

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2012 No. 857 J.R.]**

**BETWEEN**

**G.H. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND Q.H.) (PAKISTAN)**

**APPLICANTS**

**AND**

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

**RESPONDENTS**

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

1. On the 30th day of July 2015, this court gave an order extending the period of time with regard to the good and reasonable grounds set out by the mother of the Applicant in this case.

2. The grounds upon which relief was sought in the statement of grounds in relation to G.H., the infant, are as follows:-

*" 1) The Tribunal erred in law and in fact in finding that there was no evidence that the infant Applicant would be at risk of persecution in Pakistan. In the alternative the said finding is irrational in the light of the law as directed towards Ahmadyya Muslims in Pakistan and country of origin information reports showing that the persecution of Ahmadyya Muslims is endemic in Pakistan.*

*2) The Tribunal erred in law in placing a requirement that the Applicant should show she is 'an exceptional' Ahmadi in circumstances where country reports placed before the Tribunal show that non "exceptional" Ahmadi are exposed to persecution in Pakistan."*

3. The affidavit of Q.H., the mother of the Applicant, was sworn for the purpose of verifying the facts that were relied upon in the statement of grounds. In that affidavit, she stated that the Applicant, her daughter, was born in Pakistan on the 28th of December, 2005, into an Ahmadi family. She stated that her daughter had suffered persecution since birth on account of her Ahmadi status. Her father was forced to flee Pakistan in fear for his life in 2005. He was refused refugee status by reason of a finding that state protection would be available to him in Pakistan.

4. The Applicant's father has since been granted leave to remain in Ireland in circumstances where his representations were substantially directed to his faith and the treatment of the Ahmadi in Pakistan.

5. As a result of the increasing persecution the Deponent and her daughter experienced, they were forced to flee Pakistan. They arrived in Ireland on the 8th of October 2011 and made separate and unsuccessful asylum applications. She had completed the ASY1 Form in respect of her daughter and attended for interview with the Commission in respect of her daughter's application. She was subsequently notified that the Commissioner had refused her daughter a grant of refugee status, and a Notice of Appeal was submitted to the Refugee Appeals Tribunal. She was informed by letter on the 13th of July, 2012, that the Tribunal had affirmed the decision of the Commissioner in relation to her daughter.

6. The Notice of Appeal on behalf of G.H. included a significant amount of country of origin information, illustrating the discriminatory and persecutory treatment towards Ahmadi in Pakistan, in particular the attacks by "unknown terrorists" on two separate Ahmadi congregations in Lahore on the 28th of May, 2010. The country of origin information stated that the Punjab Chief Minister, the President of Pakistan and the Prime Minister condemned the attacks and ordered an enquiry. However the Punjab Commission had not yet contacted the Ahmadiyya Community. One year after that attack, on the 29th of May 2011, thirty-eight Ahmadi died in coordinated gun- and bomb- attacks on two places of worship used by the community in Lahore. The Express newspaper stated that:-

*"there seems to have been no determined effort on the part of the authorities in Punjab to track down those responsible, or to ensure that such an incident never takes place again."*

7. Australian Government Refugee Review Tribunal Country Advice (Pakistan) dated the 4th of June 2010 states:-

*"Widespread campaigns of intimidation and violence against Ahmadi followers are predominantly carried out by extremist Islamic groups such as Sunni Tehrik, Tehrik-e-Tahafaz, Khatm-e-Nabuwat, Sipa-e-Sahaba, and others."*

The Country Advice (Pakistan) also says that the extreme Jihadi groups have pressurised police in Punjab to charge Ahmadi students with blasphemy, and call for their fellow-Ahmadi to leave their private tuition school.

8. The Human Rights Watch World Report of 2012 states:-

*"Pakistan had a disastrous year in 2011... religious minorities faced unprecedented insecurity and persecution."*

9. In I.P.S. News, dated the 22nd of November, 2011, it was stated:-

*"For years, Ahmadi in Pakistan have kept a low profile, living in constant fear and humiliation. Now the hatred has*

*spread and the oppressors have become more belligerent, which has led to several instances of overt faith-based persecution. In June pamphlets listing names and addresses of Ahmadi families alongside messages inciting murder were distributed in the Punjab city of Faisalabad. Several months later, 55 year old Ahmad, whose name had appeared on that list, was shot dead in his home..."*

10. This anti-Ahmadi sentiment is not restricted to Punjab alone. The U.K. Border Agency Country of Origin Information Report dated the 29th of September states the following:-

*"The hate speech, intimidation and violence against the Ahmadis which has been the norm in Pakistan, grew alarmingly in the year under review... 2010 was the worst in terms of the numbers of killings since 1984.*

*In monitoring the mainstream Urdu papers during 2010, the HRCP Report of 2010 found 1,468 news, articles and editorials that promoted hate, intolerance or discrimination against the Ahmadis. Hate campaigns against the Ahmadi Community also continued across the country through the use of stickers, wall chalking and the distribution of pamphlets.*

*The atmosphere of intolerance towards Ahmadis – in which the perpetrators of violence against them are painted as the injured parties – is increasing and is being indirectly nurtured by the government, who do not defend Ahmadis. Three years ago a member of the Judiciary or Government would have spoken out against violence or stepped in to defend Ahmadis against attacks of the press, but this is no longer the case. "*

These are a small sample of the country of origin information, all of which is in the same vein.

#### **Analysis of the Claim of the First-Named Respondent**

11. The first-named Respondent indicated that she referred to the evidence set out by the Applicant's mother on her daughter's behalf by way of background, and also the evidence of the Applicant's mother in her case, and also the evidence of the Applicant's father in his case. The first-named respondent states that the Applicant was a young Ahmadi Muslim who was born in 2005, thus is only seven years of age. Her only experiences in Pakistan could be said to be those during the course of her education and those experienced through her interaction with other children. The Applicant's mother claimed that her child was present when she received threatening phone calls and when they were abused verbally on the street, as the Applicant's mother would bring her to and from school. The Applicant's mother, in particular, stated that the Applicant was not a very good eater and that the Applicant's mother did request one of the teachers in the school to assist her in finishing her meals as she was not finishing them, but the teacher in question refused to do so saying she would not feed a non-believer. The Applicant's mother did not take the matter any further. The Applicant's mother also stated that one day her daughter came home with a mark on her hand as a teacher had slapped her. When the Applicant's mother went to take issue with the treatment of her daughter, she was not able to obtain any satisfactory outcome as the secretary to the principal did not facilitate her speaking to the principal or the principal did not facilitate any meeting directly with the teacher in question. The Applicant's mother also stated that her daughter would not have been entitled to attend religious and social practices at school, and that other children would discriminate by not playing with her, for example.

12. The first-named Respondent said that she found there was no basis for reaching a conclusion in the Applicant's mother's case that the Applicant's mother had a well-founded fear of persecution - the same conclusion reached in relation to the Applicant's father. She concluded that the Applicant in this case does not establish the burden of proof of showing that there is a real risk of serious harm to her upon returning to Pakistan. She stated that the Applicant was only seven years of age and could never be described at this particular stage in her life as being an Ahmadi of profile or an "exceptional" Ahmadi, such that she might be exposed to a level of treatment upon return to her country of origin that might give rise to a level of persecution. The Applicant will clearly face some level of discrimination, the country of origin information is consistent in supporting such a conclusion. However she cannot find from the evidence available, and from that provided on the Applicant's behalf and that which provides a background or context to her claim, including that of her father's, that there is a real risk of persecution for this Applicant if she returns to Pakistan. In her view, the treatment that the Applicant received at school does not amount to persecution, notwithstanding it is clearly unpleasant for the Applicant. Although perhaps she does not appreciate it herself, discrimination, per se, does not constitute persecution. Having regard to all the documentation, she affirmed the recommendation of the Refugee Applications Commissioner made in accordance with s.13 of the Act.

#### **Counsel Submissions on behalf of the Applicant**

13. Mel Christle S.C. with Garry O'Halloran B.L. set out the grounds of objection to this decision of the first-named Respondent, initially making complaint about the decision of the Commissioner that no separate claim had to be considered by the Commissioner on behalf of the daughter. However as the proceedings were not taken against the Commissioner in this case but against the Refugee Applications Tribunal, this court is not in a position to take up issues of the decision of the Commissioner. Counsel pointed to Regulation 5 of the European Communities (Eligibility for Protection Regulations) 2006, which imposes a duty on the decision-maker to take into account *"the individual position and personal circumstances of the protection applicant including factors such as background, gender and age, so as to assess whether, on the basis of the Applicant's personal circumstances, the acts to which the Applicant had been, or could be, exposed would amount to persecution or serious harm."* Counsel stated that undue regard to the decisions previously made in respect of the mother and father had been made, and that the Tribunal had failed to arrive at a decision in compliance with Regulation 5.

14. Counsel cited this court's decision in *D.A. (an infant suing by her mother and next friend N.A.) (Pakistan) v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal, Ireland and the Attorney General*, dated the 4th of March 2015 and cited at [2015] I.E.H.C. 208:-

*"However it is essential that each Applicant's appeal be considered individually"*

15. Counsel also argued that the imposition by the first-named Respondent for a requirement of being an exceptional Ahmadi was unlawful.

16. Counsel also submitted that the finding of the first-named Respondent that she could not find from the evidence available that there is a real risk of persecution with this Applicant if returned to Pakistan was irrational when considered in light of the country reports and in light of the personal circumstances and history of the Applicant and quoted a decision of Clark J. in *M.A. U-H. (Pakistan) v. The Minister for Justice and Equality, the Attorney General and Ireland* [2012] I.E.H.C. 572 delivered on the 28th of June 2012. This was a judgement in relation to subsidiary protection. In that judgement, Clark J. states:-

*"The decision-maker may have been correct in finding that there is a functioning police force and judicial system in*

*Pakistan but it is equally clear from the same reports that the police and the judiciary are not sympathetic to and do not protect Ahmadis who face criminal charges under the blasphemy laws which attract harsh sentences including, potentially, the death penalty."*

She also cited country of origin information which stated:-

*"Frequent failure to punish abuses creates a climate of impunity. Police and prison officials frequently use the threat of abuse to extort money from prisoners and their families."*

She also states that:-

*"The respondents' argument that international protection is not warranted because Ahmadis do not face difficulties if they practice their faith in private is not compelling and cites the decision of the opinion of Advocate-General Bot in Federal Republic of Germany v Y (C-71/11). That the concept of religious freedom cannot be confined to private conscience to the exclusion of public manifestation of religion."*

She also states:-

*"The Court is very doubtful that COI suggests that only Ahmadi followers with high profiles are targeted for attack."*

### **Submissions by Counsel on behalf of the Respondents**

17. Counsel for the Respondents, Daniel Donnelly B.L., stated that the complaint made by the Applicant that the first-named Respondent was not entitled to have regard to the decisions in relation to the Applicant's parents was not contained in the statement grounding the application for Judicial Review.

18. Counsel argued that the reliance on the decision in *D.A. v. the Minister for Justice, Equality and Law Reform*, cited above, was *obiter dictum*. He quoted from *C.O.I. v. the Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 208, a decision of Mr. Justice McGovern, that where a case is put forward by a parent on behalf of a child, based on the same circumstances, the Tribunal or Commissioner may have regard to the findings made in respect of the parents, and may apply same unless new circumstance or evidence has emerged. And that it is desirable that there should be consistency in decision-making where a number of Applicants rely on the same allegations of fact. Counsel further quoted from the decision in *J.O. v. the Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 478 that that case appeared to rely on a child who had never been to Nigeria. He further quoted from a decision of Barr J. in *A.K. (a minor) v. The Refugee Appeals Tribunal* [2014] I.E.H.C. 571. In that case, Barr J. stated:-

*"I agree with the submission made on behalf of the respondents. Where an application is put forward on behalf of a minor and it is stated to be based on the same circumstances as were put forward by the parents, it is logical that the decision maker will have regard to the decisions put forward on behalf of the applicant's parents. This approach is in accordance with the dictum of Cooke J. in J.O. v. Minister for Justice, Equality and Law Reform (previously cited)."*

### **Discussion**

19. The appeal to the first-named Respondent is of an appeal de novo.

20. The first principle in relation to an application by a minor Applicant is that the best interests of the child shall be the primary consideration for the Commissioner and for the Refugee Appeals Tribunal. In minor applicant cases the Tribunal must assume a greater share of the burden of proof as opposed to the requirement in adult asylum claims that the burden of proof remains with the Applicant at all times.

21. Another principle is that actions which may not constitute persecution when experienced by an adult could satisfy the persecution element of the refugee definition when experienced by a child. Minor applicants are necessarily more vulnerable to the effects of torture and other forms of serious harm, in particular physical and psychological harm, and the principle of the best interests of the child require that the harm feared upon return be assessed from the child's perspective.

22. Taking account of these principles, it appears to this court that the first-named Respondent failed to properly analyse the country of origin information in relation to the treatment of Ahmadis, both by organisations and by the state (who are responsible for prosecuting Ahmadis for blasphemy).

23. Regulation 5 of the European Communities (Eligibility for Protection) Regulations imposes a duty on the decision-maker to take into account *"the individual position and personal circumstance of the protection applicant, including factors such as background, gender and age so as to assess whether on the basis of the Applicant's personal circumstances, the act to which the Applicant has been, or could be exposed would amount to persecution or serious harm."*

24. The decision of the first-named Respondent fails to undertake that task, merely stating that the Applicant "will clearly face some level of discrimination". This court has already considered the issue of where discrimination can exist in societies which amount to persecution. The case of *F.A. v. the Refugee Appeals Tribunal (constituted of Ben Garvey BL, Tribunal Member) and the Minister for Justice, Equality and Law Reform* [2015] I.E.H.C. 502, related to the situation of a Catholic living in Pakistan. In that case the Tribunal Member stated that discrimination could exist in societies without amounting to persecution.

25. As pointed out in that judgement, the European Convention for the Protection of Human Rights and Fundamental Freedoms becomes a part of Irish law by virtue of the European Convention on Human Rights Act, 2003. Article 9, dealing with "freedom of thought, conscience and religion" was added to by the provisions of Protocol no. 11.

26. The International Covenant on Civil and Political Rights is a multi-lateral treaty adopted by the U.N. General Assembly on the 16th of December 1966, and enforced from the 23rd of March 1976. This country signed the Treaty on the 1st of October 1973 and ratified the Covenant on the 8th of December 1989. The state of Pakistan signed the treaty on the 17th of April, 2008 and ratified it on the 23rd of June, 2010. Whilst it has not been brought into force by legislation in Ireland, it is a persuasive authority.

27. Hathaway and Foster quote from a decision of the Australian High Court in 1999 in the case of Shan as follows:-

*"The imposition of restrictions and freedoms traditionally guaranteed in a democratic society such a freedom of speech,*

*assembly, worship or movement may constitute persecution."*

28. The European Union's Qualification Directive, at article 10 (1) provides:-

*"(a) Member states shall take the following elements into account when assessing the reasons for persecution...*

*(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief."*

29. The descriptions in the country of origin information represent far more than mere discrimination, and the evidence given by the Applicant's mother on behalf of the Applicant in relation to her experiences to-date are, in this court's view, issues which have not been sufficiently taken into account by the first-named Respondent.

30. In this court's view, the decision of the first-named Respondent in respect of the issue of religious persecution now existing in Pakistan but amounting merely to discrimination is irrational and unreasonable and flies in the face of the country of origin information and human rights provisions in international conventions.

**Decision of the Court**

31. Having regard to the above, as this is a telescoped hearing, the court will grant leave to the Applicant and quash the decision of the first named respondent, and this court directs that the appeal be reconsidered by a different member of the Refugee Appeals Tribunal.

**Mel Christle SC and Daniel Donnelly BL**

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

**Instructed by Trayers Solicitors Solicitor**

**For the Applicants For the Respondents**