

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2010 No. 42 J.R.]**

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

**BETWEEN**

**S. A. B.**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**AND**

**HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Barr delivered on the 2nd day of October, 2014**

**Background**

1. The applicant is Pakistani national and was born on 26th September, 1974. He lived in Faisalabad with his parents, his wife and daughter. He is a Shia Muslim. He was the President of Imambargah, Aastana Haider Karar Association, which is the name of his mosque. He has held this position since July 2001. He owned a clothing business which was established in 1995 and carried on this business in partnership with another man.

2. It is the applicant's case that on 9th January, 2009, he led a celebratory procession of Shia Muslims in memory of Imam Hussain. The procession was attacked by the Taliban supporter, Eh-le-Hadiz, a splinter group of a terrorist organisation known as Sipah-i-Sahaba.

3. Four members of this group were shot dead by some people in the applicant's procession. After the attack, the applicant learnt that the police were looking for him. He went first to Rawalpindi where he stayed with a friend for two weeks. He then moved to Gujranwala, where he stayed with the grandparents of his friend for four weeks.

4. He learnt that a First Information Report had been lodged with the police and that was why they were looking for him. The applicant stated that he spoke to a lawyer who advised him that as he was being pursued for breach of Article 302 of the Criminal Code, he would be hanged if he was found guilty. The lawyer advised him to flee from the country. His business partner made arrangements for the applicant to be taken out of the country by a trafficker. The applicant left Pakistan on 21st February, 2009, and arrived in Ireland on 23rd February, 2009.

5. At the s. 11 interview, it was put to the applicant that there was no trace on the internet of any reports of the violence at the alleged procession. The applicant said that he would provide some documentation in relation to the event. He subsequently sent in a newspaper in which there was an article referring to him in the following terms:-

*"Unidentified people attack the annual Yaum-e-Ashura (Ashura Dey) Procession with modern weapons.*

*Sudden attack causes stampede in the procession; officer in charge of security, chairman of the mosque, Imam Bargah committee and other workers kill four assailants in retaliatory action.*

*Local people set houses of Shia community on fire; a case against Amir HS.B. is lodged following an order of area magistrate.*

*Faisalabad (staff reporter): the annual Ashura Dey procession was attacked by arm miscreants on Multiana Road, Faisalabad. A stampede in the procession followed. The officer in charge of security of the procession, chairman of the mosque, Imam Bargah Astana Haider-e-Karrar committee and other workers fired in retaliation and shot four assailants down. The reporting of the incident caused widespread resentment. A demonstration was organised and some angry people set fire to houses of the Shia. The administration issued an order to the area magistrate to take immediate action and to take the situation under control. On receiving the order, the police lodged a case against the chairman of the mosque committee, A.H.S.B. under section 302 of PPC and launched the action to arrest the accused. "*

6. The Refugee Applications Commissioner in the s. 13 report dated 30th June, 2009, held that the applicant had not established a well founded fear of persecution as required by s. 2 of the Refugee Act 1996 (as amended). The applicant appealed this finding to the Refugee Appeals Tribunal (RAT) which held an oral hearing on 12th November, 2009.

7. There was quite an amount of country of origin information (COI) before the Tribunal at this hearing. The following documents had been submitted:-

*"First information report dated 9th January, 2009, second version of the first information report dated 9th January,*

2009, copy of bank card, bank statements (six pages), documents certifying applicant as president of the committee at his mosque, documents stating that the applicant was an 'ardent member' of the Azadar Alliance for the district of Faisalabad, copy arrest warrant in respect of the applicant dated 13th April, 2009, human rights watch world report 2009 - Pakistan, UK border agency report on Pakistan dated 28th July, 2009, newspaper in Urdu language from Pakistan, translation of article referring to the applicant in the said newspaper, national ID card, letter from trade union certifying he was a member of the union. "

8. Before looking at the applicant's case in relation to the RAT decision it is necessary first to deal with two preliminary matters.

#### **Extension of Time**

9. Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, requires judicial review proceedings to be commenced within a period of 14 days from the date on which the applicant was notified of the RAT decision. In the present case, it is likely that the applicant received notification of the decision on 18th or 19th December, 2009. Due to the time of year, the applicant has stated that he was not able to consult with his solicitor until 5th January, 2010. The solicitor then sought a copy of the applicant's file, and it was not received until 14th January, 2010. The applicant's solicitor sent a brief to counsel and the papers were returned by counsel with admirable speed. The notice of motion appears to have issued on 20th January, 2010.

10. In the circumstances, where it has taken over four years for the application to come on for hearing and where no prejudice has been caused to the respondent by the delay in instituting the proceedings, I am satisfied that there are substantial grounds for extending time for lodging the within proceedings up to and including 20th January, 2010, which appears to be the date on which the notice of motion issued.

#### **Translation of Affidavit**

11. The respondents make the case that there is no translation of the applicant's grounding affidavit. It appears to have been sworn in the English language. They state that in circumstances where the s. 11 interview and the hearing before the RAT were held with the benefit of an interpreter in Urdu language, there is no evidence that the applicant has sufficient knowledge to allow him to swear the affidavit in the English language.

12. In *M.B.B. v. Refugee Appeals Tribunal & Ors* (Ex tempore, High Court, 20th June, 2013), Mac Eochaidh held as follows:-

*"17. There is one further submission which I should address on behalf of the respondent and that was the submission that there is no affidavit of translation to support the grounding affidavits in the case. In this respect, the respondent refers to the decision of Cooke J in Saleem v. Minister for Justice (Unreported, High Court, 2nd June, 2011).*

*18. I reject the argument made for two reasons. In the first instance it is not a matter that is pleaded in the statement of opposition. It seems to be a case that was made for the first time in the written submissions in this case and then repeated orally. In my view, where a point such as that is sought to be made, whether it is a time point or a translation point, it behoves the respondent to move expeditiously to move to strike out the proceedings if they have such an argument and that should be done by motions in limine in the proceedings, or at the very least, it should be actively pleaded, and then if pleaded, appropriate action be taken to bring the defect in the proceedings to the attention of the court at the first possible opportunity. This did not happen in this case.*

*The second reason for rejecting the argument is that in the Saleem case there was clear evidence available to the court that the applicant did not understand the content of either of the affidavits sworn because the applicant confessed to that in the second affidavit in that case.*

*There is no evidence before this Court that the applicant do not understand the contents of the affidavits sworn. There is evidence that the affidavits have been sworn with the assistance of a person who speaks both their native language and English. But there is no evidence that the applicants do not have enough English to understand these affidavits or did not have sufficient assistance with the swearing of them.*

*There was clear evidence in the Saleem case because the applicant in that case admitted that they did not speak English. If the respondent wishes to bring a Saleem point, they need to produce evidence to the court that the person who swore the affidavit did not understand it. When that evidence is available, an application to strike out the proceedings based on the unreliability of the grounding affidavit might well be appropriate but only if that evidence is clearly available. It would be disproportionate to strike out proceedings on the basis of a hint or suggestion that the person's English is not up to scratch."*

13. In *S.A. (Afghanistan) v. Refugee Appeals Tribunal & Ors* [2012] IEHC 8, Hogan J. set out in clear terms that the rules of court should not be used as an instrument to prevent justice being done. He stated as follows:-

*"There is no doubt but that as both this case and Saleem illustrate, a certain laxness and complacency has crept into the practice of swearing of affidavits in recent times and the specific requirements of r.14 may have been overlooked through inadvertence in many cases. This does not mean, however, that non-compliance with this rule should result in the automatic exclusion of the affidavit in question. The Rules of Court themselves envisage that perfection is a quality given to few and so the Rules acknowledge this by allowing, for example, for the amendment of pleadings, joinder of new parties, extension of time and the slip rule.*

*In this regard, I would venture to repeat what I said in the context of an application to extend time to deliver a defence in O'Connor v. Nurendale Ltd. [2010] IEHC 387:-*

*'None of this, however, requires that the judicial discretion to strike out for want of defence must be exercised in an unbending, mechanical or unforgiving fashion. Quite the contrary: the courts must, to some extent, accommodate ordinary human frailties, failings and foibles, at least where it is possible to do so without material injustice to the other party. '*

*This general approach to non compliance with procedural rules has been consistently followed in this jurisdiction. Thus, for example in Director of Public Prosecutions v. Corbett [1992] I.L.R.M 674, 678 Lynch J articulated similar sentiments, again, admittedly, in the content of an application to amend pleadings:-*

*"The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While Courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendments should be made. If there might be prejudice which could be overcome by an adjournment then the amendments should be made and an adjournment also granted to overcome the possible prejudice and if the amendment might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses."*

14. I am satisfied that it would be unduly harsh to reject the applicant's case on the basis that there was not an Urdu translation of the grounding affidavit. In addition, there is no evidence that the applicant does not actually understand English sufficiently to enable him to swear the grounding affidavit. In the circumstances, I will permit the affidavit sworn by the applicant on 18th January, 2010, to remain in evidence.

### **The Substantive Matters**

15. The RAT made a number of credibility findings adverse to the applicant. The first of these was in relation to the timeline in relation to the events which allegedly took place on 9th January, 2009. The applicant had given evidence that the trouble at the procession had occurred at or around 2pm. The First Information Report (FIR) which was filed with the police appeared to be timed at 2.05am in one version of the report and at 2.05pm in the other version. The RAT held that if the procession took place and if there was a shooting incident as recounted by the applicant, it would be highly unlikely that a report would be filed with the police within such a short space of time. The RAT held that the time span involved in the filing of the alleged complaint must question the grounds and validity of the complaint in question.

16. The timeline is certainly a difficulty in relation to accepting the genuineness of the documents in question. However, if the applicant was going to produce a fake FIR one would have thought that he would have ensured that the times would tally with each other in his account. The time difficulty is there, but I do not think that it is so stark as to be fatal to the applicant's case. This is particularly so given that the two documents are slightly different in content. They are also different in relation to time, one being lodged at 2:05pm and the other at 2:05am.

17. One must also keep in mind that the FIR was followed by an Arrest Warrant issued on 13th April, 2009. If the RAT was going to reject this documentation, it was incumbent on the Tribunal to say so in clear terms and to say why it was taking this course of action. The RAT did not specifically deal with the Arrest Warrant in its decision.

18. The second credibility finding concerned the six week period between the date of the procession and the date on which the applicant fled to Ireland. The RAT stated that while the applicant made the case that he was being sought by the police on four murder charges *"he appears to have been able to live without hindrance from the security forces for six weeks after these crimes were alleged to have been committed. That particular time span is significant because of the serious nature of the alleged charges. Also the time span involved must question the credibility of this man's claim that he is to face charges in Pakistan and must, as a consequence question as to whether or not this march or any of the events relating thereto ever took place."*

19. This account is misleading because it gives the impression that the applicant was living openly and without hindrance from the police and security forces for six weeks in the period after the procession and before he left for Ireland. In fact, the applicant's clear evidence at the time of his 11 interview was to the effect that he four weeks with his friend's grandparents in Gujramwala. The RAT did not say whether it rejected the applicant's account in this regard. In the circumstances, the applicant's account seems to be a sufficient explanation for how he avoided police attention for that period of time. The Tribunal's finding in this regard is unsound as it was not based on the evidence which was before the Tribunal.

20. The RAT went on to look at the newspaper that had been submitted by the applicant. It will be recalled that at the s. 11 interview, it had been stated to the applicant that there was no news media report of the alleged incident at the procession as recounted by the applicant. He said that he would try and get some documentation concerning the events that had occurred on that date. He sent in the original of a newspaper in which there was an article referring to him.

21. The RAT stated as follows in relation to the newspaper article:-

*"I also note that the Refugee Documentation Centre was unable to find any recorded evidence of violence occurring in Faisalabad around the time of Ashura (which was the religious event that this march was alleged, related to). However, I accept that this appellant has produced a newspaper report relating to an alleged attack on the procession. This is a report that was produced after Mr. B. was interviewed pursuant to s. 11 of the Refugee Act 1996. A UK Home Office Report on Pakistan dated 28th July, 2009 referred to such newspaper reports and criminal charges and I wish to quote from that document as follows:-*

*"In Pakistan, it is not ...difficult to have a (simulated) criminal proceeding initiated against oneself, in order to get authentic documents (e.g. a 'First Information Report' or a decision to set the accused free until the date of the trial) ... It is possible ...either [to] pay for or to use private contacts to have a newspaper article published depicting a situation of persecution'."*

22. By placing the excerpt from the UK Home Office Report in reference to the newspaper, it appears to be inferring that the newspaper article was a forgery or was deliberately placed in a newspaper so as to support the applicant's story. The RAT cannot leave the matter up in the air in that fashion. If it was asserting that the paper was a forgery, it should have said so in explicit terms. Also, the RAT could have carried out further investigation on the newspaper by an Urdu translator, to ascertain whether the newspaper was genuine or not.

23. In *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353, Cooke J. said as follows in relation to the rejection 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 "*

24. In the circumstances, I am not satisfied that the RAT was entitled to reject the documentary evidence in the form of the newspaper, without closer investigation. Furthermore, if it was going to reject the document it should have said this in clear and

explicit terms.

25. The fourth reason given by the RAT for rejecting the applicant's credibility seems to be based on the assumption that the attack on the procession did take place. It notes that there were 400 - 500 people on the procession. On this basis, the RAT held that there should be many witnesses to establish that the applicant did not fire the shots. The applicant said that he would face trial and would be hanged if convicted. If the RAT was accepting that the applicant faced capital punishment, it should have said that that was the case. The respondent submitted that insofar as the applicant was making the case that he would face serious harm in the form of capital punishment if returned to Pakistan, that was not a matter for the RAT, but was for a different decision maker when considering a subsidiary protection application. This was an important issue and it demanded an explicit assessment in the RAT decision. It ties in with the next ground of relief relied upon by the applicant.

26. The fifth reason was in relation to the assertion made by the applicant that the police and judiciary in Pakistan were corrupt. The applicant had submitted an amount of COI, which tended to show that the police and the court system in Pakistan were corrupt. The RAT quoted the following passage from the Human Rights Watch Report on Pakistan dated 28th July, 2009:-

*"11.30 The law provides for an independent judiciary; in practice, however, the judiciary was subject to executive branch influence at all levels. This influence was exacerbated in the wake of the 2007 state of emergency when the judges of the Supreme Court and the provincial high courts were dismissed and only allowed back on the bench if they swore a new oath on a Provisional Constitutional Order instituted during the state of emergency. Lower courts remained corrupt, inefficient, and subject to pressure from prominent wealthy, religious, and political figures. The politicized nature of judicial promotions increased the government's control over the court system. Unfilled judgeships and inefficient court procedures resulted in severe backlogs at both trial and appellate levels. There were extensive case backlogs in both the lower and superior courts. As of November, the Sindh District and Sessions Courts had a backlog of 120,000 cases; as of September the Peshawar High Court had a backlog of 13,000 cases; and as of October 31, the Supreme Court had a backlog of 16,596 cases.*

*11.31 The civil, criminal, and family court systems provide for open trial, presumption of innocence, cross-examination by an attorney, and appeal of sentences. There are no jury trials. Due to the limited number of judges, heavy backlog of cases, lengthy court procedures, frequent adjournment, and political pressure, cases routinely took years, and defendants had to make frequent court appearances. A case started over when an attorney changes. "*

27. The applicant has stated that in doing this, the RAT has taken only those pieces of the COI which are favourable to the position as posited by the Tribunal. He submits that the RAT did not engage in any fair and balanced appraisal of the documentation.

28. In *D.V.T.S. v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 476, Edwards J. held as follows in relation to the assessment of conflicting COI:-

*"While this court accepts that it was entirely up to the second respondent to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the second respondent to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information, it was incumbent on the second respondent to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis. "*

29. In the present case, it was not sufficient for the RAT to simply cherry pick parts of the COI which supported the proposition that there was not a corrupt police and judiciary in Pakistan. There must be a balanced and fair appraisal of all the COI submitted. Where the RAT wants to adopt or accept the COI it must state on what basis it is doing so. The RAT did not state clearly why it was coming to the conclusion that the police and judiciary were not corrupt and that the applicant would get a fair trial if returned to Pakistan.

30. The final reason given was that the applicant had not supplied any evidence that the terrorist organisation, Sipah-e-Sahaba was looking for him. I think that the finding of the RAT on this aspect is well founded. The only evidence of the terrorist organisation was that it was one of their leaders who had filed the FIR. In the circumstances, the RAT was entitled to reach the conclusion that the appellant had not provided any evidence that members of the opposing sect were looking for him or that he would suffer any retaliation at their hands should he be returned to Pakistan.

## **Conclusion**

31. In the circumstances of this case, I am satisfied that the applicant has established that the decision of the RAT was deficient in the ways outlined above. He is entitled to an order quashing the decision of the RAT dated 3rd December, 2009. I will direct that the matter be referred back for consideration by a different Tribunal Member.