THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 666 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED) IN THE MATTER OF THE ILLEGAL (TRAFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3(1)

BETWEEN

AVB

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

AND

ATTORNEY GENERAL IRELAND

RESPONDENTS

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BETWEEN

XBG

AND

AB1 (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND XBG) AB2 (A MINOR SUING BY HER MOTHER AND NEXT FRIEND XBG)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 14th day of January, 2015

1. This is a telescoped application for leave to seek judicial review, seeking certiorari to quash two decisions of the Refugee Appeals Tribunal dated the 26th and 27th April, 2010, and remitting the appeals of the applicants for *de novo* consideration by a separate tribunal member.

Background

2. The applicants are a family unit: father, mother and two children. The applicant in the first set of proceedings is the father of the family and the applicants in the second set of proceedings are the mother, son and daughter of the family unit. The asylum claim relates to the same source of alleged persecution. The same member of the tribunal determined their appeals. For the purpose of these proceedings the applicants' cases were heard together as they related to the same statement of grounds, and the same alleged persecution. I am delivering a single judgment in respect of both applications.

3. The applicants are Kosovar nationals. The father AVB was born on the 2nd May, 1968; the mother, XBG on the 26th March, 1972; the son AB1 was born on the 19th June, 2006; and their daughter AB2 was born on the 9th October, 2007. All applicants were born in

Bardh i Madh, Kosovo and are ethnic Albanian Muslims.

4. The applicants' claims for asylum stem from a claimed fear of persecution based on a blood feud based on the Canon of Lek, an ancient set of laws formulated by Albanian communities centuries ago. AVB's brother had allegedly killed his brother-in-law on the 31st March, 2009, according to a police report, because it was believed that he had been forcing his sister to engage in prostitution in Italy. AVB states that his brother can now not be found and, because the applicant is a male member of the family, he is now under threat from the murdered man's family in retribution. It is also claimed that the life of the son may be under threat, particularly when he reaches the age of majority. Further, XBG and the female child are under threat due to the nature of blood feuds. AVB states that his father attempted to come to an agreement by way of mediation to a reconciliation council, however, it is stated that this was declined by the murdered man's family and that AVB's father and his family remain in isolation in their home.

5. The applicants state that the family remained indoors until they left Kosovo on the 14th April, 2009. A paternal uncle assisted with travel arrangements, taking the family to Macedonia. That uncle then arranged for the family to be taken by lorry from there. The applicants state that the intermediaries did not speak their language, so they could not be questioned regarding the route that was taken or the locations at which they stopped.

6. The applicants arrived in the State on the 24th April, 2009. The initial interviews in accordance with s.8 of the Refugee Act 1996 (as amended) were held on the 29th April, 2009. The subsequent s.11 interviews were held on the 11th September, 2009. Their applications for declaration of refugee status were declined by the Office of the Refugee Applications Commissioner (hereinafter referred to as ORAC) on the 27th November, 2009, on the basis that their alleged fear of persecution is not well-founded; that internal relocation is a viable option for the family; that, based on country of origin information (COI), the police in Kosovo would have been capable of protecting the applicants, had they sought such protection; and that the applicants do not satisfy the nexus requirement as per s.2 of the Refugee Act 1996 (as amended) and reg. 10 of EC (Eligibility for Protection) Regulation 2006 (S.I. No. 518 of 2006).

7. Notices of appeal to the Refugee Appeals Tribunal were then initiated by the applicants. A notice of appeal was submitted by the Refugee Legal Services (RLS) on behalf of AVB and is dated the 9th December, 2009. An appeal was submitted on behalf of XBG and the children, by a notice of appeal submitted by the RLS and dated the 4th November, 2009. AVB was granted an oral hearing on the 9th March, 2010, at the offices of the Refugee Appeals Tribunal. XBG and the dependent children were not granted an oral hearing at this stage of the proceedings due to the finding pursuant to s.13(6)(a) of the Refugee Act 1996 (as amended). On the 26th April, 2010, the Refugee Appeals Tribunal upheld the recommendations of the Refugee Applications Commissioner in respect of AVB. The following day on the 27th April, 2010, the Refugee Appeals Tribunal upheld the findings and recommendation of the Refugee Applications Commissioner in respect of XBG and the dependant children. At para. 10 of his grounding affidavit AVB states that on receipt of the tribunal decision that he immediately sought the assistance of the RLS to challenge the decision. Having been informed on the 14th May, 2010, that he should procure the services of a private solicitor if he intended to institute proceedings challenging the decision, he then immediately contacted the solicitor on record in these proceedings and received an appointment to attend at his offices on the same day. His file was then sought from the RLS which was subsequently received and a brief was forwarded to counsel on the 19th May, 2010. The respondents, at para. 3 of the written submissions filed in Court, acknowledged that a short extension of time is needed in these proceedings and in the circumstances the respondents accepts that the first named applicant has explained the delay in his affidavit and the extension was not opposed. In the circumstances, I am satisfied that it is appropriate to extend time within which to bring these proceedings.

8. The case is set against a factual background of an Albanian blood feud and AVB contended that the tribunal member failed to engage with important facts in relation to this background. He alleged that the tribunal member failed to take into account relevant considerations and further took into account irrelevant considerations. There are four findings in particular that are in contention:

a) That there was no well-founded fear of persecution

b) That there are adverse credibility findings

c) That the family was not a social group within s.2 of the Refugee Act 1996 (as amended)

d) That state protection was available to the applicants

9. Country of origin information (COI) was submitted and relied upon by the applicants, and referred, inter alia, to the history of blood feuds in Albania, especially in the northern part. Male members of the family are legitimate targets although females may also get caught up. There is reference to self-confinement in the COI. AVB's sister was trafficked into Italy and her husband was subsequently killed by AVB's brother. The applicants' family were told that there is no stay on the blood feud, reconciliation was refused by the other family and the applicants' family in Kosovo are in self-confinement.

10. In relation to the finding that the applicants' claim of fear of persecution was not objectively well-founded, the applicants rely on general administrative law grounds and also matters which are required to be taken into account by virtue of EC (Eligibility for Protection) Regulation 2006 (S.I. No. 518 of 2006). The tribunal member referred to the fact that the applicants were not personally threatened and the applicants assert that this statement amounts to a failure to understand the nature of a blood feud. It applies to male members of the family. There is no suggestion that it is necessary to be threatened before you are in danger. It was pointed out by the tribunal member that the applicant's uncle and father remained in Kosovo. The applicants assert that the feud does not appear to apply to the uncle as he was on the maternal side of the family. The paternal grandfather is in self-confinement in Kosovo. The tribunal member further referenced the fact that AVB's parents were living in the same place and have not come to any harm. The applicants contend that the tribunal member fails to understand the nature and meaning of self-confinement. In light of the above the applicants submit that the tribunal member did not deal with the core/ substance of the claim.

11. In relation to the negative credibility findings made by the tribunal member, the applicants submit that this is a peripheral finding that it is based on conjecture. The tribunal member's reference to Macedonia is merely a reference that Macedonia is a party to the 1951 Convention but does not find that it is a safe country and in any event it is submitted that this is irrelevant to the matters under consideration. They further assert that the tribunal member ignored the evidence put forward that the family targeting them was resourceful and well connected.

12. In relation to the tribunal member's finding that the applicants could have sought help from the state, the applicants submit that this ignores the nature of a blood feud in that a blood feud is something that the police cannot do anything about. Police take parties into custody; however, this is not a solution any more than living in self-confinement is a solution.

13. In relation to the finding that the applicants were not a member of particular a social group, the applicants assert that the tribunal member misunderstood the decisions of the House of Lords in *Fornah v. Secretary for State for the Home Department* [2006] UKHL 46 and *Secretary of State for the Home Department v. Skenderaj* [2002] EWCA Civ. 567 and also referred to a decision of *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC) in relation to Albanian blood feuds. This point is central to the case.

14. In addition, in relation to XBG and the dependant children's case, the applicants complain that the tribunal member did not afford an oral hearing to XBG and the dependant family members and this amounted to a denial of fair procedures. The applicants further assert that there was no independent assessment of the children's case and it is pointed out that on p.78 of the interview when XBG was asked what she fears for her children, she responded "the children are not sure of safety".

Submissions of the Respondents

15. In relation to the credibility findings it is submitted on behalf of the respondents that a tribunal member is obliged to consider the matter set out in s.11(B) of the Refugee Act 1996 (as amended) and is entitled to comment on the evidence presented by an applicant. The respondents state that the tribunal member did not make a credibility finding on the applicants' account of their journey to Ireland; however, the tribunal member did comment on the reasonableness of the actions. The respondents further submit that the tribunal member was entitled to address the issue of the applicants' failure to seek asylum as soon as practicable. It was pointed out that AVB had informed the Refugee Applications Commissioner that they had chosen Ireland as their final destination when they leaving Kosovo and that they did not apply for asylum elsewhere because they wanted to come to Ireland.

16. In relation to the findings on internal relocation, the respondents submit that that finding is rational. The tribunal member notes that the applicants did not consider relocating to another part of Kosovo and further the tribunal member had regard to AVG's age; the fact that XBG had some education; and the local nature of the blood feud. All of this, the respondents contend, provides a rational basis for the decision.

17. In relation to the assessment of state protection, the respondents submit that the tribunal member consulted COI and found a functioning police force in Kosovo who are not unwilling to deal with matters such as blood feuds. The respondents further submit that there was no evidence to suggest that the tribunal member did not consider the position of the dependent children and that, in fact, the opposite position is true.

18. Finally, the respondents maintain that the findings of the tribunal member should be upheld as rational.

19. The respondents, in oral submissions, agreed with the applicants submission that the core claim in the case before the Court was the finding of the tribunal member that the applicants and their family does not come within s.2 of the Refugee Act 1996 (as amended), i.e. that they did not belong to a particular social group. It seems to me that my decision in respect of this aspect of the case will be determinative of the entire case.

20. The tribunal member begins to deal with this issue at p.18, in the last paragraph of her report where she states as follows:

> "It is submitted that the Applicant is a member of a particular social group due to the dispute with his brother-in-law's family in Kosovo. When considering 'particular social group' in Fornah /K V Secretary of State Baroness Hale of Richmond stated:
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> > 'Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention. Asylum can only be claimed by people who have a well-founded fear of persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Of these, 'membership of a particular social group' has proved the most difficult to define, but is increasingly being used to push the boundaries of refugee law into gender-related areas'.
>
> According to the Applicant, his brother murdered his brother in law after they met on a street (page 11, interview). The particular social group that the Applicant in this case is stated to belong to is defined as 'male member of a family involved in a blood feud'. According to paragraph 77 of the UNHCR handbook '[a] particular social group normally comprises persons of similar background, habits or social status'. What identifies a particular social group will be possession of a common immutable characteristic. Examples of such characteristics were given by La Forest in Canada (AG) v Ward: 1) groups defined by an innate or unchangeable characteristic; 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the associations; and 3) groups associated by a former voluntarily status, unalterable due to historical permanence. Auld J in the Court of Appeal in *Skenderaj v. Secretary for State for the Home Department* [2002] EWCA Civ 567 states: 'The Skenderaj family was not regarded as a distinct group by Albanian society any more than, no doubt, most other families in the country. To rely on the attitude of the family with whom it was feuding, as a marking out of the Skenderaj family so as to make it a particular social group for this purpose would be artificial. The threat was, as in [Pedro v IAT [2000] Imm AR 489 CA] (which concerned the rape of a woman in Angola by a soldier) a private matter, just as would be a long-standing and violent feud between neighbours or threats of violence from criminals for some actual or perceived slight or with some motive of dishonest gain. It would be absurd to regard the first limb of the refugee test as engaged every time a family is on the receiving end of threatening conduct of that sort. This stated feud between the Applicants family and his neighbours over his brother-in-laws treatment of his sister does not come within Section 2 of the 1996 Act (as amended)."

21. The applicants contend that the tribunal member was mistaken in law in relation to her finding in that area and further suggests that the tribunal member quoted selectively from the *Fornah* decision. In particular they point out that the tribunal member omitted para. 45 of the *Fornah* decision and further noted that para. 30 of the *Skenderaj* case was effectively overruled by the *Fornah* decision.

22. In the F*ornah* case, the decision of the House of Lords, at para. 45 Lord Hope of Craighead said as follows:

> "It is universally accepted that the family is a socially cognisable group in society: UNHCR *position on claims for refugee status under the 1951 Convention relating to the status of refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud*, 17 March 2006, p.5. Article 23(1) of the 1966 International Covenant on Civil and Political Rights states that the family "is the natural and fundamental group unit of society and is entitled to protection by society and the State.' The ties that bind members of a family together, whether by blood or by

marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention extends its protection."

23. The Court was referred to a decision of the Upper Tribunal (Immigration and Asylum Chamber), *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC), a decision delivered on the 28th September, 2012. This case involved a blood feud in Albania. At p.1 of the decision it sets out as follows:

> 1. "While there remain a number of active blood feuds in Albania, they are few and declining. There are a small number of deaths annually arising from those feuds and a small number of adults and children living in self-confinement for protection. Government programmes to educate self-confined children exist but very few children are involved in them.
>
> 2. The existence of a 'modern blood feud' is not established: Kanun blood feuds have always allowed for the possibility of pre-emptive killing by a dominant clan.
>
> 3. The Albanian state has taken steps to improve state protection, but in areas where Kanun law predominates (particularly in northern Albania) those steps do not yet provide sufficiency of protection from Kanun-related blood-taking if an active feud exists and affects the individual claimant. Internal relocation to an area of Albania less dependent on the Kanun may provide sufficient protection, depending on the reach, influence, and commitment to prosecution of the feud by the aggressor clan.
>
> 4. International protection under the Refugee Convention, Qualification Directive or Articles 2 and 3 ECHR is not available to an appellant who is willing and intends to commit a revenge killing on return to his country of origin, by reference to that intention.
>
> 5. Where there is an active feud affecting an individual and self-confinement is the only option, that person will normally qualify for refugee status.
>
> 6. In determining whether an active blood feud exists, the fact-finding Tribunal should consider:
>
> (i) the history of the alleged feud, including the notoriety of the original killings, the numbers killed, and the degree of commitment by the aggressor clan towards the prosecution of the feud;
>
> (ii) the length of time since the last death and the relationship of the last person killed to the appellant;
>
> (iii) the ability of members of the aggressor clan to locate the appellant if returned to another part of Albania; and
>
> (iv) the past and likely future attitude of the police and other authorities towards the feud and the protection of the family of the person claiming to be at risk, including any past attempts to seek prosecution of members of the aggressor clan, or to seek protection from the Albanian authorities."

24. At p.19 of the *EH (blood feuds) Albania* judgment, paras. 60-61 the decision under the heading 'Family as particular social group' set out as follows:

> "In the respondent's December 2010 submissions, she argued that following the decision of the Asylum and Immigration Tribunal in SB, the Upper Tribunal should find that members of families or clans involved in blood feuds or vendettas were not capable of constituting a particular social group.
>
> That position is inconsistent with the judgment of the House of Lords in 2006 in Secretary of State for the Home Department v. K, Fornah v Secretary of State for the Home Department [2006] UKHL 46 (K and Fornah), in which the respondent accepted that a family can constitute a particular social group for the purposes of Article 1A of the Refugee Convention. "

25. The tribunal decision then goes on to quote from para. 5 of Lord Hope of Craighead as set out above in this judgment.

26. At para. 62 the *EH (blood feuds) Albania* judgment continues:

> "It is settled therefore, that members of families or clans are capable of constituting a particular social group and that the Refugee Convention would be engaged where there existed a reasonable degree of likelihood that members of a particular family would be at risk of serious harm on return, subject of course to whether internal relocation was available, or whether the state provided sufficient protection against such risk."

Decision

27. While the decision of the Upper Tribunal is not binding on this Court, I find it persuasive and that it correctly applies and interprets the decision in *Fornah (supra).* It seems to me that the tribunal member fell into error in law in finding that feuds among family members did not have a convention nexus and that the decision in *Fornah* was incorrectly applied.

28. The tribunal member further erred in law and in fact in finding that the applicants did not constitute members of a particular social group, i.e. being part of a family which was involved in a blood feud with the family of AVB's brother-in-law.

29. It seems to me that the tribunal member having erred in respect of this fundamental part of the applicants' claim, that the decision is flawed and undermined and should be quashed. Any adverse findings flowing there from cannot stand.

30. I would therefore propose to grant leave and grant an order of *certiorari* in respect of the decisions of the Refugee Appeals Tribunal dated the 26th April, 2010, in respect of AVB and 27th April, 2010, in respect of XBG, AB1 and AB2.

31. I will further make an order remitting the matter back for determination by a different member/ members of the Refugee Appeals Tribunal.