

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2013 No. 12 J.R.]**

**BETWEEN**

**R.A.**

**APPLICANT**

**AND**

**REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND**

**RESPONDENT**

**JUDGMENT of Mr. Justice Eagar delivered on the 17th day of September, 2015**

**Introduction**

1. This is a telescoped application seeking an order of *certiorari* in respect of the decision of the Refugee Appeals Tribunal (hereinafter referred to as "the Tribunal") to affirm the decision of the Office of the Refugee Applications Commissioner (hereinafter referred to as "the ORAC") that the Applicant not be declared a refugee in accordance with section 2 of the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996").

2. The relief sought are as follows:

- a. An order of *certiorari* by way of an application for judicial review quashing the decision of the first named respondent to affirm the decision of the ORAC;
- b. A declaration that the Act of 1996 is incompatible with Article 39 of Council Directive 2005/85/EC,
- c. A declaration that the respondents have failed to provide the applicant with an effective remedy before a court or tribunal within the meaning of Article 39 of Council Directive 2005/85/EC;
- d. If deemed necessary, a declaration that the time limit imposed by section 5 of the Illegal Immigrants (Trafficking) Act, 2000 (hereinafter referred to as 'the Act of 2000') is not in compliance with the principles of equivalence or effectiveness, or, in the alternative, an order proving for an extension of time herein insofar as same is necessary;
- e. If necessary, an injunction prohibiting the second named respondent from further processing or determination of the applicant's claim or proceeding with any further proposal to make a deportation order in respect of the applicant pending the determination of the within proceedings;
- f. Such further or other order as this Court may deem meet.

3. The grounds on which the relief were sought are as follows:

- a. The Tribunal erred in law in determining the applicant's appeal without having any adequate regard to the arrest warrant submitted by the applicant, and in basing credibility on the translations of the said warrant.
- b. The Tribunal made repeated errors of fact and otherwise misconstrued the evidence in :
  - i. Stating that 'F's family accused him along with the Awami league people' – this is a matter of significance where the Applicant fears the Awami league;
  - ii. Stating that 'the entirety of the Applicant's claims has it's foundation in the fact that there was an incident between the Bangladeshi National Party (hereinafter referred to as "the BNP") members and the Awami league – this is significant because the said incident was preceded by a history of association with the BNP, and the Tribunal failed to examine the applicant's claim on the basis of imputed political opinion;
  - iii. Finding that it was highly significant that the applicant was not arrested, without having regard to the arrest warrant, applicant's evidence, and supportive country reports;
  - iv. Finding that the applicant's refusal to go to the police for fear of immediate arrest 'does not make sense'. No reason is given to support the said finding;
  - v. Failing to offer any reason to support the proposition that newspaper/internet reports on the killing of an Awami League member would be available. This finding was exacerbated by the manner in which the Tribunal considered the arrest warrant;
  - vi. In making a credibility finding in respect of the applicant not being located at his sister's home, without regard to the evidence that the applicant was in hiding.

c. Having determined the appeal substantially on the basis of adverse credibility findings, the Tribunal erred in law in foreclosing on any lawful consideration of the likelihood of the applicant being exposed to persecution in the future.

d. The Tribunal erred in law in failing to adequately consider the notice of appeal and country of origin reports supportive of the applicant's claim.

e. The Tribunal erred in law in taking into account matters irrelevant to its determinations and/or failed to take into account relevant considerations.

4. The statement of grounds was grounded on the affidavit of the applicant, R.H., sworn on 9th January 2013. The applicant avers that he is a Bangladeshi national who was born on 20th October 1977. He was a supporter and associate of members of the BNP, and was implicated by association in the killing of an Awami League member. A result of which is he believes he would not receive a fair trial and fled the country "in fear of [her] life". He arrived in the State on 29th August 2012, and applied for asylum. He was subsequently interviewed pursuant to section 8 of the Act of 1996 on 30th August 2012. By letter dated 11th October 2012 the Refugee Applications Commissioner, in accordance with s.13 of the Act of 1996, recommended that the applicant not be declared a refugee.

#### **Decision of the Refugee Appeals Tribunal**

5. A notice of appeal was submitted to the Tribunal along with grounds of appeal and country reports, by letter dated 30th October 2012.

6. The hearing of the Tribunal took place on 6th December 2012. The report notes that the applicant's claim was based, *inter alia*, on the grounds of appeal as contained in the form 1 notice of appeal and the submissions therein, the country of origin supporting information, supporting documentary evidence and the submission outlined in the oral appeal. Further submissions, a fresh translation of an arrest warrant, and further country reports were submitted to the Tribunal by letter dated 29th November, 2012.

7. In respect of the applicant's claim the report noted that the applicant presented as a 35 year old Bangladeshi national who had to leave his home country in fear of his life having been implicated as a suspect in a murder. The applicant told the Tribunal that he was supporter of the BNP, often contributing money to friends in the party and socialising with it's members, at his home or the tea stall where he used to go after work and discuss politics. This led to an physical incident between two friends of the applicant, M and F, members of the BNP and Awami League respectively. The applicant said that with the help of other friends, they managed to restore peace. The applicant said that the situation returned to normal thereafter. This incident occurred in or about March.

8. The applicant stated that one month later there was an armed fight between the BNP and Awami League which occurred approximately three kilometres from the tea stall. The applicant claimed that he was not present at the altercation but details that both sides went into the fields with guns. He claimed that M allegedly shot F. At this time, the applicant said he was at the building site and was informed of the shooting by a friend. The applicant told the tribunal how he was accused of murder and continued that F's family accused him of this along with the Awami League, who the applicant said, knew that he was a supporter of the BNP.

9. The applicant told his brother of the accusation against him and his brother proceeded to go to the police station and speak to the officer commanding ("OC") stating his brother's innocence. The OC said it was the victim's family/Awami League who submitted the case. The applicant was never charged with any offence and he did not attend the police station "as they would have arrested him at once". The applicant said that many times his brother tried to help him. He stated that the police had said that the incident had nothing to do with them. Although the applicant came to know that the police, rapid action battalion ("BAT") and crime investigation department ("CID") had come to his house to try and find them. In the course of which they verbally abused his family and had come every two to three days following the murder.

10. Following the murder the applicant went to his sister's house in Jaipurabad, a journey of 5 – 6 hours by bus. He was never tracked down there and he resided there for three months. He has had no contact with his sister since leaving. The applicant's brother informed him that he was not safe and that he was trying to send him abroad.

11. The applicant, who possesses no passport, claimed to have travelled to Ireland by ship, a journey of 37-38 days. The journey, which was financed by his brother, was organised by both he and an agent. He firstly boarded a cargo ship in Chittagong and was on board for 17-18 days. He did not know what country he arrived in and he had two agents accompanying him. He walked off this ship and onto another one and states that he did not know about immigration. He remained on this ship for another 19-20 days, landing in Ireland very early in the morning. He states that immigration were there but they did not ask for documents. There were no other passengers on the ship according to the applicant.

12. The applicant further stated to the Tribunal that he was happy with the translation of his arrest warrant on file, which he received by post.

13. The applicant believes that his life would be in danger if he was deported. He stated that if the RAB find him he will be shot. If the police find him he will be sentenced to death.

14. In the analysis of the applicant's claim the respondent indicated that in the round the applicant's claim is "extremely tenuous". It was noted that despite being blamed for a murder by member of the Awami League and the assertion that he would be arrested and persecuted by police upon return to Bangladesh, it is significant that the applicant was never arrested or charged with this murder in the three months prior to leaving Bangladesh. Given that the applicant is basing his application for asylum upon the convention ground of political opinion in that the applicant's claim has its foundations in an incident between BNP members and the Awami league, an incident which ultimately resulted in him being accused of murder, in circumstances where the applicant was not an (official) member of any political party. The respondent found it illogical that the applicant would be targeted for this murder in circumstances where he was not a member of any political party. The respondent stated that "it must be remembered that he did not even have a party card".

15. The respondent found it illogical how the applicant, following the murder between the two political party members, was scared in circumstances where he had an alibi and where there were numerous other people present who could have been suspected of, or blamed for the killing. The respondent found it further illogical and non-sensical that the applicant was blamed in circumstances where he was not even present at the scene. He found it incomprehensible that the applicant chose not to remain in Bangladesh to vindicate his name, in circumstances where "he had very strong grounds for fighting the claim".

16. The respondent drew the distinction between a fear of persecution and a fear of prosecution. While the respondent acknowledged objective evidence to the effect that people are sometimes wrongly accused of a crime in Bangladesh, there was no compelling

evidence in the case suggestive that the applicant was the victim of a witch-hunt at the hands of the police. Just because the applicant's name was put forward as a suspect was not conclusive that he would be either charged, arrested, prosecuted or convicted. Even if the police did investigate matters, there was no cogent evidence to show that the applicant was going to be blamed for the murder. To the respondent, the fact that the applicant was reported as being a suspect yet not pursued by the police in this respect highlighted that the applicant's situation was not one where the police were adamant and determined to prosecute the applicant.

17. The respondent found it significant that the information proffered by the police in response to a request by the applicant's brother that the applicant was listed as the third accused person for murder and was ultimately suggestive that the two preceding individuals would be found guilty of the murder. The respondent felt that this undermined the applicant's contention that he was a wanted man. The respondent proposed that if he was wanted for murder "he would have been picked up by the police in the immediate aftermath of the murder, for questioning".

18. The respondent found it not credible and undermining to a significant part of the applicant's testimony, that he would be able to spend three months undetected in his sister's house without being intercepted by his accusers or by the police, given the nature of the charges against him.

19. In response to a question about whether or not there had been a court case in relation to the murder the applicant replied that "when he was in Bangladesh, the matter had only been submitted to the police" and that he did not know of any court cases since then. It was put to him that it was strange how he was scared of a court case yet failed to make any enquiries in relation to the outcome, he then asserted that "whoever had accused him of murder had run away". The respondent said that it does not make sense that the applicant is scared of being arrested and brought to court in circumstances where he has failed to make any enquiries as to the progress of the case. The respondent would have expected a person in the applicant's position to make enquiries using any means to see if or how the murder case is progressing. This inaction on the part of the applicant raised questions as to the genuineness of the applicant's claim. The respondent noted that the applicant's claim that his accusers had run away was suggestive that they were not pursuing their claims and may not even be available if a case did come up.

20. The applicant did not have any objective information or newspaper reports in the alleged murder. The respondent deemed this surprising if such a matter were not reported in the media, considering the scale of the fight and the fact that an Awami League member was murdered. The Tribunal had regard to a lot of country of origin information in this respect and found many reports relating to incidents such as that described by the applicant/.

21. The applicant claims that his brother organised his trip to Ireland, who did not tell of his final destination asserting that he was "going to a safe place". When it was put to the applicant that it was not credible that he did not ask his brother what his destination was the applicant did not answer. The respondent felt it was bizarre that the applicant's brother would put him on a ship and omit to tell him of his destination. It was even more strange that an articulate and intelligent man like the applicant would fail to ask such an obvious question. The applicant's claim in this regard was weakened by this aspect of his evidence. In the course of his journey, previously discussed above, the applicant claimed he successfully travelled without having any problems with immigration, he claims to have merely "walked off of the ship on arriving in Ireland", although immigration were allegedly present, they did not ask him for identification. The applicant's evidence in this respect is implausible, according to the respondent, particularly in light of heightened checks and balances at all international ports and airports post 9/11. It was not plausible that the applicant managed to transit from Bangladesh, transiting one country and alighting in Ireland without ever having to show a passport.

22. In relation to the applicant's brother attending the police station to determine whether his brother was a suspect, the fact that the police freely offered this information did not make sense, especially in circumstances where he was not yet arrested. If it were the case that the applicant's brother did go to the police station to find out information, the respondent would have expected that the police might question him as to the actual whereabouts of his brother. However, this does not appear to have been done.

23. The applicant is relying on the convention ground of political opinion and has claimed to have been friendly with BNP members and to have regularly donated money to the party. However, he does not have a deep knowledge of the politics of the BNP, at interview he said that he did not know the objectives of the BNP.

24. The applicant claims to have been a wanted man yet he managed to leave the borders of Bangladesh without being intercepted by police. If it were the case that the applicant was a murder suspect, it would be expected that the police would have ensured that he did not leave the country without the matter being investigated fully.

25. The respondent referred to two copies of an arrest warrant on file. However there is contradiction as to the name on the document. The name on the first arrest warrant is 'Roja A', however the applicant present himself to the Tribunal as R.A.. The respondent acknowledged that this may well have been a typographical error or a clerical mistake. However the respondent stated that one would expect an official legal document to properly identify the individual it is aimed at. Significantly the copy birth certificate referred to 'R.A', this is a direct contradiction to the arrest warrant. The applicant, after the section 13 report, submitted another copy translation of the same document submitting that the first one was incorrect. There is no evidence that the second copy translation was translated by a certified body or organisation, while the first copy translation was certified by the ORAC translation project. The problem faced by the Tribunal on this point is that there is nothing to show that the second translation is legitimate translation. The inconsistencies between the documents were unhelpful to the Tribunal and did not assist the applicant's claim.

26. By letter dated 18th December, 2012 and received on or about 28th December, 2012 the applicant was notified that her appeal had been unsuccessful.

### **Submissions by Counsel for the Applicant**

27. Submissions by the counsel for the Applicant related to the decision of the first named respondent which, it was argued, was made in disregard to certain pertinent country of origin information and the Applicant's own evidence. It was further submitted by counsel for the Applicant that the decision was tainted by "not cogent or even rational" reasoning.

28. It is argued that the Tribunal member arrived at their negative decision having made certain adverse credibility findings in relation to *inter alia* the fact that the Applicant was not arrested or charged with the murder. This reasoning is irrational and not cogent. It is nonsensical to assume that the Applicant was not a 'wanted man' simply because he was ranked third on a list of potential suspects to the murder. It was similarly found that, "It is simply not credible that he [the Applicant] would have been able to go under the radar for three months without being intercepted by his accusers or the police". The latter finding, it was argued, was irrational and lacking in cogency. It failed to take into account the fact that the Applicant had moved location, taking up residence with his sister,

prior to departing Bangladesh.

29. Counsel for the Applicant argued that the Tribunal member failed to have adequate or appropriate regard for country of origin information and for the Applicant's own evidence in making her findings. In failing to have substantial regard to country of origin information, the Tribunal is alleged to have failed to arrive at a decision compliant with Regulation 5(1)(a) and (b) of the EC (Eligibility for Protection) Regulations 2006 which mandate an assessment of "all relevant facts as they relate to the country of origin" and "documentation presented by the protection applicant".

30. Further, the Tribunal Member is alleged to have failed in various ways to the Applicant's own evidence in arriving at issues pertaining to credibility. Cooke J stated in *IR v Refugee Appeals Tribunal* [2009] IEHC 353 that;

"The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told"

Counsel argued that the Tribunal member had no basis for finding that the Applicant's story or parts thereof were impossible. Counsel proposed that "they are certainly not beyond human experience of possible occurrences". As Cooke J said in the aforementioned case of *IR*:

"A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding"

Counsel noted that certain reasoning in the decision of the Tribunal member was "muddled".

### **Submissions by Counsel for the Respondent**

31. It is asserted by the Applicant that the Tribunal member erred in law in determining the applicant's appeal without having any adequate regard to the arrest warrant submitted by the Applicant and in basing credibility findings on the translations of the warrant.

32. Counsel for the respondent submits that the Tribunal member did not accept the credibility of the events as outlined by the Applicant. Counsel further made reference to the repeated errors of fact made by the Tribunal member, as alleged by the Applicant. The repeated errors of fact are as follows:

- a. The Tribunal failed to examine the applicant's claim of imputed political opinion
- b. The finding that it was highly significant that the applicant was not arrested in disregard to the arrest warrant, the applicant's evidence and supportive country of origin information.
- c. No reason was proffered in support of the finding that the applicant's refusal to go the police for fear of immediate arrest "does not make any sense".
- d. The failure to offer any reason to support the proposition that newspaper/internet reports on the Awami League member would be available.
- e. The final alleged error of fact related to the credibility finding in respect of the Applicant not being located at his sister's home without regard to the evidence that the applicant was in hiding.

33. Counsel for the applicant complained that the respondent failed to apply a forward looking test. However, counsel for the respondent argue there was no requirement for this as they given there was not "one scintilla of any objective evidence" pertaining to the alleged murder.

34. It is further contended that the Tribunal erred in failing to adequately consider the notice of appeal and the country of origin information.

### **Discussion**

35. The function of the High Court in Judicial Review is confined to ensuring that the process by which the conclusion has been reached is legally sound and not vitiated by any material error.

36. Cooke J. in *I.R. v. The Minister for Justice Equality & Law Reform and the Refugee Appeals Tribunal* [2009] IEHC 353, states:

"It is because in such cases the judgment of the primary decision-maker must frequently depend on the personal appraisal of an applicant, that it is not the function of the High Court in judicial review to reassess credibility and to substitute its own view for that of the decision-maker. Its role is confined when a finding of lack of credibility is attacked, to ensuring that the process by which that conclusion has been reached is legally sound and not vitiated by any material error of law."

37. The Respondent in this makes a number of findings in relation to both the credibility of the Applicant and the likelihood of his being persecuted as a result of the circumstances giving rise to this claim, that is that he was not present at the killing of one friend by another friend, but was a suspect.

38. The Respondent, at the beginning of his analysis of the Applicant's claim, describes the Applicant's claim as extremely tenuous, and notes that it is significant that the Applicant was never arrested or charged with this murder in the three months prior to his leaving Bangladesh.

39. The respondent further notes that there is a large amount of country of origin information, and says that he is aware of the fact that there is a large element of corruption within the judiciary and the police force in Bangladesh. He then says that he must assess whether the story which is relayed by the Applicant at the hearing actually happened to him.

40. In this context, he also says that it must be remembered that a fear of persecution is separate and distinct from a fear of prosecution. Another credibility finding was the fact that the Applicant was reported as being a suspect yet nothing was done by the police. In this respect, highlights the fact that this was not a situation where the police were adamant and determined to prosecute the Applicant. He also held that the Applicant was never charged nor was he arrested in circumstances where the police had

accessed his details and that this utterly undermined the Applicant's claim that he was a wanted man.

41. The Respondent states that the Applicant was asked if there had been a court case in relation to the murder, but had made no enquiries as to what the position was in relation to the case and the Respondent found that it did not make sense that although the Applicant was never arrested and brought to court in circumstances where he had failed to make any enquiries as to the progress of the case. That this raises questions as to the genuineness of his claim.

42. The role of the Applicant's brother, in speaking to the police, was also relevant. The Applicant's brother went to the police to find out whether or not he was a suspect in the murder. The police appeared to have indicated that he was a suspect. The respondent stated:

"If it were the case that the Applicant's brother did go to the station to find out information, one would expect that the police might question him as to the whereabouts of his brother. However this does not appear to have been done."

43. Given the minute scrutiny of the reasons for credibility, I should add that though in this case each of the findings were upheld, this approach should not be understood as requiring each such finding to be held by the High Court in order to sustain the legality of a decision. A decision-maker could err in one or more findings as to credibility and the High Court might, notwithstanding such error, conclude that overall, the decision on credibility is lawful. It is, in that most used, hopefully not overused phrase, "a question of fact and degree in each case."

#### **Decision**

44. In all of the circumstances, this Court is satisfied that the decision of the second named respondent complies with the jurisprudence which has arisen from credibility issues in refugee cases. In those circumstances this Court will dismiss the application for certiorari.

45. As this is a telescoped hearing, I am refusing leave to the Applicant, and refuse the reliefs sought.

**Michael Conlon SC and Kilda Mooney BL**

**Gary O'Halloran BL Instructed by the Chief State**

**Instructed by Trayers Solicitors Solicitor**

**For the Applicants For the Respondents**