

## THE HIGH COURT

## JUDICIAL REVIEW

Record No. 2011/802 JR

Between:

M.A. H. (BANGLADESH)

APPLICANT

-AND-

THE MINISTER FOR JUSTICE and EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

## JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 26th day of June 2012

1. The applicant was granted leave on an *ex parte* basis to challenge the validity of the Minister's decision not to grant him subsidiary protection. The hearing took place on the 16th May 2012. Mr. Michael McGrath BL and Mr. Byron Wade BL appeared for the applicant and Mr. David Conlon Smyth BL appeared for the respondents. Only one ground was argued before this Court at the substantive hearing which was that as no credibility finding had been made against the applicant by the Refugee Appeals Tribunal, then it falls on the Minister to evaluate the facts pertinent to the claim, if necessary in cooperation with the applicant at an oral hearing.

2. The applicant relies on the decisions of Cooke J. in *N.D. v. The Minister for Justice and Equality* [2012] IEHC 44 (2nd February 2012) and *B.J.S.A. v. The Minister for Justice and Equality* [2011] IEHC 381 (12th October 2011). He argues that the facts of this case bring it into one of the situations envisaged by Cooke J. when he found that there was no deficiency in the European Communities (Eligibility for Protection) Regulations 2006 (SI No. 518 of 2006) ("the Protection Regulations") in their implementation of Council Directive 2004/83/EC ("the Qualification Directive") but qualified his finding thus:-

*"20. This is not to say that the Minister as the deciding authority under the 2006 Regulations is wholly relieved of any obligation of co-operation in appropriate cases. Because the State has opted for separate procedures and because in inviting a distinct application following the conclusion of the asylum process the Minister solicits the information, submissions and documentation identified in the formal application appearing in Schedule 1 to the Regulations, the process of determining the application must conform to the normal rules of fair procedures. These include, obviously, the principle audi alteram partem. Accordingly, if in a given case new facts, information or documentation not previously examined in the asylum process are put before the Minister and are material to the claim [or subsidiary protection, that principle would require the Minister to afford an applicant an opportunity of comment or rebuttal if the refusal if the application was to be based, [or example, upon a finding that the information was untrue or the documents were forged. That, however, is a matter of basic fairness in administrative procedures where individual rights are potentially affected. It is not dependent upon any express reiteration of the word "co-operation" in the 2006 Regulation. Thus, insofar as this reference to "co-operation" is relied upon as requiring the Minister to afford an applicant an opportunity to rebut any proposed adverse finding which is to be based on new information not previously available to the applicant, the entitlement is enshrined in basic principles of administrative law and requires no express implementation in such regulations. "* (Emphasis added)

3. The applicant also relies on at paragraph 14 of *B.J.S.A.* which provides:

*"there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection into a form of a second appeal against the refusal of a declaration of refugee status. "* (Emphasis added)

4. The whole argument therefore relies on there being new material evidence or information which was presented to the Minister in the claim for subsidiary protection and on the absence of adverse credibility findings made by the ORAC or the Refugee Appeals Tribunal (RAT). It will therefore be necessary to examine the RAC and RAT decisions in the applicant's case and the nature of her claim first for refugee status and then for subsidiary protection, to determine whether a new claim or new evidence capable of vitiating the previous decisions was put before the Minister in the application for subsidiary protection.

5. By way of background the applicant is a 32 year old man from Bangladesh. His asylum claim which failed before the RAC and on appeal to the RAT arises from a land dispute between his father and a named man who he claims is a corrupt local politician. The applicant claimed that his father who was a businessman of integrity and repute borrowed money from the said local politician which was secured by a parcel of land. The corrupt politician then forged documents which purported to demonstrate that his father had actually sold the land to him. He was aided and abetted in this forgery by another corrupt politician who was an MP and a member of the government and who witnessed the forged deed. The two men were said to be well known for their corruption and criminal activity. His father sought resolution of the dispute through mediation at village level but when a recommendation was made in compromise of the dispute, the politician refused to adhere to the terms of the recommendation. Thereafter the applicant and his father and a large group of supporters sought to re-enter and take possession of the lands and in the confrontation the politician's son was attacked and killed. The applicant was innocent of any wrongdoing but was sought for the murder and went into hiding. He learned that the politician had filed a false murder accusation against him. After about 18 months of moving around, he decided to

come to Ireland with a trafficker who made all the travel arrangements and supplied him with a false passport which he used to travel through immigration at Dublin Airport. His parents have moved from Bangladesh to India for safety. The applicant produced a number of documents in support of his claim which was first made to the RAC on 5th November 2008.

6. While the decisions of the RAC and later the RAT which upheld the negative recommendation outlined *issues or problems* which the decision makers had with aspects of the applicant's narrative, both decisions were based on legal grounds rather than strict negative credibility rejections. These issues were outlined at length in the s. 13 report and in the Tribunal decision. The s. 13 report outlined the applicant's claim to have been falsely accused of murder but notes that he was very vague about the details of the politician's son's death; the RAC officer concludes that it was difficult to understand why, if the police investigated the murder, they suspected the applicant when there would be no evidence against him; that it was difficult to understand why the applicant did not explain his side of the story to the investigating police; that similarly no reasonable explanation was provided as to how or why the applicant's family came to have the police report including the autopsy report and the death certificate of the murdered man, the arrest warrant and the summons. Observations were made on the fact that the documents were not accompanied by any letter or envelope. His account of traveling through immigration at Dublin Airport with an agent who held and retained a false passport and his failure to seek asylum in Abu Dhabi were all found to be difficult to believe. It was also observed that the applicant had failed to seek state protection and finally it was concluded that notwithstanding the *concerns* outlined the applicant has not provided any evidence of actual harm or persistent harassment which could amount to persecution. He had not considered internal relocation and lastly there was no Convention nexus with the deeds alleged.

7. The Tribunal decision outlined the claim made on appeal where it was noted that the applicant stated that he feared the corrupt politician more than the police. The issues raised by the Presenting Officer in cross examination were detailed and it appears several issues were outlined relating to the documents and the fact that the date of the arrest warrant appeared to post date the applicant's departure from Bangladesh. In his actual analysis of the claim the Tribunal Member appeared to concentrate on the basic core of the claim- the obtaining of the loan. The Tribunal Member had difficulty in accepting why the applicant's father who was an experienced businessman and local councillor should have borrowed money from a man known to have a criminal back ground and who consorted with other likeminded persons. He found *"much about this narrative which raises many questions. Even if one could accept all that was said, in the final analysis this remained a land dispute between two people. There is nothing which could impute a political opinion to the Applicant."* The Tribunal Member then provided very detailed reasons for finding that the applicant had not sought state protection and assistance. His claim was rejected and the s. 13 report affirmed because the applicant was not a member of any particular social group and had not sought available state protection. The Tribunal Member then added that there were other features which caused concern which included the issue of credibility, s. 11B of the Refugee Act 1996 and internal relocation.

8. On 23rd October 2009 the Minister for Justice and Equality advised the applicant that he proposed to make a deportation order and advised the applicant of the options open to him including his right to apply for subsidiary protection pursuant to the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006).

9. The same claim relating to the land dispute and the false accusation of murder was by the Refugee Legal Service on behalf of the applicant on 13th November 2009 in the subsidiary protection application. It was further stated that if returned to Bangladesh the applicant would be at risk of torture and subjected to inhuman and degrading treatment and that he had already been subjected to such treatment in the past. The submissions did not expand upon such past treatment, which certainly had not been described previously. It was further stated that applicant would be in serious danger at the hands of the police under the instructions of the local MP and the corrupt politician and that there was no part of Bangladesh where he would not be at risk of suffering serious harm. Of importance to this challenge was the final statement in the submissions to the effect that *"The general credibility of the Applicant has been established, and we refer to the decisions of the ORAC/RAT etc -quote from decisions if there are useful parts"*.

10. No *"useful parts"* were quoted and indeed it would be difficult to find any in either decision. To concur with the applicant's submission that his credibility was established would in the view of this Court require the suspension of logic and intelligence. While neither the Commissioner nor the Tribunal actually spelled out that they did not believe the applicant's narrative, it is clear that the story was found to have many non-credible features which were outlined in the RAC and RAT decisions. This is therefore not one of those extremely rare and unusual cases where a new claim or new documents were being considered by the Minister and rejected on credibility grounds and where fairness would mandate an opportunity to the applicant to first be heard at an oral hearing.

11. At the risk of repetition, no new evidence was put before the Minister. In any event the decision of the Minister refusing subsidiary protection to the applicant was not in fact based solely on the previous rejection of the same claim. A reading of the cumulative findings establishes that the Minister's refusal was also grounded on the strong legal basis there was nothing to prevent the applicant from seeking protection from the authorities in Bangladesh through the judicial system, the Human Rights Commission and I or the police and further that the applicant had not demonstrated that he was previously subjected to serious harm. A person who can avail of effective state protection is not in need of subsidiary protection.

12. The Minister's reasoning cannot be faulted and the application must fail.