

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2010 / 38 JR

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

BETWEEN/

G.N. [PAKISTAN]

Applicant

AND

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

Respondents

JUDGMENT of Ms. Justice Stewart delivered on the 26th day of June, 2015

1. This is telescoped hearing for judicial review seeking certiorari to quash a decision of the Refugee Appeals Tribunal dated 29th September, 2009, affirming the recommendation of the Offices of the Refugee Application Commission that the applicant should not be declared a refugee, and remitting the appeal of the applicant for de novo consideration by a different tribunal member.

BACKGROUND

2. The applicant is a national of Pakistan and was born on 23rd March, 1973, in the north western area of Pakistan. His stated difficulties arose as a result of the conflict between the Taliban and the government forces. The following is the applicant's account of the events that gave rise to the alleged persecution.

3. The applicant married a woman from Gondo on 26th June, 2007, which is located in Swat Valley, an area controlled by the Taliban, and he visited his wife's family there regularly. On 10th March, 2008, government forces killed a number of Taliban supporters. On 18th March, 2008, Taliban members called to his in-laws' house and warned him to provide them with information in respect of his contacts with the state authorities. He believes he was suspected on account of not being from the area. On 28th March, 2008, shots were fired at him. On 3rd April, 2008, his wife was with him at her parent's house when the Taliban again arrived. The applicant succeeded in fleeing. However, his parents-in-law were killed and his wife was abducted. He has not learned of her fate since then. His shop was bombed on 12th April, 2008, and he was again shot at on 5th May, 2008.

4. The applicant states that he made arrangements with an agent; he fled Pakistan, arriving in Dublin airport on 15th July, 2008. The applicant applied for asylum on 16th July, 2008 on completed an ASY1 form shortly thereafter. A Pashto interpreter was provider for the s.11 interview, which was conducted on 9th February, 2009. The Offices of the Refugee Applications Commissioner (ORAC) issued the s.13 report in respect of the applicant's claim, signed by two officers and dated 25th and 29th February, 2009. The recommendation contained therein was that the applicant not be declared a refugee. The commissioner made eight credibility findings against the applicant. The report goes on, under the heading 'state protection', to consider the availability state protection and the feasibility of internal relocation. The report does not make a definitive findings in relation to the aspect of state protection, but does state, in the final sentence at p.72 of the booklet: "It is considered difficult to believe that the Taliban would be able to track him down in Karachi and his alleged fear that they would do so is not considered to be a valid one."

5. The applicant appealed the decision of the ORAC by form 1 notice of appeal, sent by the applicant's solicitors on 1st April, 2009. The applicant attended at the offices of the Refugee Appeals Tribunal (RAT) on 26th August, 2009, for an oral hearing in respect of his claim.

IMPUGNED DECISION

6. The RAT issued a negative decision in respect of the applicant's claim, affirming the recommendation of the ORAC that the applicant not be declared a refugee. The decision was dated 29th September, 2009, and issued to the applicant on 3rd December, 2009, by registered post. That letter was returned to the RAT marked 'not called for'. The decision was re-issued to the same address on 18th December, 2009, and this was received by the applicant.

7. The tribunal member made a series of observations in regard to the applicant's claim, set out at pp.115-117 of the booklet. First, the tribunal member refers to a report from Refworld of 14th January, 2009, which is a Human Rights Watch report published on the UNHCR's Refworld website, and quotes from part thereof as follows:

"Throughout 2008 Taliban suicide bomb attacks and operations continued in the settled areas of the north west frontier province. Battles between pro Taliban militants and government security forces in the NWFP's Swat valley displaced civilians and led to severe insecurity."

The tribunal member then goes on to state:

"...I find it difficult to accept that the Taliban members would allow Mr. [applicant] one week to give an explanation as to his activities if, in fact, they actually suspected him of being involved in providing information to the army that led to the killing of eight or ten of their members. The general profile of the Taliban would lead one to think that the Taliban would take out revenge on somebody who had provided information to the authorities on them and especially if such information led to the loss of life of any of their members. This is one items of credibility that I intend to take into account in the

overall assessment of this appeal. It is a significant item when one considers that the main reason why this man left Pakistan was related to the activities of the Taliban and his general fear of them.”

8. The tribunal member then avers that there were five attacks that the applicant alleges were perpetrated upon him or members of his family, all of which he says he reported to police. The lack of evidentiary documents to substantiate the police reports affected the applicant’s credibility, according to the tribunal member who states: “The absence of such documentary evidence must question as to whether or not these incidents ever took place.”

9. The decision then goes on to deal with the issue of state protection, quoting from newspaper articles where the Pakistani state authorities had prevented attacks, regained areas from Taliban control and arrested insurgents. The tribunal member then states that:

“It is clear from the foregoing extracts that the proactive approach being taken by the security forces must provide some form of protection for this Appellant. There is no absolute guarantee of protection within any jurisdiction. There is a functioning police force and army in Pakistan as is evident from the foregoing country of origin information.”

The tribunal member then refers to article 2 the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), and quotes as follows:

“protection against persecution or serious harm’ shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection”

The tribunal member concludes the state protection analysis by stating: “...I am of the view that some form of state protection is available to this Appellant and, therefore, his claim is not ‘well-founded’”.

APPLICANT’S SUBMISSIONS

10. Mr. Mel Christle S.C., appearing with Mr. Garry O’Halloran B.L. on behalf of the applicant, submitted that the credibility findings made by the tribunal member were made without stating the reasons for the rejection of the applicant’s explanation. The applicant submitted that the lack of regard to the applicant’s evidence as well as the country of origin information supportive of the applicant’s claim was a breach of fair procedures and in breach of s.16(16) of the Refugee Act 1996 (as amended) and reg.5(1)(a) and (b) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). The applicant contended that credibility findings made against the applicant were based on conjecture and failed to adhere to the principles enunciated by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 353.

11. The applicant submitted that the tribunal member failed to deal with the core issues of the applicant’s claim, maintaining that the decision does not state whether the tribunal member accepted if the applicant had attracted the adverse attention of the Taliban. The applicant relied on the decisions of Eagar J. in *B.A. (Nigeria) v. Refugee Appeals Tribunal & ors.* [2015] IEHC 76; a decision of this Court in *T.U. (Nigeria) & ors. v. Refugee Appeals Tribunal & ors.* [2015] IEHC 61; and MacEochaidh J. in *B.O.B. v. Refugee Appeals Tribunal & ors.* [2013] IEHC 187.

12. The applicant submitted that, with regard to state protection, there was no reasonable or effective state protection as outlined by the country of origin information and therefore a finding in relation to the existence of state protection is not cogent.

13. The applicant asserted that the tribunal member undertook the incorrect test when assessing state protection. The abilities of the authorities to provide adequate and effective protection should have given consideration to the applicant’s own evidence. Counsel refers to *James C. Hathaway & Michelle Foster, The law of refugee status 2nd Ed.* (Cambridge, 2014) where at p.314 it states:

“The ultimate question in refugee law is not whether the home state has satisfied any particular standard- the home state’s responsibility not being the subject of the inquiry- but whether it is *in fact* able to protect against a risk of serious harm.”

The applicant submitted that the appropriate test is not whether the authorities are being proactive or merely trying to provide state protection, it is a test of effectiveness of that said protection. This approach, counsel submitted, was followed in *inter alia Idiakheua v. Minister for Justice, Equality and Law Reform & anor.* [2005] IEHC 150. Counsel further contended that the tribunal member had preferential regard for certain country of origin information when assessing the availability of state protection, and relied upon the decision of Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor.* [2007] IEHC 305, and particularly para. 44.

RESPONDENTS’ SUBMISSION

14. Counsel for the respondents, Mr. Daniel Donnelly B.L., submitted that the tribunal decision is clearly a matter of the personal credibility of the applicant. With regard to the credibility findings made by the tribunal, counsel submitted that there are two main findings in relation to the applicant’s claim and these are central to the applicant claim.

15. The respondent submitted, the tribunal’s adverse credibility findings reflected findings that had been made by the commissioner and accordingly, the applicant was on notice that those issues could potentially be the basis of a further adverse finding on appeal. The applicant’s explanation for the Taliban giving him a week to explain himself that he was only suspected but not really accused was, the respondents contended, in contradiction to his own assertion that he was in danger as a result of the suspicions entertained by the Taliban. The respondents submitted that the applicant did not provide cogent answers to the questions asked; the idea that the Taliban would follow some form of ‘fair procedures’ in giving him a week to respond to the allegations against him and the respondents argued that tribunal member was entitled to dismiss it as flying in the face of reality. The respondents averred that the tribunal was entitled to consider that, having regard to the general profile of the Taliban; they would take revenge on somebody who they suspected of providing information to the authorities without giving the person the option of escape.

16. The respondents argued that the tribunal member was entitled to make a finding in regard to that lack of evidence provided by the applicant, especially since there had been five alleged incidents involving attacks on the applicant or his family, all of which, the applicant claimed to have reported to the police.

17. The respondents argued that, in regard to the state protection finding, it should be the European Communities (Eligibility for

Protection) Regulations 2006 (S.I. No. 518 of 2006) that is taken into consideration and this was quoted by the tribunal member in their decision. Therefore, the respondents contended, the finding on internal relocation was decided in line with legal principles.

18. The respondents submitted that the applicant has not displaced the presumption of the availability of state protection. The respondents relied upon the case of Noonan J. in *M.O. v. Refugee Appeals tribunal and ors.* [2015] IEHC 55, and para. 20 thereof as follows:

"It seems to me that the authorities establish that there is a presumption that a state is capable of protecting its own citizens. Whilst that presumption can be rebutted, it requires clear and convincing proof to do so. If the decision maker arrives at a conclusion in this regard, the court cannot substitute its own judgment for that conclusion and will only interfere where it is established that the conclusion is one which no reasonable decision maker could have arrived at based on the evidence. It is immaterial whether the court agrees with the conclusion or not."

The respondents also relied upon the decision on *A.M.G. (Pakistan) v. Refugee Applications Commissioner & ors.* [2014] IEHC 379 in regard to the necessity for effective state protection.

19. The respondents submitted that the findings made by the tribunal member are all severable from each other; the applicant's credibility was not accepted and even if he was telling the truth, he had the option of internal relocation.

DECISION

20. An extension of time of 14 days is required. An explanation for the delay is set out at para.11 of the grounding affidavit of the applicant. In light of the reasons set out therein, I am satisfied there are good and sufficient reasons established and I accordingly extend the time for the commencement of these proceedings.

21. First, turning to the credibility finding made against the applicant in regard to the lack of a first instance report from the police. The tribunal member states at p.14 of the decisions states:

"The absence of such documentary evidence must question whether or not these incidents ever took place. I feel that I am entitled to take the absence of such reports into account in assessing the overall credibility of the Appellant's claim in a cumulative sense."

The applicant submitted that the tribunal failed to consider regulation 5(3) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). As *per* the terms of that regulation, the tribunal member is entitled to take into account the lack of documentary evidence when assessing overall credibility. This does not form a central aspect of this decision, which is acknowledged by the tribunal member.

22. The tribunal member states that, at p.115 of the booklet:

"The general profile of the Taliban would lead one to think that the Taliban would take out revenge on somebody who had provided information to the authorities on them and especially if such information had led to the loss of life of any of their members. This is one item of credibility that I intend to take into account in the overall assessment of this appeal. It is significant when one considers that the main reason why this man left Pakistan was related to the activities of the Taliban and his general fear of them."

In the preceding paragraph the tribunal member refers to country of origin information regarding suicide bomb attacks and other acts of atrocity throughout the applicant's home province and throughout Pakistan.

23. The applicant submitted that this credibility finding was based on conjecture and in breach of the principles enunciated in the *I.R. (supra)* decision, namely, the tribunal member deduced that because the Taliban were responsible for many atrocities, it was unlikely that they would have provided the form of fair procedures as described by the applicant. The link between the generalised atrocities committed by the Taliban and the finding by the tribunal member that the Taliban would not afford the applicant time to provide an explanation is based upon conjecture, and is not in line with the principles enunciated by Cooke J. in *I.R. (supra)*. The finding would be open to the tribunal member to make but, in order to do so, the finding should be rationally linked to the evidence, particularly since the tribunal member states that: "[i]t is a significant item [...]".

24. In the penultimate paragraph of the tribunal member's decision, article 2 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) is quoted, which is worthwhile setting out hereunder:

"'protection against persecution or serious harm' shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection."

Thereafter, the tribunal member states that the applicant could have sought state protection because he claimed to have made five reports to the police regarding the threats from the Taliban. However, earlier in the decision the fact that the applicant did not have documentary evidence supportive of those reports to the police had adversely affected his credibility. The applicant is entitled to have the core aspects of his claim decided upon by the tribunal member. It is unclear whether or not the tribunal member accepts that the applicant ever attracted the adverse attention of the Taliban or whether he reported the alleged incidents to the police.

25. It seems to me therefore, that the tribunal decision is lacking in cogency and demonstrated a failure on the part of the tribunal member to address the core claim of the applicant, namely whether the tribunal member accepted that he had come to the adverse attention of the Taliban and was therefore in fear of persecution and/or at risk of same. The inconsistencies/ apparent contradictions in the findings of the tribunal member, set out above, lead me to conclude that the decision does not withstand the tests set out by Cooke J. in *I.R. (supra)*. I am therefore satisfied that the decision should not stand.

26. I propose to grant leave and to further grant an order of *certiorari* in respect of the RAT decision and remit the matter for *de novo* consideration by a different tribunal member.