Neutral Citation: [2015] IEHC 8

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 39 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

N.E. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.E.A.)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 14th day of January, 2015

Background Facts

1. The applicant in these proceedings was born on the 26th March, 2009 and is thus five years of age. He was born in Ireland but is a national of Pakistan and brings these proceedings through his father and next friend ("Mr. A").

2. Some time in 2006 or possibly early 2007, Mr. A, while living in Pakistan, was alleged by the Federal Investigation Agency ("FIA"), described as one of Pakistan's premier law enforcement agencies, to have been involved in human trafficking and to have obtained substantial sums of money from eight men in order to traffic them to Korea. It appears to have been alleged that Mr. A did not send these men abroad as agreed but kept their money. This appears from an FIA document described as "First Information Report" dated the 5th July, 2007. It seems that in or around that time, Mr. A was arrested and taken into custody. He was subsequently admitted to bail on the 16th August, 2007.

3. Whilst on bail, Mr. A fled from Pakistan and appears to have arrived in Ireland sometime later in 2007. On the 30th January, 2008, Mr. A applied for asylum in Ireland. The immigration authorities here conducted a search of EURODAC which revealed that Mr. A had a valid visa to enter the United Kingdom. Article 9(2) of the Dublin II Regulations provides that where an asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for asylum. Accordingly, a take back request was made to the United Kingdom by the immigration authorities here which was duly accepted in June, 2008 by the UK authorities. In July, 2008, Mr. A was informed of this fact and on the 13th August, 2008, a letter was sent to Mr. A directing him to present himself to the Garda National Immigration Bureau on the 28th August, 2008 to make arrangements for his removal to the UK. Mr. A had solicitors acting on his behalf at this time.

4. Mr. A did not comply with the direction to present himself for removal from the jurisdiction and on the 2nd September, 2008, he was classified as an absconder. The applicant was born on the 26th March, 2009 and when the period during which Mr. A could be returned to the United Kingdom had elapsed, he applied to be readmitted to the asylum process. By letter of 13th January, 2010, his application for readmission was granted and he was directed to attend for interview on the 22nd January, 2010. This correspondence was returned and Mr. A did not attend for interview. On the 8th February, 2010, his application was deemed withdrawn.

5. On the 25th March, 2010, Mr. A's solicitors wrote to the Office of the Refugee Applications Commissioner ("ORAC") stating that they no longer acted for him. However shortly thereafter, they appear to have been re-instructed because the solicitors wrote on the 28th April, 2010 to ORAC seeking accommodation on behalf of Mr. A and his family. On the 9th July, 2010, Mr. A once again applied to be readmitted to the asylum process and on the 3rd August, 2010, his application was refused. On the 11th August, 2010, Mr. A made an asylum application on behalf of the applicant herein who was then approximately 16 ½ months old. On the 8th September, 2010, Mr. A attended for a s. 11 interview at which he spoke on behalf of the applicant. It appears that Mr. A claimed that there was an attempt on his life in Pakistan by persons connected with the government who were also instrumental in bringing false charges against him. He also claimed that there was an attempt to kidnap his daughter who is a small child still living in Pakistan. He feared that if the applicant returned to Pakistan, he would be at risk of death or kidnap. Mr. A said that the reason for this persecution was that he refused to join the Muslim League.

6. On the 21st September, 2010, the ORAC authorised officer issued his report recommending that the applicant should not be declared a refugee. He considered, *inter alia*, that Mr. A's total disregard for the immigration regulations of the State raised credibility concerns and cast doubt on the validity of the claim. He considered that Mr. A had not shown that the applicant would suffer persecution due to political opinion in Pakistan. He also considered that the options of state protection and internal relocation would be available to the applicant. There was no nexus to s. 2 of the Act of 1996 demonstrated in his view.

7. The ORAC report also concluded that no valid reason had been advanced by Mr. A for the delay of almost a year and a half in applying for asylum on behalf of the applicant and accordingly made a finding pursuant to s. 13(6)(c) of the Act of 1996:

> "(c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;"

8. The effect of this finding was that, pursuant to s. 13(5)(a) of the Act, any appeal to the Refugee Appeals Tribunal ("RAT") would be determined without an oral hearing. The applicant through his solicitors lodged an appeal to the RAT and by letter of the 26th October, 2010, made submissions. These included claims that ORAC had erred in law and fact in a number of respects in arriving at its conclusions. In essence, the same points that had been advanced at the ORAC stage were again put forward in the appeal. Some of

the grounds advanced seem to have been more relevant to Mr. A's case and the fact that he never had a substantive hearing of his case. No complaint was made about the s. 13(6)(c) finding or the fact that there would be no oral hearing on the appeal.

9. The RAT issued its report on the 8th December, 2010 affirming the ORAC recommendation. The Tribunal Member concluded that Mr. A was fleeing prosecution, not persecution and that the applicant was not a person in need of protection. He did not accept that the applicant was in any danger, rather, that the only danger to Mr. A was of being arrested. He considered that there was no Convention nexus established for the applicant's case. He also concluded that there was no evidence of a failure of state protection in the applicant's case and that internal relocation to Karachi was a viable option.

The Proceedings

10. These judicial review proceedings came before the court by way of "telescoped" hearing so that the leave and substantive applications were heard together. The applicant seeks an order of *certiorari* quashing the determination of the RAT and various declaratory reliefs primarily to the effect that the respondents have failed to provide an effective remedy to the applicant. Although 14 grounds were pleaded, the parties agreed that only grounds 1, 6, 7, 9 and 10 would be relied upon. These were in essence that the procedure adopted deprived the applicant of an effective remedy as required by Council Directive 2005/85/EC and the European Convention on Human Rights. The other grounds may be summarised as an alleged failure to have any or any adequate regard to the applicant's submissions and documentation and placing undue reliance on adverse credibility findings in the parents' asylum application which had never been the subject of a substantive hearing.

Submissions

11. Counsel on behalf of the applicant, Mr. O'Halloran BL, submitted that the failure to afford the applicant an oral appeal in circumstances where the main issue was the applicant's credibility was fatal and he relied on *S.U.N. v. Refugee Applications Commissioner & Ors* [2012] IEHC 338. He said that the finding that the applicant's father was fleeing prosecution, not persecution, was new and it was unfair to introduce this new ground on appeal. He submitted that in any event this ignored the provisions of Regulation 9(2)(c) of the European Communities (Eligibility for Protection) Regulations 2006 which provides that acts of persecution may take the form of prosecution which is disproportionate or discriminatory. He said there was a failure to have regard to and analyse the documents submitted by the applicant and cited *I.R. v. The Minister for Justice, Equality and Law Reform & Anor* [2009] IEHC 353 in support of that submission. Finally, he submitted that the findings regarding internal relocation were irrational in circumstances where it was clear that the applicant's father would be arrested on returning to Pakistan.

12. On behalf of the respondent, Mr. Keeling BL submitted that the applicant could not now complain about the lack of an oral appeal where he had not challenged the decision of ORAC and "that ship had now sailed". He said it was clear that the applicant's father had jumped bail in Pakistan and his real fear was that he would be re-arrested if he returned there. He had deliberately evaded the authorities in this jurisdiction and abused the asylum process. There was no objective evidence in support of Mr. A's claim and he pointed to the fact that when he applied for re-admission to the asylum process, he produced a newspaper article in support of his claim that his daughter was the subject of a kidnap attempt which appeared to refer to another party altogether. Further, the article said the culprits were unknown and thus could not be connected with a fear of persecution. During the s. 11 interview, Mr. A was asked to explain the delay in making an asylum application on behalf of his son and he said that he had received legal advice that once the transfer order to the UK expired after 18 months, he was to apply, providing further evidence of Mr. A's determination to subvert the system. In the same interview, Mr. A confirmed that he had not sought the assistance of, or reported his fears to, the authorities in Pakistan.

13. The respondent further submitted that the decision under challenge was clear in its findings on credibility and relied on *Kramarenko v. Refugee Appeals Tribunal* [2004] 2 ILRM 550 and *I.R.* (op cit). These proceedings could not be viewed as an appeal on the merits and what the court must consider is whether there was evidence to support the respondent's conclusion. The court could only interfere in the event of irrationality in the sense explained in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. It was said that no Convention nexus had been demonstrated by the applicant quite apart from the credibility issue and that the relocation findings were clear and evidence based.

Analysis of the Issues

14. Dealing first with the applicant's complaint that he was not afforded an oral hearing of his appeal, it was the decision of ORAC that determined that issue, not the RAT decision challenged here. The applicant did not seek to impugn the ORAC decision in this respect and on the contrary, in making submissions to the RAT, made no reference to it. If a complaint were to be made, as in the *S.U.N.* case, the appropriate respondent to that complaint is ORAC, and the complaint ought to have been made before any appeal to the RAT was taken. Accordingly, it seems to me to be beyond argument that this issue cannot be raised in these proceedings.

15. The applicant's claim herein is in substance the same as that of his father and the fundamental difficulty was the issue of credibility. The applicant complains that his parents' case was never fully considered in circumstances where they were never interviewed in relation to their own claims and therefore it is unfair to rely on findings made in their cases. However, the facts as found previously in relation to Mr. A have never been put in issue or disputed by him in these proceedings. It was submitted that there was some unfairness in the fact that Mr. A's second application for asylum was deemed withdrawn because he did not attend for interview as a result of not receiving the notice. This however entirely ignores the fact that Mr. A, who had prior experience of the system and legal advice throughout, was, like every other asylum seeker, perfectly well aware that he was obliged to keep the immigration authorities informed of his current address. If he chose to avoid his obligations in that regard, it seems somewhat hollow to complain of the consequences.

16. On the 11th August, 2010, Mr. A had what is described as a s. 8 interview with an immigration officer at which he set out the basis for the applicant's claim for asylum. On the 16th August, 2010, Mr. A completed a detailed questionnaire on behalf of the applicant accompanied by a lengthy statement elaborating on the grounds for the application. The s. 11 interview was conducted on the 8th September, 2010 over a period of 2 hours and 20 minutes. At its conclusion, Mr. A declared himself satisfied with the way the interview was conducted. At each of these stages, Mr. A had the benefit of legal advice and a translator. Having regard to the foregoing, I cannot see how it can be said that the applicant was in any way afforded less than a full opportunity of setting out his case or that in some sense he was handicapped by the fact that his parents' claim had not been fully investigated previously.

17. The applicant complains of the fact that the RAT decision introduced a new ground for rejecting the claim, namely that Mr. A was fleeing prosecution. I am not at all certain that this was an entirely new ground. Although not explicitly adverted to in the ORAC decision, the latter decision did make clear that the application was rejected at least partly on credibility grounds. If the grounds advanced were not credible, it seems to me that one could readily infer that the real reason for the application was a desire on Mr. A's part to avoid arrest and trial in Pakistan whether explicitly stated or not. Therefore, the RAT conclusion can hardly be said to be novel or come as a surprise to the applicant. In any event, the RAT was on appeal free to arrive at its own conclusions and was not obliged to slavishly follow those of ORAC.

18. The applicant referred to the fact that the decision of the RAT contained an error at the top of p.15 where it stated:

> "The applicant's father accepted that the infant's claim was the same as his and there would be no basis for his application. I reach a similar conclusion and find that there is no Convention nexus for the infant's case."

19. It appears that at Question 13 of the s. 11 interview, Mr. A did state that the applicant's claim was the same as his own. He does not appear however to have said that there would be no basis for the application. Insofar as this may be said to be an error in the decision and an irrational finding, the applicant relied on *P.M. v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, Barr J., 2nd October, 2014) where Barr J. (at p. 25) cited with approval the following dicta in *NUZ v. RAT* [2010] IEHC 141:

> "The Court agrees with the respondent that the correct approach to the review of any adverse credibility decision is to view the decision as a whole and then to consider whether the matter complained of, in the event of the complaint being upheld, represents a core finding upon which the adverse credibility decision was based, either in whole or in part. If it does not go to the core of the matter, then the decision must fall in the event of the complaint being upheld. However, if it does not go to the core of the decision, then even if the complaint be upheld, the decision ought to stand providing, of course, that there was other unimpugned evidence capable of supporting it."

20. Barr J. went on to cite with approval a further passage in the same case (at p. 26):

> "A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim."

21. The error in this case does not appear to me to be a core finding of fact. It does not appear to form the basis for the conclusion that follows which is that the decision maker had arrived at a *similar* conclusion that there was no Convention nexus in the applicant's case. I do not think it could be said to be an error which vitiates the decision which, when read as a whole, is clearly based on other findings. It is not in any event a matter raised in the applicant's grounds.

22. The applicant further complains that there was no adequate consideration or analysis of the documents submitted by him. The Tribunal Member in coming to his conclusions says he had regard to the documentation submitted by the applicant. Thus, in reaching a determination that the applicant's father was fleeing prosecution, he refers to the FIA and appears to have taken on board the content of that agency's documents, submitted by the applicant, which bear out the conclusion that criminal proceedings are pending against Mr. A in Pakistan. The majority of the documents put before the RAT appear to relate to Mr. A's prosecution. Some relate to his business and tax affairs and do not appear relevant to any issue in either the applicant's or his father's asylum applications. Some newspaper articles were submitted. An article dated the 24th July, 2007, purporting to be from the Daily Awaz in Lahore bears the headline "AGENT INVOLVED IN HUMAN TRAFFICKING ARRESTED" and states that the FIA Passport Cell has arrested M.I.A., an agent involved in human trafficking. This article does no more than confirm what is already to be found in the FIA documents.

23. The only other newspaper clipping which could be said to relate to the applicant directly is one entitled "NEIGHBOURS FAIL ATTEMPT TO KIDNAP 3-YEAR-OLD GIRL. ACCUSED FLED". This is undated and the source unidentified. This article refers to the attempted kidnapping of A.I., 3-year-old daughter of Mr. A who resides abroad. The article states that the perpetrators were unknown motorcyclists. This article appears not to be the same one submitted in support of the application by Mr. A for re-admission to the asylum process although this is unclear. Whilst this article, if genuine, could be said to corroborate Mr. A's story, it does not corroborate any Convention nexus.

24. The applicant relied on the following passage from the judgment of Cooke J. in I.R.:

> "27. Indeed, it might well be that on closer scrutiny, some or all of these documents might be shown to be false and even to have been fabricated for the very purpose of the asylum application. However, the girlfriend's article, for example, looks superficially to be in an original newspaper surrounded by other typical items, advertisements and so on, but it could conceivably be shown perhaps that the names of the author and the photographer in the byline are names the girlfriend and the applicant have adopted in order to claim asylum. Thus, it may all be shown to be an elaborate contrivance and fraud.
>
> 28. Nevertheless, unless and until such issues are addressed by the appropriate decision-maker, from the point of view of the validity of the Contested Decision as it now exists, the fundamental point is that this was, at least on its face, original, contemporaneous documentary evidence of potentially significant probative weight in corroborating key facts and events. If it is authentic, it may prove that the applicant has suffered persecution for his political activities. If that is so, then the judgmental assessment that is made of the quality of his answers to the questions about the BPF may possibly assume an entirely different weight when all of the evidence, both testimony and documentary, is objectively weighed in the balance."

25. Even if it were the position in this case that the kidnap article was not adverted to by the Tribunal Member, it does not seem to me to advance the applicant's case in any significant way. Whilst it may be said to provide some corroboration of his story in general, it could not be said to demonstrate any evidence in support of the case that Mr. A was suffering persecution for a Convention reason. Thus it does not seem to be evidence of the type or quality referred to by Cooke J. as having the potential to prove anything that would have supported the asylum application. The Tribunal Member says that he considered all the documentation and in my view he was not obliged to embark on a detailed analysis of individual documents unless the documents on their face appeared to corroborate the claim for asylum and he decided to discount them for some reason. In this case it does not appear to me that any of the applicant's documents could be said to be inconsistent with the decision of the Tribunal Member.

26. It therefore seems to me that the fact that this and the other documents submitted by the applicant are not specifically referenced by the Tribunal Member does not invalidate the decision. The applicant has not shown that any of the documents are probative of the core issue, namely that Mr. A and by extension the applicant will suffer persecution for a Convention reason.

27. Finally, the applicant contends that the relocation findings are irrational and ought not stand. I cannot accept that submission. The RAT decision carefully examines the possibility of relocating to Karachi and considers the relevant demographics of that city. Of course it must be said that relocation would only arise where the applicant has a well founded fear of persecution for a Convention reason and that has been found not to exist in this instance. Some decisions of this court suggest that the making of internal relocation findings is inappropriate where there has been a negative credibility finding. In that regard, the applicant relied upon the judgment of Mac Eochaidh J. in *E.I. and A.I. v. The Minister for Justice, Equality and Law Reform & Anor* [2014] IEHC 27 where he

said:

> "9. […] I fully agree with the comments of Clark J. with respect to the redundancy of making internal relocation findings in situations where credibility is rejected. The practice of making negative credibility comments in asylum decisions followed by an internal relocation assessment is commonplace. It is not the function of the High Court to direct inferior Tribunals as to how they should take their decisions in future. A clearly expressed credibility finding without equivocation leading to a rejection of the applicant's claim is self-evidently a desirable outcome when justified by the evidence. However, it is understandable that decision makers often make equivocal findings in respect of credibility. In such cases, it is not surprising that such findings are then followed by an internal relocation assessment. Clark J. expressed the view that where an internal relocation finding is made, notwithstanding a rejection of credibility, that internal relocation assessment is not to be tested for compliance with the provisions of Regulation 7 of the EC (Eligibility for Protection) Regulations 2006. With the greatest respect to my learned and experienced colleague, I am not convinced that any assessment of internal relocation should escape full-blooded scrutiny in judicial review, nor am I convinced that the provisions of Regulation 7 should apply to some but not all internal relocation assessments. In any event, in my experience, most internal relocation assessments which follow negative credibility findings rarely follow clearly expressed comprehensive rejections of credibility. They are usually credibility findings such as those which appear in this case. In other words, they are equivocal. The Tribunal Member has doubts as to the credibility of the applicant but does not appear to be in a position to reject fully the applicant's narrative because of the weaknesses observed. In those circumstances, the decision maker, quite naturally, feels compelled to proceed to examine the question of internal relocation, if the facts and circumstances justify such a consideration."

28. In the present case, the ground upon which the applicant attacks the internal relocation finding is that it was irrational because the applicant's father would be arrested as soon as he returns to Pakistan. The submission that it would be unreasonable for the applicant to relocate without the benefit of his father's company is surprising as it appears to overlook his mother and indeed the fact that he has relatives in Pakistan looking after his sister. Presumably, if Mr. A is innocent of the charges levelled against him, the applicant should not be deprived of his company for long. Quite apart from the internal relocation finding, it should not be overlooked that the RAT found that the applicant had not established a failure of state protection, a finding not challenged in these proceedings.

29. Accordingly, I will dismiss this application.