returning from Iraq would be thrown into jail, she conducted an internet search to see if that assertion was capable of support. Having found the impugned document, in the second paragraph of the analysis, the Tribunal member finds that there were indeed difficulties faced by Iranian refugees seeking to return from Iraq. She says "There were bilateral problems in respect of repatriation as the Iranian embassy in Baghdad said refugees lacked correct documents to prove they were Iranian."

11. The Tribunal member then considers the potential consequences of the possible difficulty for the applicant to prove his Iranian nationality, namely that, "I must consider his case by reference to the country of habitual residence which, in this case, is Iraq." She then reaches the conclusion already mentioned, namely, "I conclude that the basis for persecution he fears in Iraq, is non Convention related". On that basis she further finds, "That there is not a reasonable likelihood that this applicant would face persecution for a Convention reason if returned to his country of former habitual residence."

12. The central thrust of the attack on this reasoning in the first ground is that it is contradictory in that it starts by saying, "It is simply not possible for me to analyse this case by reference to his country of former habitual residence", but ends by doing precisely that.

13. Secondly, while addressing the possibility of a fear of being arrested and jailed if returned to the country of origin and nationality, namely Iran, it is submitted that the Contested Decision does not examine the reality of that risk by reference to country of origin information and reaches no conclusion on it. Thirdly, the recourse to the "Iranian Refugees at Risk" document, without the knowledge of the applicant, is alleged to be a material and obvious infringement of the mandatory requirement of s. 16 (8) of the 1996 Act.

14. It is possibly correct to say that on a literal construction of s. 16, (8) there may have been a technical non compliance in the failure, prior to reaching the Contested Decision, to furnish to the applicant the "Iranian Refugees at Risk" document as a source of information which came to the notice of the Tribunal during the course of the appeal. Nevertheless, the Court does not consider that in the particular context any such non compliance is of such material significance as would justify the exercise of the Court's discretion to issue certiorari to quash the contested decision on that ground.

15. To understand why this is so, it is necessary to have regard to the precise nature of the exercise of analysis that is set out in section 6 of the decision. In particular, it is necessary to have regard to the fact that the Tribunal member is there dealing primarily with an appeal as made against the report and recommendation of the Commissioner which had turned on the "numerous credibility issues", which had been identified in the claim to a well founded fear of persecution if returned to the Iraq and to the Al Tash Camp, in particular.

16. The Commissioner had found that there were, "serious doubts about whether the applicant had actually been a resident of the Al Tash Camp in Iraq." (See paragraph 4.5 of the Commissioner's report.) No claim to fear of persecution in Iran was raised at that point. On the appeal to the Tribunal, as expanded in detailed written submissions, the claim again made was that, "The appellant fears for his life if he is returned to Iraq". Twelve specific submissions were made, - although the paragraphs are numbered 1 to 14, numbers 12 and 13 appear to be missing. The only place where mention is made of Iran is in submission 8 and this is not for the purpose of claiming persecution but in giving the historical origin of the Al Tash Camp. Submission 8 reads, "Kurdish Al Tash refugees were forced to leave Iran as early as the nineteenth century revolution. This oppression continues to this very day. We would therefore submit that as the applicant alleges, returning to Iran is not an option available to him. This is confirmed by Kurdistanmedia.com and the Democratic Party of Iranian Kurdistan". It is thus made in support of the adjacent submissions in the document as to the oppressive conditions in that camp.

17. The grounds of appeal, as set out in s. 2 of the Contested Decision, make no mention of any claim to persecution feared in Iran. It was only therefore, during the course of the appeal hearing that any suggestion was raised as to a fear of possible consequences in Iran if returned there, when the applicant said that he would be arrested and thrown in jail. This possibility of return to Iran is raised at a number of points in the contested decision, where the Tribunal summarises the exchanges at the appeal as follows:

- "The applicant was asked why he could not return to Iran, he claims that Iranians would not accept him."
- "The applicant was asked what he feared if he returned to Iran and he claims that he cannot return there because the Pasdaran would arrest him as he has not lived there in the past. And he claims that he is viewed as an Iraqi."
- "The applicant was asked whether there was any country of origin information to support such assertion. None was provided at the hearing."
- "The applicant was asked whether he would experience any problems because of his ethnicity. He claims that he had had problems in Iraq and that if he is caught by the Pasdaran in Iran, he would be arrested and thrown in jail. He was asked how he would know this he claims that he heard this from people."

18. It is clear therefore, that the possibility of returning to Iran was raised and discussed at the Tribunal hearing but only as a logical possibility arising out of the applicant's apparent nationality. It was not addressed as a claim made by the applicant to a specific Convention based fear of persecution which had not previously been mentioned. It arose out of question raised by the Tribunal member in exploring the applicant's background and not out of any claim on the part of the applicant. The applicant's only Convention based claim remained that advanced from the outset, namely fear of persecution in Iran.

19. It is thus clear to the Court that in the analysis set out in section 6 of the Contested Decision, the Tribunal member is not, when dealing with the issue of Iranian citizenship, seeking to address a new claim to persecution which had been advanced, but merely examining the point made in the appeal that, "return to Iran was not an option", because of the difficulties faced by Iranian refugees from the earlier war in gaining acceptance as Iranians combined with the practical problems of obtaining the necessary papers to prove their Iranian origin, in order to return. The recourse to the impugned country of origin document is thus confirmatory of the very

difficulties raised by the applicant and not something which was relied upon in order to reject a claim to a fear of persecution in Iran. The reference to being arrested and jailed as an Iraqi, was not made as a claim to be at risk of being so persecuted but as the inevitable consequence of attempting to enter Iran without Iranian papers after a lifetime of living in Iraq.

20. It is therefore, correct to say that there is a no conclusion, as such, in section 6 of the Contested Decision on the question as to whether there would be a risk of persecution to the applicant if returned to Iraq, but that is because no such conclusion was called for since no such claim had been made and the actual return to Iran rather than Iraq was not in issue.

21. It also follows that there is no contradiction as alleged in the way in which the question of the actual claim to fear of persecution in Iraq is analysed. In effect, the reasoning in section 6 can be paraphrased and broken down as follows:

- First, if the applicant is, as he says, a national of Iran, his claim to refugee status must be examined by reference to his position if returned to that country and not by reference to Iraq, his country of habitual residence since infancy, because the latter is only relevant under the definition of refugee in s. 2, where an applicant has no nationality.
- Second, if he is entitled to citizenship of Iran, his fear of persecution, as claimed, is irrelevant because it relates only to his situation in Iraq. There is, however, a problem for persons in his position in actually asserting such citizenship, so that doing so, may not, as he says, be an option.
- Third, in such event, he may in fact find that he has citizenship of neither Iran or Iraq but in such case, his application must be judged, for the purposes of the definition in s. 2, by reference to a fear of persecution if returned to a country of habitual residence and as that is Iraq, the claim must fail because the particular feared claim is not recognised by the Convention.

22. For these reasons, the Court considers that none of the grounds for which leave has been granted has been maintained as well founded and the application for relief must be rejected. The first ground is rejected because the Court considers that it is based upon a misreading of the analysis in section 6 of the Contested Decision. The second ground is rejected because, even if there was a technical non compliance with s. 16 (8) (which is by no means certain, having regard to the wording of that section,) in the non furnishing of the impugned document, it would not warrant the quashing of the decision because the document was relied upon only to confirm an assertion made by the applicant at the hearing and its use had no material bearing on the validity of the conclusion reached, as to the establishment, or otherwise, of a Convention based fear of persecution if returned to Iraq, the applicants country of former habitual residence.

23. The application for judicial review is therefore refused.