Neutral Citation: [2014] IEHC 161

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2011/742 JR]

BETWEEN

T. J.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND MINISTER FOR JUSTICE AND EQUALITY

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered the 27th day of February, 2014

1. This is a 'telescoped' application for judicial review of the Refugee Appeals Tribunal's decision, dated 21st June, 2011, to affirm the Refugee Application Commissioner's recommendation that the applicant be refused refugee status.

Background

2. The applicant was born in Afghanistan on 1st November, 1989. It is his case that in December 2007, he was taken by the Taliban to Pakistan to participate in a training workshop with a view to him becoming a suicide bomber. He states that he was revolted by the material that he was shown which included videos of American soldiers apparently mistreating Afghan prisoners. The applicant fell ill and was allowed return home. He states that he was so frightened of the Taliban that he only spent one night in Afghanistan before he fled from the country.

3. The applicant arrived in Ireland on 14th January, 2008. On his arrival, the applicant applied for asylum in the State. That application was unsuccessful before the Refugee Applications Commissioner (hereinafter the "RAC") and before the Refugee Appeals Tribunal (hereinafter the "RAT"). The second named respondent made a deportation order against the applicant. The applicant's solicitors felt that the decision of the RAT was flawed because it was clear that they were under the impression that the applicant had not submitted any documentation in support of his application. In point of fact, the applicant had submitted three documents which he felt were very significant in providing corroboration of his application. By letter dated 29th September, 2010, the applicant's solicitors made an application on his behalf to the second named respondent under s. 17(7) of the Refugee Act 1996, for permission to make a further asylum application. The s. 17(7) application letter enclosed a copy of the documentation on which the applicant intended to rely. By letter dated 28th October, 2010, the second named respondent consented to the applicant making a further application for a declaration of refugee status.

4. The applicant completed the documentation and attended for interview. By letter dated 7th April, 2011, the applicant was notified that the RAC had declined his application for refugee status. The applicant appealed this decision to the RAT.

The Documents

5. The applicant had submitted three documents in support of his application. The first was his driving license. The second was a document allegedly issued by the Afghan Government dated 10th January, 2008. It stated as follows:

> " *[Emblem of the Government of Afghanistan]*
>
> *Government of Islamic Republic of Afghanistan*
>
> *Ministry of the Interior*
>
> *[Provenance of] Paktika Constabulary*
>
> *Department of Detentions*
>
> *MO 2240 Date: 1386/10/20 [10th January, 2008]*
>
> *On the basis of accurate information, T. J., a seminary student; name of father, H. J.; who had been engaged in studies in one of the military schools of the Taliban, and had subsequently been dispatched to Pakistan to special circles of military training for suicide attacks has now returned to Afghanistan.*
>
> *Urgent notice is hereby given to the above named individual and his family to turn himself in to the government. Otherwise, he would be subject to a heavy punishment if arrested.*
>
> *Any residents of the village who have any knowledge regarding this matter are hereby urged to cooperate with the government.*
>
> *[Signature: Chief Constable of [the Provenance of] Paktika]*
>
> *[Seal: Government of Islamic Republic of Afghanistan, Ministry of the Interior, [Provenance of] Paktika Constabulary, Department of Detentions]"*

6. The third document was allegedly issued by the Taliban and was dated 5th January, 2008. It was in the following terms:

> *" [Insignia]*
>
> *Islamic Emirate of Afghanistan*
>
> *Ministry of the Interior*
>
> *Security Command of Paktika*
>
> *Directorate of Crimes*
>
> *No. 220 Date: 15/10/1386 [05 January, 2008]*
>
> *T. J. – student – and his family are hereby informed that he must join the Taliban movement at the earliest possible time and he must not provide the secret information to the government and must continue his studies with us and if he does not join us, it would mean that he is an accomplice of the government and hence he would be pursued by us and if he is arrested, he would be given a heavy punishment.*
>
> *[Signed:]*
>
> *[Seal: Islamic Emirates of Afghanistan. Security, and of Paktika Directorate of Crimes]"*

7. The applicant's case was that because he had taken part in a Taliban training exercise and then left the training exercise on grounds of ill health, he was likely to be persecuted by both the Taliban and the Afghan Government. He was afraid that he would face persecution at the hands of both entities. The RAT found that while the applicant may have had a subjective fear of both entities, his fear was not objectively well founded. The Tribunal found that the documents were not corroborative of the applicant's account and they were afforded little weight by the decision maker. The RAT held as follows in relation to the documents:

> *"Various documents purportedly emanating from and issued by the government or other agencies in Afghanistan in 2009 and 2010 which relate specifically to the appellant were also submitted despite his contention that his family had since left Afghanistan and are living in Pakistan. The appellant's contention that he was the nephew of a Dr. G. B. was undermined by his inability to state to the Tribunal, when asked by the presenting officer, what the professional occupation of his uncle was. In those circumstances, while the Tribunal does not make any explicit finding in relation to the purported identity and other personalised documents represented by the appellant, it affords them little weight and finds, accordingly, that they do not advance his claim in any material respect."*

8. As can be seen from this part of the decision, the RAT fell into error in holding that the documents were issued in 2009 and 2010. This led the decision maker to hold that they were of little weight, as they were issued years after the applicant had left the training camp and at a time when his family had relocated to Pakistan. In fact, both of the documents issued in January, 2008, which was close to the time when the applicant had been on the training exercise. In these circumstances, it would appear that the RAT made a serious error of fact in dismissing the documents as being of little weight. The documents provide significant corroboration of the applicant's story and would tend to suggest that his fears of the government and of the Taliban were objectively well founded. In *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353, Cooke J stated as follows in relation to dismissing of documentary evidence:

> *"Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated."*

9. The RAT found that the documents submitted by the applicant were of little weight because they were issued in 2009 and 2010. This was a manifest error of fact. The applicant is entitled to know on what basis the documents were being discounted. Given the importance of the documents to the applicant's submission, he is entitled to *certiorari* of the decision on this ground.

Error as to time in Afghanistan

10. An error was also made in relation to another finding of the RAT, where it was held that having allowed the applicant to leave the training camp, the Taliban did not bother the applicant again. This seems to be predicated on a belief by the RAT that the applicant had spent an appreciable period in Afghanistan after the training camp and before he left for Ireland. The relevant portion of the RAT decision is as follows:

> *"The Tribunal was entitled to inquire what use the appellant would be to the Taliban if he had been forced to join the group. It is difficult to understand why the Taliban would warn him that he would be press-ganged on the next occasion, he refused to show up to their 'seminars'. After expressing manifest disgust at being shown a video of a suicide bombing, the Taliban allowed the appellant return home and never actually bothered him again before he left Afghanistan. From this analysis it finds that the events which he has a subjective fear of are not reasonably possible to materialise, i.e. being forced to join and fight for the Taliban against his will."*

11. This finding also appears to be based on an error, because it is suggested that the applicant spent a significant period in Afghanistan before coming to Ireland. In fact, the applicant's version which seems to have been accepted by the Tribunal was that due to his fear of the government and Taliban, he only spent one night in Afghanistan before taking flight out of the country. Thus, the reasoning underpinning this finding by the RAT has been undermined by the error as to the length of time that the applicant spent in the country before fleeing out of the country to Ireland.

Lack of Clarity

12. It has also been argued by the applicant that the RAT decision was insufficiently reasoned. In particular, the applicant points to the internal inconsistency within the decision in relation to his credibility. The RAT acknowledged at p. 9 of its decision:

> *"Whilst the subjective nature of the fear the appellant claims to have may be real, the Tribunal must also consider whether it is reasonably possible, applying an objective test, that the matters he claims to subjectively fear may actually come to pass for him in the future. The Tribunal finds that if the government had, in fact, any interest in persecuting the appellant as feared by the appellant, they had the opportunity to do so, yet did not avail of that opportunity. In the circumstances, one cannot say that the subjective fear of the government expressed by this appellant is objectively well founded, although it does not doubt that he may actually hold such beliefs. As he has aged*

out, this appellant is now in a better position to apply his faculties of logic and reason to the facts and circumstances of his past situation in Afghanistan and come to a more reasoned view of the likely risk to him were he to return there than he had when of a younger age."

13. The Tribunal continued as follows:

"The Tribunal has come to the conclusion that the appellant's subjective apprehensions as to persecution by the government are not borne out in country of origin information and are, accordingly, not objectively well founded."

14. The applicant argues that this constitutes a further strong suggestion that the Tribunal was prepared to accept that the events recounted by the applicant did, in fact, take place. Further on in its ruling, the Tribunal stated:

"The events which he has a subjective fear of, are not reasonably possible to materialise i.e. being forced to join and fight for the Taliban against his will."

15. The applicant has argued that this was yet another indication that the RAT was prepared to accept that the applicant had a genuinely held fear. However, the applicant concedes that at a later portion of its decision, the Tribunal goes on to suggest with equal force that the applicant may not be telling the truth about his subjective fear. The Tribunal, at p. 10 of its decision, having referred to several factors which led it to have doubts about the applicant's credibility, then stated at the bottom of that page:

"It should, however be noted, that the above issues on credibility lead to the conclusion that the appellant is not credible in his evidence."

16. In *A.S.O. v. Refugee Appeals Tribunal & Anor* [2009] IEHC 607, Cooke J held that the decision reached by the decision maker should be based on clear reasoning. The applicant should not be left at the end of the process unable to identify the precise ground upon which the application for refugee status has failed. The learned judge held at paras. 28 – 29 of his judgment:

"28. In the present case, had there been no application for judicial review, the Minister would have been required to make a determination under s. 17(1) on the basis of a section 13 report in which the applicant's entire story has effectively been discredited as untrue; and an appeal decision which appears to accept the story as true but which bases the affirmation on the availability of State protection and the possibility of internal relocation.

29. While that might not pose any practical difficulty for the Minister in making the determination, it does not appear to be compatible with the clarity of explanation and the transparency of decision making expected of asylum procedures that a claimant should be left at the end of the process unable to identify the precise ground upon which the application for refugee status has failed. Furthermore, the fact that the applicant cannot tell whether the account of having suffered persecution or threats of serious harm has been accepted or been rejected as untrue may create disadvantages for the applicant at subsequent stages when subsidiary protection is sought or when representations are made against a deportation order with a view to obtaining temporary leave to remain in the State upon humanitarian grounds. Accordingly, in the court's view, where a section 13 report makes a negative recommendation based entirely or predominantly upon detailed and cogent findings of lack of credibility, it is undesirable, particularly where there has been an oral hearing on appeal, that the issue of credibility should be left hanging in the air without specific comment in the appeal decision of the Tribunal."

17. A similar view was expressed by the High Court (Clark J) in *W.N.M. v. Refugee Appeals Tribunal & Anor* [2010] IEHC 171. At paras. 17 – 20, the learned judge stated as follows:

"17. The respondents argued that the applicant's credibility must be taken as accepted as no negative credibility findings were made and the sole basis on which the applicant was found not to be a refugee was that state protection would be forthcoming and / or that she could relocate within Nigeria. While a silence as to credibility may lead to the inference that credibility is accepted in some cases, the court is not convinced that this situation can be assumed in all cases and especially not in this case where the absence of a positive finding may have adverse consequences for the applicant at a future stage of the immigration process. As a general principle, if an applicant is found to be entirely credible in her narrative of systematic and serious abuse suffered at the hands of a non-state actor, then this ought to be stated. Where a recommendation in favour of refugee status is withheld on the basis of the availability of state protection or internal relocation, the court's capacity to review the assessment of either antidote to refugee status should not be hampered by the absence of a conclusion on the nature and source of the risk faced by the applicant. Unless the determination of credibility is spelled out, it can be difficult, if not impossible to assess the validity of a decision to affirm a recommendation that the Minister ought to refuse refugee status.

18. While the obligation to provide clear reasons is of importance in most administrative decisions, it is of more urgent importance in asylum applications as, pursuant to s. 16(17) of the Refugee Act 1996, the Commissioner's s. 13 report and the Tribunal's appeal decision must be furnished to the Minister to form part of an applicant's file before him in the event that an application for subsidiary protection and / or leave to remain on humanitarian grounds is made. An entirely credible applicant could be at an unwarranted disadvantage at that stage if the Minister's agents were unable to discern from the decisions of the asylum authorities that the applicant's account had been found credible and whether it was accepted that she would face a risk of serious harm within the meaning of the Geneva Convention, the Refugee Act 1996, or the Protection Regulations, if returned to her country of origin.

19. The absence of any findings whatever on the question of credibility or past persecution distinguishes this case from the more usual situation where doubts as to the truth of the applicant's account are evident and the Tribunal Member goes on to assess state protection and / or internal relocation on an 'even if' basis, i.e. even if I do accept your account, which I don't, you could relocate or avail of effective protection. No finding either way was made in this case and the absence of clarity impairs the court's ability to review the legality of the Tribunal Member's decision having regard to Regulation 5(2). The opacity in the decision on the issue of credibility also impedes the assessment whether the Tribunal Member considered the reasonableness of internal relocation by reference to the applicant's personal circumstances.

20. In those circumstances, the court is satisfied that the negative decision falls to be quashed as it fails to meet the requirement that decisions should be so couched that 'the addressee can ascertain from the decision why the appeal failed and…the court is placed in a position to exercise its function of judicial review': Pamba v. The Refugee Appeals

Tribunal & Anor (Unreported, High Court, Cooke J., 19th May, 2009). This judicial review Court has been unable to ascertain fully why the appeal failed and will therefore refrain from addressing the applicant's arguments on state protection and internal relocation."

18. In *T.M.A.A. v. Refugee Appeals Tribunal & Anor* [2009] IEHC 23, Cooke J held in relation to the giving of reasons by the RAT:

> *"9. …It seems to me that the starting point in that regard is the fact that the obligation on a tribunal such as the Refugee Appeals Tribunal when making a determination of this kind to give reasons for its conclusion has, in effect, two purposes.*
>
> *10. In the first place it is to enable an applicant for refugee status who is adversely affected by the conclusion to know with sufficient detail and clarity why the negative finding is being made against him or her, including the reasons for rejection of the principal or material factors upon which the claim to a well grounded fear of persecution is based. The second purpose is that a decision of a tribunal of this kind, which is susceptible of judicial review before the High Court, must give the reasons for its decision in sufficiently clear and concrete terms to enable the High Court to exercise its judicial review jurisdiction so that if the Court on reading the decision and having regard to the totality of the material which is available to the Court, finds that it is unable to understand the basis upon which the conclusion has been reached, or apparently material factors have been discounted, then the statement of reasons in the decision is possibly defective."*

19. The applicant has submitted that the Tribunal decision herein fails to meet either of the two objectives of the duty to give reasons highlighted by the court in the *T.M.A.A.* case. First, it is submitted that the applicant is not able to glean from the decision with sufficient clarity why his appeal has been refused. Secondly, due to the lack of clarity in the decision, the court is hampered in the exercise of its judicial review jurisdiction as it is impossible to discern in concrete terms the reason for the refusal of the appeal. I accept that it is unclear whether the Tribunal ruled that the applicant's story was subjectively credible, meaning that he did hold the fears that he said he did and for the reasons as stated by him, but that these fears were not objectively sustainable, or whether the Tribunal held that his story was incredible. The Tribunal decision is lacking in clarity in this regard.

Internal Relocation

20. The Tribunal also found that the applicant could relocate within Afghanistan, by going to Kabul. In this regard, the Tribunal stated as follows:

> *"The Tribunal also found that the appellant could relocate within Afghanistan, to Kabul (this location was specifically addressed by his solicitors in submissions to the Tribunal), for example, to escape any alleged problems he might have with the Taliban or Hezb-e-Islami. Given the degree of concern demonstrated by the appellant's family in sending him to Ireland on the financial resources displayed by them in being able to pay what would inevitably be a vast sum in the context of the average Afghan income to facilitate his travel to Ireland, it would be expected that the appellant's relatives would have the resources to enable the appellant to escape the threat of the Taliban within the country. Country of origin information submitted and heavily relied on by the appellant to the Tribunal in the form of, inter alia, the UNHCR 2010 Guidelines on Afghanistan, would support this finding: 'UNHCR generally considers internal relocation as a reasonable alternative where protection is available from the individual's own extended family, community or tribe in the area of prospective relocation. Single males…may, in certain circumstances subsist without family and community support in urban and semi-urban areas...'. The only real impediment to internal relocation identified by his solicitors was his alleged persecution emanating from the government. However, as identified above, that element of claim is held not to be well founded and therefore does not amount to an impediment to internal relocation."*

21. The applicant does not accept this analysis. He points to country of origin information which he maintains was not adverted to by the Tribunal. In particular, it is argued that the Tribunal failed to take into account the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, issued on 17th December, 2010. The applicant notes that the guidelines were issued against a backdrop of worsening security situation in certain parts of Afghanistan. In the guidelines, civilians suspected of supporting armed anti-government groups are identified as being a particular target of persecution. The guidelines state:

> *"Civilians suspected of collaborating with, or otherwise supporting, armed anti-government groups may face arbitratory detention, including detention without charge, and ill-treatment by ISAS or Afghan authorities."*

22. The applicant submits that these guidelines emphasise the up to date risks to persons suspected of supporting armed anti-government groups. He states that whatever about the position in April, 2009 when the report upon which the Tribunal relied was published, by December, 2010 such persons faced a real risk of persecution. I am satisfied that having regard to the applicant's participation in the training workshop, allied to the documents submitted from the Afghan Government, and taken in conjunction with the up to date country of origin information, there was considerable evidence from which it could be inferred that the applicant was likely to face persecution at the hands of the government forces such that internal relocation was not a viable option. In holding that it was an option for the applicant, the RAT failed to take sufficient account of the up to date country of origin information and the document issued by the Afghan Government in January 2008. If the Tribunal was going to disregard these matters, it would have to state clearly the grounds upon which the documents and the country of origin information was being disregarded. This was not done in this case.

Extension of Time

23. The letter notifying the applicant of the RAT decision was received by the applicant on or about 20th July, 2011. The notice of motion grounding this application was filed in the Central Office on 16th August, 2011. This was slightly after the expiry of fourteen day period within which it was permissible to file the leave application. The delay in this regard was dealt with by the applicant in paras. 21 and 22 of his affidavit sworn on 15th August, 2011. In essence, the delay was caused by virtue of the fact that the applicant had to obtain the opinion of counsel and had to have papers drafted during the long vacation. I am satisfied that in the overall context of this claim, the period of delay by the applicant does not give rise to any prejudice on the part of the respondents. Accordingly, I extend the time for submission of the application herein up to and including 16th August, 2011, being the date on which the notice of motion issued in his case.

Conclusion

24. The court is satisfied that the applicant is entitled to an order of certiorari quashing the Tribunal Member's decision of 21st June, 2011, and is entitled to an order remitting the applicant's appeal to the RAT for further adjudication by a different Tribunal Member.