

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 377 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 AS AMENDED

AND

IN THE MATTER THE ILLEGAL IMMIGRANTS

(TRAFFICKING) ACT (2000) (AS AMENDED)

BETWEEN

S.W.A.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE

MINISTER FOR JUSTICE AND EQUALITY

THE ATTORNEY IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 30th day of January, 2017**Issues**

1. Leave was afforded to the applicant on the 27th June, 2016 for judicial review of the decision of the first named respondent bearing the date 6th April, 2016 furnished to the applicant under cover letter dated the 14th April, 2016 which was ultimately received by the applicant on 18th April, 2016, on the basis of an asserted lack of reason contained in the Refugee Appeals Tribunal decision insofar as credibility was concerned and excluding medical evidence on the basis of evidence relative to the issue of credibility. In addition leave was afforded to the applicant to apply for certiorari on the basis that the Tribunal erred in law in failing to consider whether the applicant maybe exposed to persecution on his return to Pakistan by reason of his religion.

2. Ultimately at the hearing of this matter on the 19th January, 2017 it was indicated to the applicant that insofar as the first ground was concerned having read the submissions and the papers submitted that there was no real basis to condemn the first named respondent's decision. Following this exchange the applicant's representatives conferred and decided that the matter could proceed simply on the basis of the second ground advanced namely the Tribunal erred in law in failing to consider whether the applicant maybe exposed to persecution on his return to Pakistan by reason of his religion.

Brief background

3. The applicant is a Pakistani and was born in 1987. He arrived in Ireland on the 14th October, 2013 and applied for asylum on the 17th October, 2013. He had two s. 11 interviews namely on the 10th December, 2013 and the second one on the 13th May, 2014. A s. 13 report issued on the 18th June, 2014 and on the 9th July, 2014 the applicant was advised that his application for refugee status was refused and as a consequence he served a notice of appeal dated the 23rd July, 2014. By way of decision on the 6th April, 2016 the first named respondent issued a decision denying the applicant refugee status.

The impugned decision

4. The decision identifies that there was a hearing in respect of the appeal on the 25th November 2015.

It appears to me that para. 2.1 is relevant and provides: -

"The appellant is a 28 year old man who has received education to third level. He is Shia Muslim and claims that he is at risk from extremist groups because of his race religion and political opinion."

5. The decision then goes on to deal with the two asserted incidents in Pakistan as to why the applicant allegedly fled from Pakistan. In respect of the personal assault on the applicant he has given different dates as to when this occurred namely in June 2012 and June 2013. The Tribunal was dissatisfied with the explanation for the different dates. The second incident which the applicant has relied on is an alleged killing of certain members of his family on the 8th September, 2013. Ultimately the Tribunal did not accept the applicant's evidence in this regard for various reasons. A further problem identified by the Tribunal was as to the identity of the party who organised for the plaintiff's travel to Ireland. In this regard the applicant initially asserted that his brother had organised travel for him however later asserted that it was his mother as his brother wouldn't speak to him because the brother felt that the applicant had deserted his family in Pakistan.

6. At para. 3.12 it is provided:-

"On the basis of the documentation received from the U.K. authorities, and the finger print of the applicant, the Tribunal is satisfied that the appellant is a Pakistani national. The Tribunal proceeded to determine the appellant's claim on the basis that he is a Pakistani."

7. At para. 4.5 The Tribunal identifies that the applicant's core claim is that as a result of his religion (Shia Muslim) he is fearful of persecution in Pakistan.

8. The decision of the Tribunal runs to fourteen pages and there is no further mention of the applicant's religion within the decision save that there is reference to religion in the country of origin information which was considered.

9. At para. 4.26 it was indicated that all matters were considered in the round and the Tribunal found that the appellant was deliberately unhelpful and uncooperative.

10. At para. 5.1 it is provided as follows:

"The appellant has not established to the satisfaction of the Tribunal that he has any forward looking well founded fear or persecution in Pakistan".

Submissions

11. The applicants submissions are to the effect that the analysis as to well founded fear is not in fact an analysis at all or if it could be described as analysis it is wholly insufficient and/or inadequate and/or unreasonable. The applicant relies upon the judgment of Cooke J. in *M.A.M.A. v. Refugee Appeals Tribunal & Ors* [2011] IEHC 147 the judgment delivered on the 8th April, 2011. In this regard para. 17 of the judgment contains the relevant jurisprudence that is relied on and reads as follows:

"This court accepts as correct the approach to the standard of proof outlined in this case law. The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant."

12. The respondent counters that using the term "will not necessarily relieve" implies that in some cases the fact of past events not being believed will relieve the administrative decision maker of the obligation to consider a risk of future persecution. I accept this submission.

13. The applicant also relied on *MMA v. Refugee Appeals Tribunal & Ors*. (Unreported, High Court, MacEochaidh J., 13th February, 2013). At para. 26 MacEochaidh J. states as follows:

"In passing, I note that the case law, and in particular, the decision of Cooke J. in *M.A.M.A. v. the Refugee Appeals Tribunal* [2001] IEHC 147, clearly sets out the law on when an international protection decision maker must decide whether there is a risk of persecution in a forward looking way based upon an accepted nationality or ethnicity. When does that core element have to be decided? The M.A.M.A. case examines the point at which a Tribunal Member or a decision maker can find that the underlying facts supporting the claim for persecution are so lacking in credibility that there is no reason to proceed to determine ethnicity or the question of applying the forward looking test as to a fear of persecution.

I have no doubt that if the credibility were fair findings this is a case which would have fallen squarely within the category of cases where the decision maker should have asked the question: 'What if I am wrong about credibility - should I decide the rest of the issues in the case?'"

14. Clearly MacEochaidh J. also accepts that in some circumstances the lack of credibility on the part of the applicant relieves the decision maker for looking at the possibility of persecution if repatriated.

15. The respondents rely upon the decision delivered by Humphreys J. on the 4th November, 2015 in *A(R) v. Refugee Appeals Tribunal & Ors*. [2015] IEHC 686 notwithstanding that the applicant takes exception to reference to this case given the fact the case is under appeal and due shortly for hearing before the Court of Appeal.

16. Essentially the portion of the judgment relied upon by the applicant is contained at para. 24 where Humphreys J. identifies that that are a number of conditions for qualifying as a refugee, all of which must be satisfied which include that the asylum seeker is generally credible. If the applicant's credibility cannot be accepted, it cannot be the case that they can be held to have a subjective fear, still less an objective one".

17. The respondent acknowledges that Humphreys J. did not consider the M.A.M.A. or MMA decision aforesaid.

18. The respondent argues that a forward looking test is either not needed because of the finding as to the credibility of the applicant or in fact the forward looking test was undertaken as evidenced by para. 5.1 of the decision aforesaid.

Conclusion

19. Within the impugned decision there is a finding that the applicant is a Pakistani national (see para. 3.12). The status as to the applicant's religion is somewhat more difficult. In this regards as aforesaid at para. 2.1 there is a clear statement to the effect: "he is a Shia Muslim". Another reference to the applicant's religion is at para. 4.5 to the effect that the applicant's core claim is that as a result of his religion.

20. If it is the case that by reason of para. 2.1 of the decision the Tribunal accepted that the applicant was a Shia Muslim then it is clear that although the details of the asserted persecution in Pakistan were not accepted nevertheless the applicant's claim was accepted to the extent that he claimed to be a Shia Muslim from Pakistan. If on the other hand para. 2.1 does not recognise the applicant as being a Shia Muslim then the decision is to be effect that the applicant is a Pakistani national who did not suffer the incidents complained of and a well founded fear of persecution in Pakistan has not been made out irrespective of the applicant's religion.

21. In all of the circumstances it appears to me that given the acceptance that the applicant is a Pakistan national and given the ambiguity as to the applicant's religion within the decision impugned then in the words of Cooke J. it appears to me that there is some element of the applicant's story which can be accepted as possibly being true (his religion) and therefore his claimed Shia Muslim status deserved further consideration in respect of the forward looking test of a well founded fear of persecution if returned to Pakistan.

22. For the reasons above the applicant is entitled to an order of certiorari quashing the decision of the 6th April, 2016 and for that reason I will also extend time.

