

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2009 No. 830 J.R.]**

**IN THE MATTER OF SECTION 5(2)(a) OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000,**

**BETWEEN**

**U.M.**

**APPLICANT**

**AND**

**DENIS LINEHAN ACTING AS THE REFUGEE APPEALS TRIBUNAL**

**RESPONDENT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**FIRST NOTICE PARTY**

**AND**

**IRELAND AND THE ATTORNEY GENERAL**

**SECOND NOTICE PARTY**

**JUDGMENT of Mr. Justice McDermott delivered on the 28th day of November, 2014**

1. This is an application for leave to apply for judicial review of the decision of the respondent (the Tribunal) dated 3rd July, 2009, rejecting the applicant's appeal against the decision of the Refugee Applications Commissioner (ORAC) declining to recommend that he be granted refugee status. The decision was communicated to the applicant under covering report dated 13th July, 2009, said to have been received by him and his solicitor on 14th July. Nineteen grounds were set out in the statement of grounds relied upon.
2. The applicant is a Pakistani citizen born in the North West Frontier Province of Pakistan on 25th March, 1969. He is a Muslim and of the Yousuf Zai ethnic group. His first language is Pashtu and he also speaks English and Urdu. He claims to be the holder of a BISE (a Fellow of Science qualification from Karachi University), a BA (University of Peshawar) and an LLB (Gomal University). He states that he worked as a lawyer from June, 1995 to January, 2006 and was registered with the District Bar Association, SWAT, NWFP Pakistan. He married in 2004 and his wife remains in Pakistan and they have no children.
3. The applicant claims that he was an active member of the Awami National Party (A.N.P.) and General Secretary of the party in his area. He asserted that his duties included creating awareness about the party and the alleged wrongdoings of the then Pakistani Government. The applicant submits that whilst making an anti-government speech in January, 2006 he was warned by the police to stop, but when he continued in the police attempted to arrest him and he fled the scene.
4. The applicant claims that the Pakistani Government, through local administrators, fabricated a criminal case against him because of his political beliefs and a warrant for his arrest was issued under s. 204 of the Criminal Procedure Code. He was declared an offender under s. 512 of the Code by the Court of Session in Pakistan.
5. The applicant also claims that as a criminal lawyer, while engaged as counsel for a claimant in a double murder case in January, 2007 the accused who were members of a notorious criminal gang absconded. He claims that they threatened him and that, if he returned to Pakistan, his life would be in danger from them.
6. His claim for asylum was based, therefore, on two matters:-
  - (1) The fact that he was declared an offender by the Court of Session in Pakistan due to his political affiliations and the conspiracy to fabricate a criminal case against him, and
  - (2) The danger he faces because of the threats he has received from professional criminals.
7. As a result of these threats he claims to have spent thirteen months living in the mountains of the District of Shangha, approximately 140 kilometres from his own village attempting to evade the police and other agencies. He does not claim that anything happened to him in Shangha, but he left because he felt like a prisoner there. He claims that he cannot obtain state protection as it was the state in the form of the local administrators who fabricated the criminal case against him.
8. The applicant claims that he secured assistance from an Indian agent who assisted him in obtaining fake and forged documentation and arranging his passage out of Pakistan for 1,000,000 rupees (Pak). He travelled to Delhi where he spent one month from 7th March to 9th April, 2007. He then travelled through the United Kingdom where he spent approximately a day at Heathrow Airport, from which he travelled to Belfast. He then travelled by bus from Belfast to Dublin on 11th April, 2007. He is unable to produce any travel documentation as he claims this was returned to the agent and also that he never personally presented any documentation to the immigration authorities. He did not apply for asylum in India or England because Pakistan had extradition treaties in force with both countries.

## Refugee Applications Commissioner

9. On 12th April, 2007, the applicant applied for asylum. He was interviewed by ORAC on 27th July and in a report dated 15th August, it was recommended that he not be declared a refugee. The applicant appealed this decision to the Tribunal.

## Tribunal Decision

10. Following on oral hearing on 2nd September, 2008, a decision of the Tribunal was given on 3rd July, 2009. A summary of the applicant's claim in respect of political persecution is set out as follows:-

"He said that he had problems in his home country of Pakistan because of his membership of the Awami National Party (A.N.P.). He joined that party in either 2001 or 2002. He said that he was General Secretary of the party in a place called T. His duty was to promote the party or create awareness of the party in question. As part of raising awareness of the party he highlighted the injustices created by the military rule of President Musharraf. He recalls a meeting that took place on or about the 22nd day of January, 2006. He made a speech at the meeting criticising the government but prior to the meeting he was warned by the police not to make the speech in question. After that, a First Information Report (police report) was lodged against him and he knew that the police wanted to arrest him. However, he said that he managed to escape to a village in another district. After that the applicant fled to a place (in a different province) which was approximately 140m from his own village...It appears as if he stayed there for a period of thirteen months. At the oral evidence stage he stated that the warrant issued for his arrest on 6th day of March, 2007. It was then that he left Pakistan and went to India. He claims that the actual warrant for his arrest issued after the First Information Report had been filed. He stated, at interview, that the arrest warrant was issued pursuant to s. 204 of the Criminal Procedure Code and was issued on 13th day of February, 2006. He said that he received a certified copy of that on 5th day of April, 2007....He did not make any contact with any of the non-governmental organisations (NGO'S). He said that nothing remarkable happened to him when he was in (that province). He left...because he felt like a prisoner there."

11. The Tribunal examined the applicant's claims in relation to his membership and participation in the A.N.P. in depth. It noted that when asked as to when he joined the party, he could not give an exact date or year. The Tribunal examined the country of origin information concerning the A.N.P. which was downloaded from the internet under reference [www.awaminationparty.org.contactusasp](http://www.awaminationparty.org.contactusasp). A number of facts concerning the party were the subject of questions in the course of the s. 11 interview and in oral evidence. The Tribunal concluded that the applicant had little basic knowledge of the A.N.P. and that it was highly unlikely that he was a member of the party or that he would be persecuted on account of his alleged membership. In particular, the Tribunal relied upon the following matters:-

(a) The history and background of the party as given in the downloaded information stated that in 1986 the National Democratic Party merged with several other groups to form the Awami National Party. Abdul Wali Khan was elected as President and Sindhi nationalist Rasul Bakh Paligo was elected Party Secretary General. A.N.P. was one of a number of left wing parties in Pakistan. Its strongholds were in the Pashtun areas of Pakistan, particularly in the North West Frontier Province. It was one of the few political parties to conduct internal elections. However, the applicant claimed that the party founder was Mr. Abdul Ghaffer Khan before the partition in 1947 and that later his son, Abdul Wali Khan, became his successor and Asfandiyar Wali Khan was a Senator of the Legislative National Assembly in Pakistan. However, the party was founded in 1986, not 1947, and by persons who were not cited as the founders by the applicant.

(b) The applicant was not aware of the party's symbol which, according to country of origin information, was a lantern.

(c) The applicant was unable to furnish the five fundamental principles of the A.N.P.

(d) Though national elections were held in 2002 in which the A.N.P. took part, he was unaware of the performance of the party at that election. Elections were held on 20th October, 2002, and the A.N.P. won 1% of the popular vote but no seats in the Lower House of Parliament. The applicant claimed that he did not know the exact percentage of votes that the party achieved at national level, but he thought it was 30%. He did not know how many seats the A.N.P. had in the Lower House of Parliament, but thought they had won two or maybe three seats at national level.

12. The applicant produced a number of documents relating to his alleged prosecution as a result of political activities, including:-

(a) The original of his Awami National Party membership card.

(b) Arrest warrants in respect of the applicant.

(c) Three First Information Police Reports (FIR's) in respect of the applicant.

(d) A newspaper article regarding the applicant's claim.

13. The documents submitted suggest that on 8th February, 2006, the police came across the applicant delivering a speech which was said to be "provocative" and inspiring people to violence against the government and local administration officials. The police report states that the applicant was an active member of the A.N.P. and had many previous convictions for obstructing the local administration in the course of their duty. An attempt was made to arrest the applicant, which failed. Thereafter, the accused avoided the police and did not cooperate in the investigation. A warrant issued for his arrest and he was declared a "proclaimed offender", having absconded, by order made on 4th May, 2006, in the Court of District and Sessions. The warrant is apparently extant. It issued following the applicant's refusal to appear before the local police or the court within a period of thirty days on 4th February, 2006. Though the documents are not specifically cited or discussed in the decision, the Tribunal stated in its conclusion that it had considered "all relevant documentation in connection with his appeal".

14. The applicant's claim in relation to threats as a criminal lawyer are summarised as follows:-

"He also said that he was threatened by a criminal gang whilst he was defending another client in his capacity as a lawyer. The case involving this particular client was prior to the lodgement of the First Information Report against him. The case involves the defence of a client and was held on 22nd day of January, 2007. They threatened him over the telephone. He could not lodge a First Information Report concerning these threats because, at that stage, the police were searching for him. He referred to the fact, at interview, that three members of the legal profession had been murdered by criminals in the past. Two of the people who were murdered were named...He said that the police investigated those assassinations but he did not know if anybody was accused or charged in relation to them. When this man was living in (a nearby province) no threats were made against him by this criminal gang."

The Tribunal was concerned at the lack of basic legal knowledge on the part of the applicant who claimed to be a criminal lawyer. The applicant was asked about Articles 9 to 13 of the Constitution of Pakistan which provided for the protection of fundamental rights, including the right to bail, the right to counsel, the right to apply for *habeas corpus*, the right of cross examination and representation at a criminal trial, the right to be informed of charges, the right of appeal and the right not to be subjected to double jeopardy in criminal proceedings. He referred in a rambling way to the right to freedom of expression in petitions pending in the Supreme Court of Pakistan. He made no reference to Articles 9 to 13 of the Constitution and the Tribunal considered that these should be within the knowledge of any lawyer claiming to be a defence lawyer in criminal matters, since they represent the fundamental principles on which the trial of any criminal offence would be conducted. The Tribunal found that this lack of knowledge gave rise to a serious question as to whether he was a lawyer at all.

15. The applicant relied upon a number of documents in relation to his claim to be a lawyer, including:-

- (a) A District Bar Association identification card.
- (b) A document said to be a certificate that he was a member of the Bar with a right of audience to act and plead before any court or tribunal except the High Court, and a notification dated 3rd March, 2000, appointing him a Commissioner for Oaths.
- (c) A typed document purporting to certify that the applicant was a practising lawyer recommending him for a course.
- (d) A Bachelor of Law Degree from Gomal University dated 1994.
- (e) A BA from the University of Peshawar dated 1991 and other documents.

16. The Tribunal considered the applicant's claim to have been threatened by a criminal gang in Pakistan. It was not satisfied that he was being sought by police in relation to the public order offence and, therefore, was not satisfied that he could not have made a report to the police about the alleged threats by criminal gang members or that the police would not have dealt with the complaint. It was satisfied that state protection would be available to the applicant in respect of those threatening him. The Tribunal did not specifically cite or rely upon the documents submitted in support of his claim to be a criminal lawyer, but was clearly not satisfied on the evidence before it of the truthfulness of that claim.

## **The Challenge**

### **Ground (i)**

17. It is submitted that the length of time between the oral hearing, which occurred on 2nd September, 2008 and the making of the decision on 3rd April, 2009, exceeded a period of three months and was unreasonable and in breach of fair procedures. The court is satisfied that there is no substance to this ground. No prejudice is alleged to have occurred by reason of this delay. No complaint is made that there is any error in the decision in respect of the statement of the applicant's case, and the facts upon which the credibility issue was determined. The adverse credibility findings arose principally from the differences between the facts stated in the country of origin information in respect of the A.N.P. and the summary of the questions answered by the applicant in the course of the s. 11 interview in respect of his membership, which are contained in the documentation in the case. Accordingly, the adverse credibility finding was not mainly based on the evidence given at the oral hearing. It is clear from the decision that the several credibility issues in relation to the applicant's membership and participation in the A.N.P. were directly referable to the issues identified from the documentation. (See *N.M.B. v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, Finlay Geoghegan J., 24th January, 2005). The finding did not simply depend on the recollection and assessment of the applicant's oral testimony (see also *A.S.R. (Afghanistan) v. Refugee Appeals Tribunal & Ors* [2010] IEHC 514 and *F.K.S. v. Refugee Appeals Tribunal* [2009] IEHC 474).

### **Ground (ii)**

18. It is contended that the Tribunal failed to have regard to a medical certificate dated 27th August, 2008, indicating that the applicant suffered from clinical depression. This certificate post-dated the ORAC decision and offered no relevant evidence in support of the applicant's claim for asylum. This ground fails.

### **Grounds (iii), (v), (vi), (vii) and (viii)**

19. These grounds relate to the documentary evidence concerning the applicant's claimed political activities which were submitted in the course of his application and the additional documents relating to the alleged police investigation of alleged criminal offences arising out of his addressing a public meeting as outlined earlier in the judgment.

20. The applicant submits that reliance on the downloaded information from the website [www.awaminationalparty.org](http://www.awaminationalparty.org) was unfair in that he was not given notification that it would be relied upon. However, factually this is completely incorrect as the document formed the appendix to the ORAC report which had issued in this case and, as a result of which, the appeal to the Tribunal was initiated. Grounds (v) and (vi) are, therefore, without substance.

21. The balance of the documentation was not referred to in the course of the decision and the applicant claims that it was corroborative of his claim to be a member of the A.N.P. who was the subject of a prosecution which had resulted in the issue of a warrant for his arrest in Pakistan. No other incident of state harassment for political belief was relied upon by the applicant, save that a FIR report suggests that he had made speeches to public meetings tantamount to incitement on previous occasions. It was submitted that in reaching the negative credibility finding, the Tribunal should have had regard to the documentary evidence produced and, if it was rejected as offering little or no support to the applicant, that conclusion should have been made clear in the body of the decision and reasons given for it. Reliance was placed on the judgment of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353, in which as one of the guiding principles in respect of judicial review of credibility findings on asylum matters, the learned judge stated:-

"9. 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 even pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated."

22. In *I.R.* a similar credibility issue arose when the applicant was found not to have the fundamental knowledge of the political party to which he claimed to belong and the Tribunal gave a number of examples of discrepancies in that regard between his answers at the s. 11 interview, and the knowledge obtained from country of origin information and other documents concerning the operation of that party and its standing in elections held in Belarus at various times. The case did not turn entirely on the oral testimony of the applicant. The observations made by the Tribunal were based on questions put to the applicant which arose directly and logically out

of his own account. Though it could not be said in that case that it was irrational for the tribunal member to consider that a better knowledge of the political party might have been expected from someone with the applicant's level of education who claimed involvement in the party, the applicant also relied on a number of documents which on their face appeared to relate directly to specific facts and events recounted by him and formed the basis of his claim to have suffered particular mistreatment on specific dates. These included court documents and a police summons. Cooke J. stated:-

"25. The Court considers that what is crucial about this material so far as concerns the legality of the process by which the conclusion on credibility in the Contested Decision was reached, is that none of it is referred to anywhere in that decision except insofar as it might be said to have been included in the phrase "The Tribunal has considered all the relevant documentation..." which appears in the Conclusion at section 7. In view of the potential significance of that evidence and of the fact that (a relevant exhibit) contains only photocopies the Court sought and was given by the parties, confirmation that the documents in question when produced by the applicant were, or at least appeared to be, originals rather than photocopies and that as such they had been given to the Commissioner and then, in accordance with section 16 (5) of the 1996 Act, transferred to the Tribunal..."

26. It is true, of course, as counsel for the respondents submitted, that the mere existence and submission of such documents does not necessarily render untenable a judgment as to the lack of credibility of the oral testimony of the applicant. Indeed, counsel pointed out that even on a cursory examination of the translations of the court documents there were discrepancies which might put their authenticity in question...

27. Indeed, it might well be that on closer scrutiny, some or all of these documents might be shown to be false and even to have been fabricated for the very purpose of the asylum application...Thus, it may all be shown to be an elaborate contrivance and fraud.

28. Nevertheless, unless and until such issues are addressed by the appropriate decision-maker, from the point of view of the validity of the Contested Decision as it now exists, the fundamental point is that this was, at least on its face, original, contemporaneous documentary evidence of potentially significant probative weight in corroborating key facts and events. If it is authentic, it may prove that the applicant has suffered persecution for his political activities. If that is so, then the judgmental assessment that is made of the quality of his answers to the questions about the (political party) may possibly assume an entirely different weight when all of the evidence, both testimony and documentary, is objectively weighed in the balance.

29. The Court accepts that there may well be cases in which an applicant relies partly on oral assertions, partly on documents, and partly on country of origin information and in which the decision-maker has sound reason to conclude that the oral testimony is so fundamentally incredible that it is unnecessary to consider whether the documents are authentic and whether the conditions in the country of origin are such that the claim could be plausible. The decision-maker in such a case is finding that what the applicant asserts simply did not happen to him. In the present case, however, the situation is materially different because the adverse finding of credibility is effectively based on the Tribunal member's premise as to the level of knowledge to be expected and the apparent lack of that knowledge, while the documents have the potential to establish that specific events did happen and happened to the applicant. It is this which gives rise to the need for the whole of the evidence to be evaluated and the analysis to be explained."

23. The court, therefore, found that the decision making process was fundamentally flawed because the documentary evidence which had been expressly relied upon before the Commissioner and in the notice of appeal and which was, on its face, relevant to the events on which credibility depended "was ignored, not considered, and not mentioned in the contested decision".

24. The documents submitted in this case are said to support the proposition that the applicant was a member of the A.N.P. and was the subject of police harassment and a prosecution which resulted in the issue of a warrant for his arrest for addressing a public meeting of some 180 to 200 people on 8th February, 2006, which resulted in a prosecution and in the issuing of a warrant in May of that year. However, in this case as in *I.R.*, the Tribunal decision is based substantially on the discrepancies said to exist between the responses, information and documents that he furnished about the political party and the country of origin information on the A.N.P. which was available to the Tribunal. A similar lack of knowledge was found in respect of the applicant in the *I.R.* case.

25. There was no suggestion that the documentation submitted was false, neither is there any suggestion that any forensic study or further inquiries were made as to its authenticity. It is not the case that the Tribunal is coerced to decide the matter in favour of the applicant simply because the documentation exists. However, it must be properly considered and assessed in the overall review of the case, since it was clearly relevant to the asylum claim. The court is, therefore, satisfied to grant leave to apply for judicial review in respect of Grounds (iii), (vii) and (viii) and that the applicant has established on those grounds that the decision is fundamentally flawed.

#### **Grounds (iv) and (x)**

26. These grounds relate to the suggested failure of the Tribunal to refer to the documentation produced by the applicant in respect of his membership of the legal profession and legal qualifications, and the papers in respect of the criminal prosecution arising out of which he alleged he had been threatened by criminal gang members who were alleged to have threatened him because he had implicated them in other offences. This matter occurred approximately two weeks before the applicant was alleged to have addressed the public meeting. It is difficult to understand how any member of the legal profession defending a murder case would not have an understanding of the basic articles of the Constitution referring to the criminal justice system and, in particular, the rights to bail, *habeas corpus*, and the core rights of an accused in the course of a criminal trial. It is difficult to take issue with the Tribunal's conclusion that the failure of the applicant to display such basic knowledge caused it to "...seriously question as to whether this man is a lawyer at all". It may indicate that he is a very badly trained lawyer or an entirely incompetent one. It is in that context that the documents become relevant. If authentic, they are supportive of the proposition that he was a lawyer though in this instance, one could empathise with a decision not to proceed further in the face of the overwhelming ignorance displayed of the Pakistani criminal law. It also seems clear that under normal circumstances it would be open to a criminal lawyer to complain to the police about threats by criminals in the course of his practice and state protection in respect of the complaint was held to be available by the Tribunal. If that were the only issue upon which this decision was based, the court would have little difficulty in refusing relief. In respect of this issue, I am not satisfied that the absence of a reference to the court documents concerning the criminal gang or of the applicant's qualifications is as important as the failure to consider the documents relating to his political involvement. The court is not disposed to grant leave to apply for judicial review in respect of these grounds.

#### **Grounds (xi), (xiii), (xiv), (xv), (xvi), (xvii), (xviii) and (xix)**

27. Having regard to the decision reached in respect of the consideration by the Tribunal of the documents concerning the claimed

involvement by the applicant in the A.N.P., the court does not consider it necessary to consider the balance of the grounds. Grounds (xii), (xiii), (xiv), (xv), (xvii), (xviii) and (xix) could not possibly offer any substantial ground upon which to grant leave to apply for judicial review and are unstateable. The court is not satisfied that the previous decisions of the Tribunal cited in support of the application for asylum and the failure to include them in the decision, give rise to any substantial ground upon which to challenge the decision.

### **Conclusion**

28. For the reasons set out above the court is satisfied to grant leave to apply for judicial review in respect of Grounds (iii), (vii) and (viii) and treating this application as the substantive hearing it is also satisfied that the applicant has established that the decision is fundamentally flawed. The decision of the Tribunal will be quashed and remitted for hearing before a different tribunal member.