

THE HIGH COURT**JUDICIAL REVIEW****Record No. 2009/953JR****Between:/****H. K. [PAKISTAN]****APPLICANT****-and-****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND DENIS LINEHAN SITTING AS THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 5th day of November 2013**

1. The applicant seeks an order of certiorari quashing the decision of the Refugee Appeals Tribunal (RAT) dated the 24th June, 2009, to make a negative recommendation to the Minister in relation to his asylum application. He is a member of the Ahmadi community from Pakistan and argues that the Tribunal failed to apply a forward looking test in his case. Mr Ian Whelan B.L. appeared for the applicant instructed by Travers and Co. solicitors and Ms Siobhan Stack BL appeared for the respondents.

Background

2. The applicant arrived in Ireland on the 11th August, 2006, and sought asylum on the 15th August, 2006. Following an oral hearing before the Refugee Appeals Tribunal on the 6th November, 2007, a negative recommendation was made by decision dated the 24th June, 2009. This decision was notified to the applicant by letter dated the 14th August, 2009, which was received by him on the 17th August, 2009. The proceedings before this Court were issued on the 17th September, 2009, and are therefore outside the statutory time period. The applicant seeks an extension of time in the order of 16 days. The reasons for the delay in issuing proceedings were explained in his affidavit and are accepted by the Court and the extension will therefore be granted.

3. The applicant's background as a Punjabi and a member of the minority Ahmadiyya religion were accepted by the Tribunal Member. He claimed that he came to Ireland (via the United Kingdom) from Lahore in Pakistan, where he was married with four children. He fears that if he is returned to Pakistan he will face persecution based on his Ahmadi status. He gave evidence of experiencing such persecution in the past; on one occasion a group called Khatam-e-Nabuwat (which is vehemently opposed to the Ahmadiyya faith) attacked the mosque he attended and worshippers were killed and others arrested. After that incident the mosque closed and the Ahmadi community began attending prayer meetings at the applicant's house. Khatam-e-Nabuwat became aware of this and began harassing those attending. The applicant submitted country of origin information (COI) in support of his assertion that discriminatory laws restricting the practice of his religion are enforced and serve to aid discrimination against members of the his community. Such persecution of the Ahmadiyya movement was at the core of the applicant's case.

4. Against this background of discrimination, the applicant described his particular experience and fears. A central facet of his narrative concerns personal targeting by a Dr. [S] to whom he rented a property. The applicant claimed that Dr. [S] was a member of Khatam-e-Nabuwat but he was unaware of this when he first rented him the premises, which was used as a surgery. After a number of years, in 1998, the applicant sought possession of the premises but Dr. [S] refused to vacate. The applicant then initiated court proceedings to obtain possession of his premises and also lodged a complaint with the police. The relationship deteriorated as he was threatened physically any time he appeared in court in connection with those proceedings. The problems were exacerbated when on the 31st October, 1998, Dr. [S] appeared to be willing to vacate the premises and asked the applicant to move some things out of the premises, then called the police while he was doing this and accused the applicant of stealing his property. The police then commenced criminal proceedings against the applicant. On another occasion he was shot at by a number of Dr. [S]'s security guards who were also members of Khatam-e-Nabuwat. When the applicant filed a complaint with the police they took action against the security guards but following objections by Dr. [S] that such action was being taken on the basis of the instructions of an Ahmadi, the charges were dropped.

5. The applicant's civil action continued and it appears that a determination was to be handed down in January 2006. Prior to the court appearance, the applicant was seriously assaulted and warned not to appear in court. As he then failed to turn up in court an arrest warrant was allegedly issued in respect of him. He subsequently moved to Lahore as he feared being killed. He rented a house in there and started a new estate agency business. Later that year, people who had come to him to buy a house assaulted him when they found out he was an Ahmadi. He decided to leave Pakistan and travelled first to the United Kingdom and then to Ireland. He claims that there is no State protection available to him in Pakistan in respect of his fears and that relocation within Pakistan is not a viable option for him.

Applicant's Submissions**Delay**

6. The applicant argues that there was extraordinary delay in the delivery of the decision as almost 20 months elapsed between the date of his appeal hearing and the date he received the decision, in breach of his right to have his appeal determined within a reasonable time and to expect the respondent Tribunal to conduct its affairs efficiently. The applicant submits that the function of the Tribunal Member is the expeditious dispatch of its business and that the Chairperson of the Tribunal is obliged to ensure that the business of the Tribunal is managed efficiently. The applicant argues that by allowing a situation to arise whereby an appellant experienced a delay of almost 20 months, such obligations were not fulfilled. In light of the delay, the Chairperson should have exercised his general power to reassign the appeal to another member of the RAT after the initial hearing had taken place (pursuant to the Second Schedule of the Refugee Act 1996, as amended). The applicant relies on an ex tempore judgment of Mac Eochaidh J. in *Azeez v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, 21st December, 2012), where leave was granted to argue that "delay per se causes invalidity where the decision rests upon credibility findings. Inevitably, demeanour affects

credibility findings even if it is not expressly referred to by the decision maker. It is possible that the effect of demeanour on credibility, be it positive or negative, may fade after a period of time such as the ten-month gap in this case."

Substantive Issues

7. The applicant further submits that the decision is invalid as the Tribunal Member did not properly consider the claim made and did not fully understand the true nature of that claim. He identified two errors of fact made in the decision. First, at page two of the decision the Tribunal Member identified his claim as being that *'If he was to return to Pakistan he would be targeted by the Ahmadi group'*. Secondly, at page fifteen of the decision, it is stated that *'it would appear as if he did not experience any great difficulties before then'*, referring to the applicant asking Dr. [S] to leave the house. The applicant submits that he had provided evidence of difficulties which he had experienced as an Ahmadi before that point. This seemed to be accepted by the Tribunal as even in the same paragraph of the decision at page fifteen the Tribunal Member noted *'he was involved in a fairly serious atrocity in 1984, in which a group of Ahmadi people were attacked and a number of people were killed'*.

8. The applicant submits that although he clearly claimed that all of his problems were enhanced because he was Ahmadi, this aspect of his claim was either not understood or not considered by the Tribunal Member. The Tribunal decision is confused and seems to be grounded on the proposition that if the events associated with Dr [S] had never happened, then the applicant would not have experienced any problems. The applicant contends that such a suggestion is irrelevant as those events did occur. It was never considered whether the Khatam-e-Nabuwat or KTM vigilante group exists, whether state protection would be available to him or whether internal relocation was a viable option. If the COI had been examined it would have been evident that the Khatam-e-Nabuwat group did in fact exist and that Ahmadi have problems with them and that the Pakistani State does not protect Ahmadi. The only finding made was that the applicant would be able to return to his country of origin, but that ignores his evidence of past persecution on the basis of his identification as an Ahmadi.

Respondents' Submissions

Delay

9. The respondents explain the delay by referring to an affidavit sworn on the 17th July, 2013, which confirms that the Tribunal Member had dictated his decision by the 11th February, 2008, and submitted the tape thereof to the offices of the Tribunal where it was mislaid. The respondents argue that there was therefore no undue delay in the preparation of the decision, as it was ready within approximately three months of the oral hearing and the only delay was administrative in nature. In this respect, the respondents note that Dunne J. stated in *A.W.S. v. Refugee Appeals Tribunal* [2007] IEHC 276 that a delay between an oral hearing on the 16th May, 2005, and the submission by the Tribunal Member of a decision for typing on the 5th August, 2005, was not such as to justify quashing the decision. Similarly, in *H.R. (Belarus) v. Refugee Appeals Tribunal* [2010] IEHC 510, Ryan J. held that a delay of 10 months between the hearing and the decision did not constitute substantial grounds for quashing a decision and leave was refused as the applicant in that case had not established any inaccuracy or flaw in the decision arising from the delay.

10. The respondents point out that the decision of Mac Eochaidh J. in *A v. Minister for Justice* (Unreported, High Court, December 21, 2012) related to a case where demeanour was found to have been taken into account. That is not the case here as the credibility of the applicant was accepted and there was therefore no question of demeanour being taken into account in order to reject credibility. In this case, the applicant's evidence was taken at face value and found not to relate to persecution for religious grounds, but rather to a property dispute.

Substantive Issues

11. The respondents contend that the first error of fact identified by the applicant (see above), while clearly erroneous, forms no part of the Tribunal Member's analysis. It is abundantly clear from the decision as a whole that this is a typographical error at best and an immaterial error overall.

12. The respondents deny that any second error occurred as argued by the applicant and submit that it is clear from reading the decision as a whole that when the Tribunal Member stated that the applicant had no difficulties prior to those with his tenant, he meant that he had no great difficulties with Mr. [S] prior to asking him to leave the house. The respondents submit this is not an error of fact at all or, alternatively, is not a sufficiently material error of fact to invalidate the decision.

13. Finally, the respondents argue that it is quite clear from the substantive section of the Tribunal decision that the narrative as set out by the applicant and the claim as stated by him was specifically considered by the Tribunal. The Tribunal simply found that the issue was really no more than a property dispute and that is something which is within the power of the Tribunal to find. Thus, internal relocation and state protection are not relevant.

The Court's Analysis

14. In cases made by Pakistani applicants seeking asylum on the basis of their membership of the Ahmadi religion, the important task for the protection decision maker is to establish whether they are in fact who they claim to be as it is well established that Ahmadi are subject to extreme discrimination supported by specific anti-Ahmadi laws in Pakistan. The acts of discrimination which are documented in COI reach the level of persecution in areas where Khatam-e-Nabuwat operates and all recent and relevant COI reports on Pakistan indicate a high level of anti-Ahmadi activity.

15. In this case the Tribunal accepted that the applicant was a member of the Ahmadi religious community but took the view that the applicant's religion played no role in his private dispute with his tenant Mr. [S]. The Tribunal Member seems to have found that since this was a private dispute, the applicant was not in need of international protection. It seems to the Court that this was an unnecessarily restricted and incomplete assessment of his claim, which included an accepted and documented attack on the mosque which the applicant attended; the holding of prayer meetings in his own house after the mosque was destroyed; a business relationship in which the applicant was disadvantaged because he was Ahmadi and his tenant was a member of Khatam-e-Nabuwat; an assault by the tenant's armed bodyguards which caused him to abandon his court proceedings; the failure of the police to investigate the assault once they were informed that he was Ahmadi; a relocation and a new career necessitated because he was Ahmadi; and an attack by clients in the new venture because he was Ahmadi followed by the decision to seek asylum in Ireland because he feared for his life.

16. The Tribunal Member commenced his assessment by stating:

"This man, basically, states that he was targeted in Pakistan on account of the fact that he was involved in the Ahmadi religion. At the outset, I want to make it clear that I accept that this man is a member of the Ahmadi group. They are a

minority group within Pakistan and, undoubtedly, they suffer harassment at the hands of opposing religious groups, especially main stream Muslims”.

17. Having so found, the Tribunal Member was bound to look at the whole claim of threats and assaults made because of his Ahmadi faith, the reality of the warrant for his arrest and most importantly whether he could on a return to Pakistan be able to access effective state protection as an Ahmadi. This did not occur: the whole claim was ignored and no forward looking test was applied. The entire focus of the decision was on the assessment of a very limited aspect of his past experiences. As indicated by this Court on the day of the hearing, the failure to apply a forward looking test would in itself suffice to quash the decision. A forward looking test can never be irrelevant when an applicant is found to be a member of a group whose members suffer harassment and discrimination which are capable of amounting to persecution for Convention reasons.

18. It appears to the Court that the applicant's claim of a history of harassment and assault was ignored in the Tribunal's finding:

"I must say that I am impressed by the fact that this man lived as an Ahmadi in Pakistan for a significant number of years and it appears as if he was never susceptible to any sanction by the authorities in accordance with the legislation to which I have already referred. For that, reason, I do not think that it is realistic for this man to fear the authorities if he was to return to Pakistan”.

19. In this Court's judgment in *M.L.T.T v. The Minister for Justice, Equality & Law Reform* [2012] IEHC 568, the importance of applying a forward looking test as part of the refugee status determination was underlined. The following excerpt from the decision of Peart J in the case of *Da Silveira v. Refugee Appeals Tribunal & Ors* [2004] IEHC 436 was cited in the *M.L.T.T.* case and is also pertinent here:

"The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that, owing to such well founded fear for a Convention reason is outside the country of nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution. In the context of the present case, this could mean that simply because the Tribunal, on an inference drawn from incorrect facts in relation to the rape has concluded that the applicant cannot be believed, or that her account of her escape seems somewhat far-fetched, it cannot thereby lightly or automatically discount completely her evidence of membership of the UFC and her involvement at political rallies, since that evidence is relevant on its own in relation to whether if she were returned to Togo she would suffer persecution in the future on account of her political opinion.”

20. Applying Peart J.'s dictum to this challenge, the Tribunal Member's finding that what occurred in the past was entirely due to a private property dispute does not absolve him from the obligation to consider whether the applicant, as an accepted member of the Ahmadiyya faith, would be at risk of persecution on account of his religion if he was returned to Pakistan.

21. On the basis therefore that the tenancy dispute formed only a part of the claim and that the remaining aspects of his account of past persecution were not considered and further that no assessment of future risk was conducted, the Court will quash the decision of the Tribunal and direct that the appeal be heard afresh before a different Tribunal Member.

22. Finally, there is the issue of the quite unusual delay in notifying the applicant of the appeal decision. As the Court has already determined that the decision should be quashed on other grounds, it is not necessary to determine whether or not that delay amounted to a breach of the applicant's right to fair procedures and good administration. While no flaw in the decision was identified which was attributable to the delay, the delay of almost 21 months was certainly highly unsatisfactory and a similar delay could, amount to a breach of good administration.