

THE HIGH COURT**JUDICIAL REVIEW****Record No. 2006/869 J.R.****Between:****N. H. V. [BANGLADESH]****APPLICANT****-AND-****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 30th day of September 2013**

1. The applicant claims asylum on the basis that he is a Rohingya registered refugee in Bangladesh who is falsely sought for crimes which he did not commit and fears being forcibly returned to Burma where he was born and where he will suffer persecution. The Refugee Applications Commissioner and the Refugee Appeals Tribunal both found that he is stateless and that Bangladesh is the country of his former habitual residence for the purposes of Section 2 of the Refugee Act 1996. The Commissioner's negative findings were far more extensive than those found by the Tribunal but nevertheless the Tribunal upheld the negative recommendation on other credibility grounds. The applicant seeks an order of certiorari quashing the Tribunal decision dated 9th June 2009. A telescoped hearing took place on 16th July 2013. Ms Sunniva McDonagh S.C. with Mr James Buckley B.L. appeared for the applicant and Ms Sinéad McGrath B.L. appeared for the respondents. After hearing their submissions the Court indicated *ex tempore* that the decision would be quashed. The Court now gives its reasons for that decision.

Background

2. The narrative provided to the Commissioner was that he was born a Rohingya Muslim in Burma in 1979. He lived there with his family until 1989 when the Burmese military attacked and destroyed the family home causing the family to flee to neighbouring Bangladesh. Between 1989 and 2001 he lived with his parents and siblings in a UNHCR-administered refugee camp in south eastern Bangladesh. He said he could speak Rohingya but was unfamiliar with a phrase read to him from the Quran in the Rohingya language and claimed that his secondary education at a local school was conducted in the Bengali language. In 2001 after problems arose at the camp he and his family travelled north to Barlekha province where he moved from village to village and worked as a general labourer. He married a Bangladeshi woman in 2002 and has two children born in 2003 and 2005. He was never granted Bangladeshi citizenship. When a caretaker government came to power and declared martial law, the special Rapid Action Battalion (RAB) force began to target Burmese refugees. For that reason he feared being refouled to Burma where he would face persecution by reason of his ethnicity. Further, in June 2008 illegal weapons were found behind his house with the marking "Made in Burma". He knew nothing about the weapons but as he was the only Burmese national in the area he was suspected of involvement. He heard through his wife that the police came to his home looking for him. They took her to the police station where they mistreated her. He did not return home and in July 2008 he flew to Ireland via Dubai and Istanbul. He did not apply for asylum in Dubai or Turkey because he was told there was no system there. His wife, children, parents and siblings remain in Bangladesh. He furnished a number of documents to confirm his registration as a refugee (a refugee family book, a copy of a volunteer security pass for Jumma Para transit camp, and a photocopy of a Bangladeshi master card for the registration of refugees from Burma, bearing his name and the names of his family members) and a copy newspaper article from *The Daily Sylhet Bani* dated June 2008 relating to the arms find.

The Section 13 Report

3. In a Section 13 report issued in December 2008 the Commissioner found that several issues undermined his claimed nationality and ethnicity and that his testimony was riddled with inconsistencies and errors, including:-

- Country of origin information (COI) states there were no reports of refoulement from Bangladesh to Burma of UNHCR registered refugees or asylum seekers and indeed that the Bangladeshi government provided some protection against refoulement;
- COI states that refugee children in Bangladesh are prohibited from accessing formal education within or outside refugee camps and Bengali language instruction is not available;
- One of his documents dated 1989 stated 'Myanmar' but another dated 1992 stated 'Burma'. He did not know the capital of Burma / Myanmar, saying that Myanmar was the capital of Burma. COI states that Burma was renamed Myanmar in 1989 and the capital was moved from Nay Pyi Taw to Rangoon (formerly known as Yangon).
- He says that the Rohingya speak a dialect of Bengali from Chittagong. He said he could speak Rohingya and said the Rohingya alphabet uses the Bengali alphabet. COI states that Rohingya language uses the Latin alphabet. He was not familiar with a phrase from the Quran written in Rohingya.
- He said he left Burma at the age of 10 and his brother and sister were born in Bangladesh. His documentation dated 1989 records that there were three children aged between 5 and 12 – his sister was 6, his brother was 8 and the applicant was 10. His explanation was that this was a new book and he insisted his siblings were born in the refugee camp.
- His travel details were not believed. No direct flights from Istanbul to Dublin took place on the day he travelled. He was also unable to name the airline between Turkey and Dublin.

4. Ultimately it was not found credible that he was a refugee from Burma.

The Appeal

5. The applicant filed a notice of appeal and written submissions addressing a number of the credibility findings made by the Commissioner. He argued that refugees in Bangladesh are neglected and tortured and he drew the Tribunal Member's attention to selected passages from a 2008 UK Home Office COI report. An oral hearing took place in May 2009. It is an unusual feature of the case that no Presenting Officer attended the hearing on behalf of the Commissioner. It is recorded in the Tribunal decision that the applicant sought to explain certain of the discrepancies noted in the Section 13 report. He said he left the UNHCR camp owing to poor living conditions and because the refugees were punished for demanding increased rations. He gave evidence about his education and the difference between the Sanskrit, Bengali and Rohingya languages. The Tribunal Member made no adverse credibility findings on this issue and said the differences between the languages were therefore immaterial to the claim. The applicant said that after leaving the camp he lost contact with his parents and he left Bangladesh because as a Burmese refugee he was unwanted and was subjected to mental and physical harassment and was not paid for work that he did. He also said he was falsely implicated in local disputes, specifically when the RAB found an arms cache near his home and stormed his house in June 2008. He was not home but the RAB harassed and beat his wife who was detained for two days. He told the Tribunal that he had been formally charged with an offence under Bangladeshi law in relation to the arms find and he produced a Bangladeshi District Court Order which states that the case against the applicant had been adjourned from time to time until 30th September 2008 when a warrant issued for his arrest owing to non-appearance.

6. Submissions were made at the oral hearing with respect to COI submitted, specifically a 2007 UNHCR report referred to in the applicant's submissions. It was submitted that the camp conditions amounted to persecution. Reference was also made to a US Department of State report on the RAB force and a UK Home Office report. Both of these reports were relied on by the Commissioner and were attached as appendices to the Commissioner's Section 13 report. Parts of the Home Office report were summarised in the applicant's written submissions but the parties disagree as to whether the full report was submitted to the Tribunal.

The Impugned Decision

7. The Tribunal decision is not easy to understand. The applicant's ability to speak Bengali, his inability to speak or read Rohingya, and his clear evidence that he attended a local school outside the camp were matters of high import in the Commissioner's report. However at the Tribunal stage he was afforded the benefit of the doubt on these issues and on his travel arrangements to Ireland. Having overcome this fairly significant background hurdle, the applicant might with reason believe that his narrative was accepted. However, the decision was negative. It was not accepted that conditions in the official refugee camps amounted to persecution "*in the absence of some Convention reason for being subjected to conditions which are such as to cross the threshold of amounting to persecution.*" The Tribunal Member found that the applicant was stateless and that Bangladesh was the country of his former habitual residence. It was recognised that the main basis of the asylum claim was that he feared refoulement by the Bangladeshi authorities but the Tribunal Member found that this fear was not supported by COI and not well founded. That conclusion derived from a US Committee for Refugees and Immigrants report which was appended to the Section 13 report together with a US Department of State report 2007, both which were cited by the Tribunal Member as support for the conclusion that there were no repatriations of Rohingyas.

8. The next part of the claim - his fear of persecutory prosecution for an illegal arms cache - was found to be "*vague, incoherent and inconsistent*". The Tribunal Member noted a number of issues pertaining to that aspect of his claim. While several credibility findings and inconsistencies were identified among the following findings, it was impossible to discern whether the claim of unfair prosecution was rejected because:-

- It was his wife who suffered the bulk of the harassment, not the applicant;
- The date given for secretly meeting his wife and learning that she had been arrested were not consistent;
- He said he did not think to ask his wife what had become of their children when she was arrested;
- He said his wife could not leave due to their economic situation but her family contributed towards his funds for travelling;
- His explanation for not applying for asylum at an earlier stage of his journey was not reasonable and undermined his credibility;
- The newspaper article furnished to the Commissioner carried little weight *as a piece of corroborative evidence*;
- The District Court Order furnished to the Tribunal could not be verified but in light of previous credibility findings the Tribunal accorded little weight to it; and
- The Tribunal Member was mindful that the applicant travelled through immigration on an admittedly false passport.

9. Ultimately the Tribunal Member summarised his findings as being that he did not accept that there would be a reasonable likelihood that the applicant's stated fear would be realised if he was returned to Bangladesh and that his fear of persecution was therefore not well founded. State protection and internal relocation were not addressed.

10. There are a number of difficulties with this decision. If the Tribunal was prepared to overlook clear credibility issues identified by the Commissioner and accept that the applicant was in fact a refugee registered with the UNHCR, it logically follows that he was accepted to be of Rohingya ethnicity with Burmese origins. That means that the only aspect of his account which was found not credible was his story that he was wrongfully suspected of illegally importing weapons from Burma. It is against that specific backdrop that the decision must be viewed.

11. While the applicant complains that the documents he furnished to support the claim were not considered as they were not referred to in the Tribunal decision, the Court finds no substance to this complaint. Unlike the Commissioner, the Tribunal seems to have accepted the validity of the UNHCR registration book as he accepted the part of his claim relating to the time spent in a refugee camp, giving him the benefit of the doubt in relation to certain inconsistencies identified in the Section 13 report. The District Court order has not been exhibited and so the Court cannot comment on it. The newspaper article was so extraordinarily self-serving that the Court has no difficulty in finding that any Tribunal Member would be excused from rejecting the article without any reference to it

in the decision. The article says "*an illegal arm*" was found in a house in the village and not "*behind my house*" or "*near my house*", as suggested by the applicant. The piece ends by saying "*RAB and police are not arresting the real criminals; instead they are trying to arrest innocent people like [N.H.]*".

12. The Court has no difficulty with the reasonableness of the findings made on vagueness, inconsistency and lack of credibility relating to the alleged arms cache. As this case will eventually be heard by another Tribunal Member, it not appropriate for the Court to comment further in this regard.

13. Having determined on reasonable grounds that the arms cache story was not credible, the Tribunal Member was left with a Rohingya man, originally from Burma, who lived with his family in a UNHCR-administered refugee camp until 2001 and then left the camp, married a local, established a family and worked as a casual labourer without papers moving from place to place for seven years until he came to Ireland in 2008 in fear of being refoiled to Burma by the Bangladeshi authorities. The Tribunal Member dismissed his claim on the basis that the evidence before him was that Rohingyas are not refoiled.

14. The applicant complains that this conclusion is directly contradicted by a 2008 UK Home Office report which was brought specifically to the attention of the Tribunal in the written appeal submissions and again at the oral hearing. No explanation was provided for the preference of the reports relied upon by the Tribunal Member over the Home Office report. However, on analysis, there is in fact no contradiction between the COI reports cited by the Tribunal Member and the Home Office report. The extract from the Home Office report relied upon by the applicant refers to the repatriation of more than 230,000 Burmese Rohingya refugees between 1992 and 1999, mostly by way of coercion. The report does not specify whether those people were registered or unregistered refugees. The USCRI report appended to the Section 13 report which was relied on by the Tribunal Member deals with the issue with greater specificity. It states that there were no reports of the refolement of UNHCR-registered refugees or asylum seekers but there were reports that the authorities had forced Muslim Rohingyas from Myanmar back over the border and that the Bangladeshi Rifles (BDR) had sealed the border to prevent the entry across a river of about 1000 Rohingyas fleeing communal violence in Myanmar. Thus, as Ms McGrath quite correctly pointed out, the COI is consistent in that it distinguished between the treatment of registered Rohingya refugees who enjoy protection and unregistered Rohingya refugees who may be subject to refolement.

15. The US Department of State appended to the Section 13 report, also relied on by the Tribunal Member, further indicates that that the law of Bangladesh does not provide for the granting of asylum or refugee status and the government has not established a system for providing protection to refugees but in practice it provides some protection against refolement. The report outlines the difficulties for the Rohingya community who are persecuted in Burma and unwelcome in Bangladesh where the government continues to deny asylum to newly arriving Rohingyas from Burma who are categorised as economic migrants. The report states that the Bangladesh government turns back as many persons as possible at the border and according to the UNHCR, some refugees returned by the government were likely entitled to refugee status. It then states "*There were no repatriations of Rohingyas*". It seems to the Court that the report makes the distinction between not allowing Rohingyas to enter Bangladesh apparently without any examination of their circumstances and not actually returning those who are in recognised camps who are registered by UNHCR. Thus it was not quite accurate to find that COI stated that "*There were no repatriations of Rohingyas*".

16. Critically, in light of this objective information, no consideration was given to whether the applicant who left the camp some considerable time ago still enjoyed UNHCR protection. There is nothing in the decision to suggest that the Tribunal Member disbelieved that the applicant left the camp in 2001. The question of whether he continued to enjoy the protection afforded to UNHCR-registered refugees was not considered even though the Tribunal appeared to accept that the applicant had enjoyed protection while in the refugee camp.

17. Even if there were evidence that the applicant would continue to enjoy UNHCR protection if returned, the question of whether he might be at risk of persecution in *Bangladesh* by reason of his ethnic origins was not considered. The case made was that he and apparently his family left the UNHCR refugee camp because of adverse conditions and treatment of refugees by the Bangladeshi authorities, and because the refugees were punished for demanding increased rations. After leaving the refugee camp he had to live in hiding and was never granted citizenship. He outlined mental and physical harassment and abuse as a worker because of his Burmese origins and / or his Rohingya ethnicity and his illegal status. He said that if a Burmese national is recognised in Bangladesh he is neglected, tortured and blackmailed or returned to Burma.

18. The applicant's evidence is, to some extent at least, supported by the COI referred to. The USCRI report appended to the Section 13 report states that at least several hundred Muslim Rohingyas from Myanmar had left Bangladesh for other countries such as Malaysia, because of the Government's severe restrictions against them in Bangladesh. The same report records that Rohingyas living outside the camp were in makeshift camp near a highway and a river and there had been fatalities on the road and in the water. The Government continued to ignore UNHCR requests to allow Rohingya refugees to work locally, and insisted that Rohingya refugees remain in camps and are not allowed to possess money. Money in their possession can be confiscated. The UNHCR said there were many reported cases of abuse against refugees, including rape, assault, domestic abuse, deprivation of food ration entitlements, arbitrary detention and documentation problems.

19. These issues were not considered although they formed part of the applicant's core claim once it was accepted that he was actually Rohingya and had been a refugee. For that reason the decision has to be set aside and the matter must be considered afresh.

Conclusion

20. For the foregoing reasons the Court granted an order of certiorari quashing the decision and directed that the case should be remitted for fresh consideration by a different Tribunal Member. Given the changes which have come to pass in Myanmar / Burma since the decision was taken in 2009 (not least the transfer of power from the military junta to a nominally civilian government), the applicant must of course have an opportunity to submit fresh information if he so desires. The applicant was awarded his costs.