Neutral Citation: [2014] IEHC 380

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 121 J.R.]

BETWEEN

A.M.K. (A MINOR)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 25th day of July, 2014

Background

1. The applicant lived with his father, mother and brother in Ghorband District, Afghanistan. His father and brother had been influential figures in the local Taliban organisation. His father and brother were blamed for killing innocent people and taking their lands and shops. When the Taliban was overthrown, the applicant's father and brother could not get jobs due to their previous misdeeds. The applicant stated that relatives of the victims of his father and brother reported their crimes to the new government. In December 2002, two commanders who were part of the new government and were members of the Afghan army came to the applicant's house and took his father and brother away. They never returned and are presumed dead.

2. After his father's death, the applicant lived for eight years with his mother at his maternal uncle's house in Alam Khel village. The applicant states that he did not go to school because the people who killed his father and brother could have harmed him. As he was growing up, he was bullied and assaulted in the village.

3. At his s. 11 interview in June 2010, he said that about a year and a half previously, he was caught by villagers who hit him. The next day villagers who had suffered at his father's hands pushed him off a high rocky mountain. He fell, hit his head, fainted and bled heavily. He injured his head and neck. His doctor prescribed medication and he was in hospital for a few days. His neck was in a cast and he could not move. After that he stayed at home doing nothing.

4. As he grew older, his life became more difficult and the local people informed the commanders when he reached adulthood. Fearing that the applicant would continue the crimes of his father and uncle, the commanders' relatives requested them to take revenge. Seven or eight months before his s. 11 interview, the two commanders who had killed his father and brother sent letters to the applicant's uncle saying the applicant should be handed over. There were four or five letters and the last letter threatened that if the applicant was not handed over, the uncle and his son, and the applicant, would be killed. His uncle went to the local police station and told them how he feared the applicant might be harmed, but they said that they could not offer protection. They said to go to Kabul, which was nearby, and ask a government agency for help. The applicant could not do that as it was people from the government who were sending the letters.

5. In March 2010, he went to Mazar-e-Shgarif in Balkh province and spent one and a half to two weeks there with his two married sisters and his uncle. During that time, people came to his uncle's home in Alam Khel looking to take him away and kill him. They destroyed his uncle's home. His mother sent word that he should not return as they were looking for him. His uncles in Mazar-e-Sharif said that they could no longer keep him as they would be in danger. An uncle entered negotiations with a trafficker. His uncle and mother paid $12,000 between them for his travel with an agent by sea and road through Iran, Turkey and other unknown countries. He arrived in Ireland by sea and took a train to Dublin.

6. The applicant states that he was brought on the journey in a truck, which stopped from time to time, but always in jungles or other deserted places where there were no people around. He says that he was not allowed to speak to the people who opened the container. He could not question them. When asked as to why he did not seek asylum in either Iran or Turkey, the applicant stated that he did not do so because there was no asylum system in operation in either country. The Commissioner found as follows in his report:-

> *"However, it is considered that the UNCHR operate in both Iran and Turkey and it is reasonable that he would have sought asylum in those or the other countries he travelled through. The applicant has not provided a reasonable explanation for not seeking asylum as soon as possible and this serves to undermine the well foundedness of his claim. "*

7. The applicant appealed this decision to the RAT. In advance of that hearing, the applicant submitted a large volume of country of origin information to the effect that in reality there was no recognisable asylum system in operation in Iran and that in Turkey there was a very limited form of asylum for non-Europeans. This will be referred to in greater detail later in this judgment.

8. The Tribunal reached the decision that the applicant's account was not credible. It gave a number of reasons as to why that decision was reached. In relation to the failure to seek asylum in either Iran or Turkey, the RAT stated as follows:-

> *"The Tribunal finds the applicant's failure to claim asylum in either Iran or Turkey to be not generally indicative of a genuine fear of persecution. His explanation for that failure to the effect that it was impossible to claim asylum in either of those countries was not reasonable or credible given that it is not in accordance with reality where the UNCHR operate asylum systems. "*

The Leave Application
9. In his judgment dated 12th November, 2012, O'Keeffe J. granted the applicant leave to seek *certiorari* of the RAT decision on the following grounds:-

> *"(b) The Tribunal provided no reasons as to why it was not reasonable for the Applicant not to apply for asylum in Turkey or Iran and failed to apply any of the country of origin information submitted on this issue which stated that Turkey and Iran did not apply proper standards in considering applications for protection from Afghans. The Tribunal erred in holding that the Applicant gave contradictory evidence on this issue.*
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> *(c) The Tribunal made a material error of fact and law in holding that the applicant failure to claim asylum in Iran or Turkey was not generally indicative of a genuine fear of persecution. A refugee applicant is entitled to choose his country of application, and country of origin information was submitted which set out the difficulties faced by Afghans who seek protection in Iran and Turkey. The finding by the Tribunal was materially incorrect. "*

The Country Information Submitted on Iran
10. It is necessary to have regard to the country information submitted on behalf of the applicant in relation to Iran and Turkey. In relation to Iran, the Tribunal was referred to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, July 2009, wherein it was noted as follows:-

> *"Iran also has a sizeable population of registered Afghans, with approximately 935,000 maintaining registration and documentation at the end of May 2009. While a convention signatory, Iran has made reservations to the Convention with regard to the freedom of movement and employment. Temporary work permits have recently been made available for eligible registered Afghans who have paid their municipal taxes and a 400USD fee. It remains to be seen how many such persons receive a work permit from employers. The Iranian authorities have declared 23 provinces in whole or in part off limits for foreign residence, including refugees, with Hormozgan province, the most recently declared 'no go' area in May 2009. Some 140,000 refugees are affected and have to choose between internal relocation or return to Afghanistan. Afghans who depart Iran without specific permission and an exit visa would not be able to legally re-enter or be returned to Iran in the absence of both an Afghan passport and an Iranian visa, regardless of prior legal and possibly long term stay or even birth in Iran. Those Afghans who attempt to enter or are returned without meeting these requirements may be subject to arrest detention and forcible return to Afghanistan.*
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> *There are also several tens of thousands of unregistered Afghans in Iran. Over 405,000 such persons were deported in 2008 and a further 178,000 from January to 3rd June, 2009. Over 80% of deportees originate from the northern provinces or the western region. Over 97% of those deported as single males are presumed to have entered Iran for its livelihood opportunities. Opportunities to seek international protection are limited for such arrivals as, though a signatory to the 1951 Convention, there is no apparent national refugee status adjudication system in Iran. Moreover, the government does not recognise UNHCR 's refugee status determination mandate."*

11. The Tribunal was also referred to a section on Iran from the United States Committee for Refugees World Refugee Survey 2009 which makes no mention of UNCHR protection activities. Rather, the report states that Iranian border security killed 15 - 20 people crossing from Afghanistan in 2008 and that Iran deported over 406,000 Afghans in 2008 and over 720,000 over the previous two years. The report observes that there were plans for mass deportation of Afghans living illegally in Iran and that the Iranian authorities arrest and rapidly deport refugees for irregular entry, lack of documentation and unauthorised movement outside their province of registration. The report states that Afghan deportees are regularly subject to inhuman treatment and beatings during detention. The report also states:-

> *"Iran claims to have a refugee status determination procedure but the legal framework for its implementation is unclear. Individuals cannot challenge before a court the Government's decision regarding their status as a refugee. "*

12. The Tribunal was referred to a call by Human Rights Watch for the halt of mass deportation of Afghans from Iran in June 2007. This document states that since late April 2007, the Iranian government had forcibly deported back to Afghanistan nearly 100,000 registered and unregistered Afghans living and working in Iran including many refugees. The document recalls that Iranian authorities were in the process of transferring thousands more to camps near the Afghan border before deporting them. The report stated as follows:-

> *"Since late April, the Iranian government has forcibly deported back to Afghanistan nearly 100,000 registered and unregistered Afghans living and working in Iran. The Iranian government says the mass deportation is aimed at reducing the number of illegal immigrants in the country, but Iranian officials have also expelled Afghans who have been registered with the authorities, many of whom have been regarded as refugees (panahandegan) for many years. Iran announced in 2006 that it would 'voluntarily repatriate' all of the more than I million Afghans remaining in Iran by March 2008, saying that none of those people are refugees...*
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> *According to accounts gathered by Human Rights Watch, the Iranian authorities are transferring thousands of Afghans to three holding facilities near the Iranian-Afghan border before deporting them to Afghanistan. The three facilities known as Askarabad, Sang-e Safid, and Tal-e Seeya, which is also known as the 'Black Dungeon, ' are all veritable prisons. Recent deportees have told Human Rights Watch that the Iranian authorities routinely beat Afghans in these locations and force them to pay for their own food and water. According to the AIHRC, Afghans spend between one and 19 days in these facilities before the authorities deport them back to Afghanistan. "*

The Country Information Submitted on Turkey
13. The Tribunal was furnished with a section on Turkey from the UNHCR's Global Report of 2008. The report states:-

> *"UNHCR 's operation in Turkey continues to be determined by the country's geographic limitation to the 1951 Convention, which formally excludes non European asylum- seekers and refugees from access to the Turkish asylum procedure. Turkey instead accords these refugees temporary asylum pending UNHCR 's efforts to find durable solutions for them outside Turkey. UNHCR thus assumes a direct, operational role in determining the protection needs of non-European asylum-seekers and the subsequent resettlement possibilities of recognized refugees ...*

UNHCR significantly increased the number of RSD decisions in 2008, affecting some 9,200 persons, up from 7,650 in 2007. The reduction in the average waiting period for an RSD decision from 11 months to five was a boon for asylum applicants who have to live in Turkey without welfare support.

The Office continued to process individual non-European refugees for resettlement. Most of the 3,800 refugees resettled in 2008 went to Australia, Canada, Finland and the United States. UNHCR intervened with the Turkish authorities on behalf of some 3,400 non-European asylum-seekers so that they could benefit from the national procedure for temporary asylum. In response to these interventions, 72 people were admitted to the Government's temporary asylum procedure, and were subsequently interviewed by UNHCR. Despite the Office's intervention, however, 85 asylum-seekers were refouled in 2008, more than in previous years. "

14. The UNHCR report also noted some of the many challenges faced by asylum-seekers in Turkey:-

"The sharp increase in the number of asylum-seekers, many of whom had few prospects for durable solutions, posed serious challenges to UNHCR's operation in Turkey in 2008. As the authorities in provincial cities accommodating refugees have limited means for essential services, the socio economic situation of many people of concern to UNHCR remains extremely difficult. High fees of USD 250 per adult for obligatory resident permits and complex administrative requirements to access the labour market exacerbate the problem. As a consequence, many refugees and asylum-seekers resort to informal economic activities, a practice that renders their stay illegal and leaves them at a heightened risk of exploitation. Meanwhile, difficulties aligning Turkey's asylum system to that of the EU and international protection standards persist."

15. The Tribunal was also provided with a copy of Amnesty International's 2009 Report titled "*Stranded-Refugees in Turkey Denied Protection*". The report states:

"Amnesty International is concerned that persons in need of international protection in Turkey are prevented from accessing their internationally recognized rights due to Turkish asylum regulations that do not conform to international standards and which are unfairly and arbitrarily applied. They are denied an opportunity to apply for asylum either at Turkey's borders or after being arbitrarily detained. Those that are able to submit an application do not have access to a fair and satisfactory national refugee status determination system and face severe restrictions in gaining access to health, adequate housing and work. Furthermore, Amnesty International is concerned that refugees, asylum-seekers and others in need of international protection are forcibly returned to countries where they are at risk of persecution in breach of the principle of non-refoulement. "

16. The report makes particular reference to the forcible return of Iraqi and Afghan nationals and refers to beatings and forcible expulsion of persons caught close to or within 50km of the Iranian border. It further notes that asylum-seekers are commonly held in administration detention in grossly inadequate conditions.

The Legal Submissions

17. It was argued on behalf of the applicant that a refugee applicant is not obliged to apply for asylum in the first safe country. This was set out by Finlay Geoghegan J. in *Gioshville v. Minister for Justice, Equality and Law Reform & Ors* (Unreported, 21st January, 2003) where she cited the following passage from Prof. Hathaway's book "*The Law of Refugee Status*":-

"There is no requirement in the Convention that a refugee seek protection in the country nearest her home or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection. The universal scope of post protocol refugee laws effectively allows most refugees to choose for themselves the country in which they will claim refugee status. This basic premise flows from the universal declaration of human rights and was confirmed subject to minor qualifications by Conclusion 15 of the Executive Committee of the UNHCR: 'The intention of the asylum seeker as regards the country in which he wishes to request asylum should, as far as possible, be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person before requesting asylum already has a connection or close links with another state, he may, if it appears fair and reasonable, be called upon first to request asylum from that state. '...

At present then, the only claims to refugee status which may be deflected under international law remain those from the narrow category of persons defined in Conclusion 15 and then only insofar as the State with which they are affiliated agrees to extend protection. Otherwise, the refugee secures the actual or de facto nationality of another state. She is entitled to have her claim for refugee status determined in the country of her choice. "

18. The respondent in its statement of opposition accepted this proposition of law.

19. The applicant has argued that this particular finding of the RAT flies in the face of the country information which was put before the Tribunal. He states that if the information is considered properly, there is simply no official asylum system in Iran at all, still less is there any appreciable input on the part of the UNHCR in any such system. In relation to Turkey, the UNHCR has a limited role in carrying out a Refugee Status Determination (RSD) for non-Europeans. However, because such persons do not have the right to be recognised as refugees in Turkey, the UNHCR will try to get them asylum in other countries.

20. The applicant, when asked why he had not sought asylum in either Iran or Turkey, stated that there was not an asylum system in operation in either country. It should also be noted at this juncture that the applicant claims that he was born on 2nd May, 1994. This would mean that he was just 15 years of age when making the journey that is recounted and when seeking asylum in Ireland in 2010. While there was some debate as to the applicant's true age, in March 2011, before the oral appeal hearing, the RLS furnished the Commissioner and Tribunal with a number of documents including a report from Dr. Karen White, a social anthropologist with knowledge of Afghanistan, who had spoken to the applicant. She placed him at approximately 16 years of age based on various cultural indicators. In April 2011, after the appeal hearing, the RLS furnished the Commissioner and the Tribunal with a letter from Dr. Leonard of the SPIRASI Centre for the Care of Survivors of Torture confirming that, following a meeting with the applicant, it was the combined opinion of a doctor, a psychotherapist and a social worker that he was a minor. The Tribunal Member was requested to consider him as an age disputed minor.

21. I am satisfied that the Tribunal either failed to have regard to the country information before it, because had it done so, it would not have reached the opinion that the UNHCR operated asylum systems in both countries. Alternatively, if it did have regard to the country information available, it was in error when it determined that the UNHCR operated asylum systems in both countries. The

applicant has submitted that the Tribunal failed to take account of the country information in respect of Iran or Turkey in assessing whether the applicant had provided a reasonable explanation for not having applied for asylum in these States while travelling to Ireland. I think that this submission is well founded.

22. It is also argued that the Tribunal erred in fact and in law. The Tribunal held that there was a UNHCR operated asylum system in both countries. I am satisfied, having regard to the country information submitted, that the Tribunal was in error in making this finding. This was a material error in that it contributed directly to the rejection of the applicant's credibility. In rejecting the applicant's credibility on the basis of this material error, the Tribunal erred in law.

23. Not every error will render a decision invalid. In *AMT v. Refugee Appeals Tribunal & Anor* [2004] 2 I.R. 607, Finlay Geoghegan J. stated as follows at paras. 23-24 of her judgment:-

> *"Whether one considers the legal principles applicable to the assessment of credibility in claims for refugee status or the principles of constitutional justice, I have concluded that the obligation of the tribunal member is to assess the credibility of the applicant in relation to the story as told or evidence given by him/her. This did not happen in this case. In assessing the credibility of the applicant, the tribunal member has included as part of his story a fact for which she had no relevant material and, further, placed reliance upon such fact in a manner adverse to the applicant in reaching a conclusion against the credibility of his story. Such error renders the decision invalid.*
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> *In reaching the above conclusion I do not wish to suggest that every error made by a tribunal member as to the evidence given will necessarily render the decision invalid. It will, obviously, depend on the materiality of the error to the decision reached. The error must be such that the decision maker is in breach of the obligation to assess the story given by the applicant or the obligation to consider the evidence given in accordance with the principles of constitutional justice. "*

24. I am satisfied that the Tribunal made a material error in its finding that the UNHCR operated asylum systems in Iran and Turkey at the relevant time. The decision in this regard was one of a cumulative set of reasons given for making the determination that the applicant's story lacked credibility. The court cannot know what weight the member of the Tribunal attached to each of the reasons given by him for the finding that the applicant was not credible. This is similar to the situation which presented itself in *Keangnane v. Minister for Justice, Equality and Law Reform & Anor* [2007] IEHC 17, where Herbert J. stated as follows:-

> *"As the Court cannot be aware of what weight the Member of the Refugee Appeals Tribunal attached to each of the six reasons given by him for finding that the Applicant was not credible or trustworthy and his unsupported testimony was unreliable, the Court must conclude that as reasons four, five, and six cannot be permitted to stand as reached by the application of unfair procedures, the entire decision must of necessity be therefore set aside."*

25. A similar finding was made by Edwards J. in *A.A. v. Minister for Justice, Equality and Law Reform & Anor* [2010] IEHC 143, where he stated as follows:-

> *"The application was not refused because the applicant was regarded as having given an incorrect answer to this particular question. It was refused for a variety of reasons, one of which was that that the applicant showed a lack of knowledge towards the Bajuni community, and the island. This supposedly 'incorrect answer' was just one of a series of circumstances causing the applicant [sic1 to conclude that the applicant lacked the knowledge in question. It could be argued that this factor, namely lack of knowledge, that was ultimately taken into account with other factors, was well supported by other evidence and that therefore the overall view under this heading was sound. However, while it could be argued that this one detail is unlikely to have tipped the balance or to have significantly added to the overall impression of the Tribunal on that issue, it is impossible to be certain of this. As pointed out by Herbert J. in Keagnene v. Minister for Justice, Equality and Law Reform 'the Court cannot be aware of what weight the Member of the Refugee Appeals Tribunal attached to each of the reasons given by [her1for finding that the applicant was not credible or trustworthy and that his unsupported testimony was unreliable. ' In the circumstances, and on this one discrete issue, the Court considers that the applicant has demonstrated substantial grounds for arguing that the entire decision should be set aside. "*

26. In these circumstances where the impugned finding is one of a series of cumulative findings and where it is not known what weight was attached to each particular finding, it is necessary to quash the entire decision. Furthermore, given that there were reasons leading to a finding of lack of credibility, it is not possible to sever the impugned finding from the remainder, which may be possible had the impugned finding related to a discrete and severable issue, such as the question of internal relocation as a credible alternative.

27. In the circumstances, I will quash the decision of the RAT in this matter dated 26th April, 2011, and direct that the matter be referred back to the RAT for determination before a different Tribunal Member.