

THE HIGH COURT
JUDICIAL REVIEW

[2011 No. 888 J.R.]

BETWEEN**O. F. [Burma]****APPLICANT****AND****THE MINISTER FOR JUSTICE AND EQUALITY, COMMISSIONER OF AN GARDA SIOCHANA, IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Mr. Justice Cooke delivered the 25th day of June 2012**

1. By order of the Court (Edwards J.) 26th September, 2011, leave was granted to the applicant to apply for judicial review of a decision of the first named respondent (the Minister) dated the 24th August, 2011, which refused an application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006, (the 2006 Regulations). In addition to an order of *certiorari* quashing that decision, the reliefs sought included a declaration as to the invalidity of the 2006 Regulations in failing to provide for a public hearing on the application for subsidiary protection before an independent tribunal together with an order of *mandamus* directing the Minister to provide such a hearing.

2. In moving the application, counsel accepted (while not abandoning the grounds) that these additional reliefs had been dealt with in subsequent judgments of the High Court. In effect, the essential ground advanced in support of the claim to an order of *certiorari* was directed at the manner in which the determination of the application dealt with, or failed to deal with, what counsel described as one of two "core elements" in the claim to eligibility for subsidiary protection. It was submitted that the Minister had failed to make a finding which he was bound to make on the question as to whether, if it was accepted that the applicant was a member of the Burmese Rohingya ethnic minority whose habitual place of residence since the age of two years has been Bangladesh, he would face a real risk of serious harm in the form of inhuman and degrading treatment to which, according to country of origin information, the members of that ethnic minority were exposed in Bangladesh.

3. The applicant arrived in the State in 2008 and claimed asylum. He claimed to be a Rohingya refugee who had been born in Burma, but had been obliged to flee with his uncle when two years of age, following the death of his parents. He claimed that he had since lived with his uncle in a UNHCR refugee camp ("Domdomia") at Teknaf in Bangladesh. He said he had received education in the camp from the age of four until he was nine years old. He accepted during the asylum process that he did not speak the Rohingya language, but spoke Bengali. He said that because of the difficulties faced by members of his community he was unable to find work, but in 2008 he claimed that he had been offered work by a religious group named Harkat Ul Jihad which he knew to be an organisation banned and illegal in Bangladesh. Very shortly after joining the group, he claimed to have overheard a conversation in which the terrorists in question were discussing a proposal to sell the applicant in Afghanistan to fight with terrorists. He said that he fled and travelled to Dhaka. He claimed that a false charge of theft and robbery had been made against him by a mosque on behalf of the religious group and that his life would be in danger from the group if he was returned to Bangladesh.

4. The claim was the subject of a negative recommendation by the Office of the Commissioner in a report under s. 13 of the Refugee Act 1996, dated the 20th January, 2009. In essence, the account he gave as summarised above was found to be lacking in credibility such that he did not warrant being given the benefit of the doubt. In particular, doubt was expressed as to the authenticity of documentation which he had produced including a refugee "family book" and a "camp certificate". His knowledge of the Rohingya people living in Bangladesh was also judged to be inadequate and to put his credibility in question. It was pointed out that when asked at interview if he had any problems while living in the Domdomia refugee camp in question, he had replied "No". The Authorised Officer concluded "the applicant is found to have enjoyed *prima facie* refugee status and the assistance and protection of the UNHCR in Bangladesh. Whilst acknowledging that the Rohingya do face some discrimination and difficulties in Bangladesh, it is considered that this does not amount to persecution".

5. This negative recommendation was affirmed on appeal by a decision of the Tribunal dated the 14th September, 2009. In the view of the Court, this decision is notable for the detailed examination of the claim which the Tribunal member has carried out. In particular, the Tribunal member noted the following:-

- The applicant confirmed that he could not speak Rohingya and would be unable to understand Rohingya people from Burma;
- He was unable to name any other refugee camps in south eastern Bangladesh and had not heard of any other such camps;
- Explanations he gave in relation to discrepancies which were identified in the documentation he produced were considered inadequate.

6. In particular, the applicant had presented what purported to be "Rohingyas Refugee Family Book" from the Domdomia camp. This is a form of identity document issued to residents of the refugee camps, but was open to abuse because they could be confiscated by refugee leaders and sold to outsiders who could use them to access services in the camps. The Tribunal member examined the document in detail and noted that it had obviously been tampered with because the card number and other details had been deleted or overwritten. In the medical records section of the document, information had been removed and other information had been written in. Another document submitted was claimed to have come from the UNHCR in Bangladesh but did not bear the UNHCR logo and contained spelling mistakes. It was in English and purported to be signed by a person described to be "Head of the Teacher". Having

noted these and further discrepancies in the documentation the Tribunal member concluded: "When all of the foregoing is considered cumulatively serious issues arise in relation to the applicant's claim that he lived in the Domdomia camp Teknaffor in or around fifteen years.... Having considered the applicant's account, all information on file and having taken into account the applicant's age, given the serious credibility issues that arise, the applicant cannot be given the benefit of the doubt". Clearly, therefore, the Tribunal member disbelieved the substance of the story told by the applicant upon which his claim was based and particularly having regard to the applicant's lack of knowledge and the patent falsity of the documentation, his claim to have lived as a Rohingya refugee in a UNHCR camp for some fifteen years.

7. The declaration of refugee status having been refused, the application for subsidiary protection was made. So far as the applicant's personal history and the facts relied upon were concerned, the application was based upon exactly the same elements as put forward in the asylum process. The risk of "serious harm" asserted was that of "torture, inhuman or degrading treatment or punishment" under the 2006 Regulations. In arguing the case, counsel focused specifically upon the proposition that the conditions which the applicant would face if returned to Bangladesh amounted to "degrading treatment" in this sense.

8. Counsel for the applicant characterised the case made in the subsidiary protection application as containing two elements, namely, the general proposition that, as indicated by country of origin information, members of the Rohingya ethnic minority in Bangladesh faced conditions of such severe mistreatment, discrimination and hardship that it amounted to degrading treatment. Secondly, it was asserted in the application that the applicant's personal experience and particularly the incident when he was forced to flee the religious/terrorist group in order to avoid being sold into terrorism in Afghanistan constituted evidence of past "serious harm" which demonstrated that, as a member of the Rohingya minority, he was personally exposed to the risks evident in the country of origin information.

9. So far as concerns this latter element as one of the essential facets of the application, counsel for the applicant accepted that the Minister was entitled to discount it in the determination of the application in that he was entitled to accept and adopt the findings made by the decision makers in the asylum process to the effect that the account in this regard was disbelieved and that the event in question had not in fact happened.

10. Thus, the central argument advanced as to the invalidity of the determination was as follows. Neither the asylum decision makers nor the Minister had made any specific finding that the applicant was not, as he claimed, a member of the Rohingya ethnic minority. Any ambiguity on that point that might be perceived in the way in which doubts had been expressed as to the applicant's general story had been resolved by the concession made in the statement of opposition that the determination "did not find in the matter of fact that the applicant is not a Rohingya at all". In those circumstances, having regard to the extensive country of origin information submitted as to the plight of the Rohingya people in Bangladesh and the mistreatment and other conditions they faced, the Minister was obliged to consider and decide whether or not the applicant, as a Rohingya, faced a real risk of being subjected to degrading treatment if returned to Bangladesh. That, it was submitted, was a decision that fell to the Minister to make and was not one for the Court. The Minister had not addressed it in the Determination.

11. In the judgment of the Court, this contention is unfounded because it relies, in effect, upon an unduly formalistic dissection of the determination and a failure to appreciate the basis upon which the refusal rests when the determination is read as a whole.

12. In the first place, it is to be noted that in making the "Assessment of Facts and Circumstances" the determination quotes extensively from the decision of the Tribunal as summarised above and particularly the doubts expressed as to the applicant's claim that he had lived in the camp in question for fifteen years. The text then states in bold type: "Collectively these issues raise major credibility concerns regarding the applicant's claim that he is a Rohingya refugee". Counsel submitted that this appeared to be a statement which raised doubt as to the applicant's claim to be a member of the Rohingya ethnic minority. The Court does not agree. Having regard to observations made elsewhere in the assessment and to the absence of any query being raised as to whether the applicant originated from Burma, it is clear that the writer is here raising doubts, not as to his ethnicity, but as to whether his fifteen years in Bangladesh were spent as a refugee in the camp as he had claimed. As the country of origin information specifically recorded, Bangladesh is host to very large numbers of refugees from Burma of which some 28,100 were recorded as registered as refugees in the various camps. In addition, however, "The government estimates that there are between 100,000 and 200,000 Rohingyas living outside the camps without legal status ...". In other words, having regard to the question mark raised as to the applicant's lack of knowledge of matters that might be expected of a camp resident refugee and the use made of the tampered camp documentation, the Determination is raising doubts based on the possibility that while the applicant may have the particular ethnicity, he is not someone who has lived in a UNHCR refugee camp for fifteen years. The implication of that, of course, is that the applicant may have lived as a Rohingya for an extended period of time in Bangladesh without the need for protection because, as he had conceded, he had experienced no specific problems.

13. Notwithstanding the conclusion reached in that assessment, the Determination nevertheless proceeded to consider country of origin information relating to the general situation of Rohingya refugees in Bangladesh. In particular the situation regarding human rights in that country was examined. It was noted in that regard that the country was a party to the principal UN human rights treaties although the United States State Department Report of 2009, had recorded that Rohingyas arriving from Burma had been turned back as economic migrants and the UNHCR had reported that some of the individuals who were turned back were likely to have been entitled to refugee status. In reality, however, this information is not directly germane to the personal circumstances of the applicant. In the application for subsidiary protection, similar material had been adduced and that may explain why it is also addressed in the Determination. But the relevant issue is not whether new refugees from Burma are being turned back. The applicant claims to have lived for upwards of fifteen years in Bangladesh and does not claim to have at any stage been subjected to any particular incident of deliberate or violent mistreatment at a level of severity which could be characterised as constituting serious harm in the form of inhuman or degrading treatment.

14. It is undoubtedly the case as illustrated by some of the citations relied upon in the application that Rohingyas resident in Bangladesh may, as a minority, face economic and social difficulties including mistreatment in the form of denial of access to humanitarian aid, limited access to education, curtailment of freedom of movement and obstacles in finding employment.

15. The Court, however, accepts the submission made on behalf of the Minister that such hardships and difficulties and even the denial of educational, social and economic entitlements which are sought to be ensured by international law, do not suffice to bring the applicant's claim within the scope of the concept of "serious harm" in the form of inhuman or degrading treatment for the purpose of eligibility for subsidiary protection. As counsel for the Minister correctly pointed out, the protection designed to be afforded by subsidiary protection under this heading corresponds to that afforded by Article 3 of the European Convention on Human Rights. It is an absolute prohibition of torture and inhuman or degrading treatment or punishment and connotes primarily direct and deliberate personal mistreatment or humiliation of the individual. It does not, in the view of the Court, extend to encompass general conditions of discrimination of a social group as a whole at least in the absence of evidence of the concerted or systematic mistreatment of

members of the group generally and that a level of severity in its consequences for individuals.

16. Finally, the Court is satisfied that, contrary to the submission made on behalf of the applicant, the Determination does address and decide the "core issue" which fell to be determined in that in several places the text records the conclusion that "it is not accepted that the applicant would face a real risk of torture or inhuman or degrading treatment in his country of origin" and that "overall, and having regard to all facts on file, I am not satisfied that the applicant has demonstrated that he is without protection in Bangladesh and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by torture or inhuman or degrading treatment in Bangladesh if he is returned there". However, even if the phraseology in the Determination could be open to criticism as an inadequately direct response to this aspect of the application, the Court is satisfied it would not be justifiable to intervene to quash this Determination as unlawful in the absence of any evidential basis having been laid in support of the proposition that this applicant personally would face a risk of exposure to degrading treatment. In the application the assertion was made: "We submit that the applicant has suffered discrimination which amounts to persecution as a person of Rohingya ethnicity living in Bangladesh" and that "it is submitted that the treatment already suffered by the applicant supports the applicant's contention that he is at risk of further torture if he is returned and that this is borne out by country of origin information".

17. The Court is satisfied that, on close examination, these assertions have not in fact been substantiated. The applicant in his s. 11 Interview made general complaints as to the dire conditions in which the refugees lived in the camp; the difficulties of obtaining work; the inadequate food distribution; the poor conditions of shelter in wet weather. When asked why he left Bangladesh he gave as the only reason the need to get away from the Harkat Ul Jihad group. His claim was not based upon any personal experience of direct mistreatment amounting to degrading treatment for the sole reason that he was a Rohingya living in Bangladesh.

18. For all of these reasons the Court is satisfied that the grounds in respect of which leave was granted have not been made out and the application for judicial review must therefore be refused.