Neutral Citation: [2015] IEHC 244

THE HIGH COURT

JUDICIAL REVIEW

[2010 No 1292 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, AND SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

K.A. (A MINOR SUING BY HER FATHER AND NEXT FRIEND B.A.)

APPLICANT

AND

CONOR GALLAGHER SITING AS THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of April, 2015

1. This is an application by way of judicial review for an order of *certiorari* quashing the decision of the first named respondent affirming the recommendation of the Refugee Applications Commissioner that the applicant not be granted refugee status.

Background
2. The applicant was born in Cork on 6th February 2010 to Kosovan parents and is a Kosovan national. Her parents arrived in Ireland on the 18th January 2008 and unsuccessfully claimed asylum. Shortly after her birth an application for asylum was made on behalf the child on the 23rd March 2010. A section 3 questionnaire was completed on her behalf by her mother, B.A. on 29th March. The interview was conducted with her mother on the 23rd April and a negative recommendation issued form ORAC on the 14th May 2010. This decision was appealed by notice of appeal dated 17th June 2010. Written submissions were furnished on the 19th July which included extracts from country of origin information. The appeal was non-oral by reason of the provisions of s. 13(5) and (6) of the Refugee Act 1996 (as amended). The decision of the 27th August was notified to the applicant by letter dated 22nd September 2010. The appeal was unsuccessful.

Background
3. The questionnaire completed by the child's mother stated at Q.21 that and her husband left Kosovo due to a blood feud between their family and another family "B" because they were in danger. Her parents were concerned that the applicant child would be in danger if she returned to Kosovo because of the blood feud and feared she might be kidnapped or maltreated as part of that feud.

4. It was accepted by the applicant's mother in the section 11 interview that the claim advanced on behalf of the child was based entirely on the facts which gave rise to the parents' failed applications for asylum.

Section 13 report
5. The blood feud alleged had continued for over 20 years between B.A's family and family B. There had been one attack on her husband by a named individual some 10 years previously in which he had been stabbed in the throat causing a life threatening injury. Her husband and the extended family feared family B and specifically her husband's assailant and his brother. It was concluded that the potentially violent conduct of one member of family B towards the applicant's father could not be considered as persecution arising out of a blood feud but was, rather, a criminal act more suitable to criminal proceedings in Kosovo. It did not give rise to grounds for international protection. It was also considered that there were viable options open to the applicant through her parents to access assistance and protection should she return to Kosovo from the authorities and/or through a mediation programme which offers a form of reconciliation to families in blood feuds, if that be required. It was concluded that relocation was a reasonable option on return to Kosovo. It was noted that the applicant's claim was based on the fact that she was a member of a family unit who might be pursued by non-state actors of persecution and it was accepted that the Convention nexus could be established on the basis of her family membership in that her family was a particular social group under the Convention.

6. After considering all elements of the applicant's case it was concluded that the applicant's mother's claim that the child would not be safe in Kosovo because of the applicant's grandfather's blood feud with another family was insufficient to establish a fear of persecution on a Convention ground. It was stated:-

> "Given the applicant's mother's fear of being persecuted was deemed to be not well-founded only serves to discredit the applicant's own fear in this case. However if we are to accept the applicant's fear in this instance and if there was ever a chance of harm coming to the applicant, then there would seem to be sufficient protection from the authorities and there are specific mediation centres in place especially for family feuds that could offer assistance. Furthermore internal relocation would be a viable option for her in such circumstances."

7. Having made a determination "that the applicant showed either no basis or a minimal basis for the contention that the applicant is a refugee" under s. 13(6)(a) the appeal from this decision proceeded without an oral hearing under s. 13(5)(a).

The appeal
8. Extensive submissions were furnished to the Tribunal on behalf of the child applicant. Extensive country of origin information in relation to feuds in Kosovo was submitted. Two statements from the applicant's brother and uncle were also submitted outlining the origins of the feud between the families which was said to have commenced in 1988 when B.A.'s father quarrelled with a member of family B and shot him dead. The statements indicated that the family felt threatened by family B and that the police were not undertaking any initiatives to prevent any further attacks. However, there is no evidence in either statement of any further attacks taking place since the attack on B.A in February 1999. The report from the counsellor and psychotherapist in respect of B.A.'s injuries

and symptoms of post traumatic stress disorder consistent with the attack described was also included. The wounds inflicted were said to be clearly visible and the subject of continuing treatment from plastic surgeons.

Tribunal decision
9. It was submitted on behalf of the applicant that a child was entitled to have her claim considered on its own merits irrespective of the rejection of the parents' claim for asylum. The Tribunal noted that both parents had applied for refugee status in the State and had been refused at first instance. The same member heard both appeals and affirmed the decisions reached. However, notwithstanding that fact the Tribunal also acknowledged that this did not determine the applicant's case nor did it fetter the decision-maker's discretion in any way since, as a matter of law, each case must be decided on its own merits. The Tribunal considered all of the material submitted on behalf of the applicant and noted that:-

> "As a matter of common sense regard must be had to the position of the applicant's parents, since it is a very relevant consideration bearing in mind paragraph 43 of the UNHCR Handbook."

10. The Tribunal also noted that the applicant's solicitor claimed that family affiliation is a relevant ground which in itself required an assessment of the parents' position. It is clear the Tribunal Member was careful to ensure that the application on behalf of the child was considered on its own merits. However, it was noted:-

> "I found that neither of the applicant's parents has a well-founded fear of her Convention reason based on being in a blood feud or other reasons. Accordingly, applying the above legal analysis, (it) would require and (sic) independent ground to be put forward on her behalf or that her advisors outline a change in circumstances. No evidence worthy of credit was being put forward in this regard."

11. The Tribunal Member's approach to this issue has not been challenged in any of the grounds advanced. Some criticism was made in the course of argument of the approach adopted. However I am satisfied that the Tribunal's approach to the applicant's child's case was entirely in accordance with law and in particular the judgment of Cooke J. in *J.O. (a minor) (suing by her mother and next friend A.O.) v. Minister for Justice Equality and Law Reform* [2009] IEHC 478

12. It was accepted by the Tribunal that the Convention ground of membership of a particular social group may be applicable to cases where a person is targeted by reason of being in a particular family which is feuding with another. The attributes of a blood feud as set out in the country of origin information and materials submitted were considered. The evidence in the case indicated that the applicant's grandfather shot family B's grandfather in 1988. Some 11 years later under the opportunity afforded by the Balkan War, A.S., a member of family B, stabbed the applicant's father. Other than threats there were no further incidents. The Tribunal reached the following conclusion:-

> "Leaving aside the issue of the probity of the statements or motive in assisting a relative's refugee application, neither statement (of B.A's brother and uncle) refer to any incident of recent origin. Threats appear to continue to be made, but no effort has been taken to carry out the threat. While this is not a case of criminal vengeance such as the Dublin/Limerick gangland killings, it could not be said to come within the classic principles of a blood feud e.g. as set out by, *inter alia*, Mr Standish (an expert on the subject)."

13. The Tribunal considered that the history given was not consistent with a notorious feud and while details were provided that an attempt had been made to end the feud the lack of commitment by either family to continue it was shown by the fact that no further violent incident occurred since 1999. It was noted that the applicant's grandfather and great-uncle were not subject to targeting nor was any other member of the family apart from B.A. in 1999. The Tribunal determined:-

> "I find that the stabbing in 1999 was a purely criminal act causing serious harm inflicted during the course of a Civil War. I find that it is not a blood feud as would be properly understood and applying the 'non exhaustive' criteria set out in the UNCR position on claims for refugee status…relating to the Status of Refugee based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud…it does not come within that definition."

14. A further argument was advanced that even if the Tribunal did not accept that family B and B.A.s family were engaged in a blood feud, the child applicant still had a well-founded fear of persecution by a reason of a membership of a particular social group comprising of her family because an attempt was made to kill her father. In particular it was submitted that Reg. 9 of the European Communities (Eligibility for Protection) Regulations 2006, made clear that acts of physical or mental violence which are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights may constitute persecution for the purposes of s. 2.

15. The Tribunal concluded that neither of the applicant's parents had a well-founded fear of persecution for a Convention reason based on a blood feud or any other reason. It determined that it would require an independent ground to be advanced or a change in circumstances to warrant a different conclusion. There was no evidence worthy of credit put forward in that regard. The Tribunal also took into account the fact that the child had never been to Kosovo, would be travelling there with her parents who had not been to the country for many years, the absence of any act of violence for 11 years and the broader family network. It was, therefore, reasonable to conclude that the child applicant would not be at risk of persecution for Convention reason if she went to Kosovo.

16. The Tribunal also considered whether there would be a failure of state protection from a Convention based threat in the child applicant's case. It was noted that the attack in 1999 occurred when there was no effective state protection available. However the perpetrator was arrested and detained and there had been no act of vengeance by the applicant's family such as to provoke a reprisal. The Tribunal considered that effective state protection would never amount to perfect protection and the Tribunal was not satisfied that it had been demonstrated that the state was either unwilling or unable to provide protection in relation to what it concluded was a criminal act which did not come within one of the recognised Convention grounds.

17. The issue of relocation did not arise having regard to the Tribunal's findings of fact.

The Challenge
18. This application is by way of telescoped hearing. The applicant seeks to have the determination of the Tribunal quashed on the following grounds:-

> "(a) The first named respondent erred in law in failing to assess the applicant's claim in accordance with the definition of the term 'refugee' contained in s. 2 of the Refugee Act 1996 (as amended);

(b) The first named respondent erred in law in assessing whether the applicant has a well-founded fear of persecution by reason of her membership of a particular social group comprised of her family in accordance with s. 2 of the Refugee Act 1996 (as amended);

(c) The first named respondent erred in law in finding that the applicant does not come within the Convention ground of 'membership of a particular group' by reason of family association;

(d) The first named respondent erred in law in assessing whether the state protection would be available to the applicant if she were to be returned to Kosovo;

(e) Without prejudice to the generality of (d) the first named respondent erred in law requiring the applicant to demonstrate a 'complete breakdown of state apparatus' in order to rebut a presumption that state protection would be available to her."

19. A further ground that the applicant's claim for refugee status under s. 17 of the Act had not been fully determined in accordance with the procedure which complies with a minimum standards required by Council Directive 2005/85/EC was not pursued having regard to the present state of the law.

Grounds (a) to (c)
20. There is no doubt that the Tribunal accepted that the targeting of family members on the grounds of blood feuds could constitute persecution on a Convention ground in respect of which the child applicant's claim must be considered. The Tribunal, having considered that claim in accordance with the guidelines concerning the principles and factors thought to be relevant to an examination of the risk arising in respect of blood feuds outlined by the UNHCR, concluded that the history advanced did not amount to a blood feud. It was satisfied that the assault on B.A. was one incident of criminal violence directed at the child applicant's father in 1999, though threats had been made since that time none of them had been acted upon either prior to or since the applicant's parents left Kosovo either in respect of the parents or any other member of the family. This finding of fact was not challenged in these proceedings as irrational or unreasonable.

21. It is submitted on behalf of the applicant that the Tribunal erred in law in that it should have concluded that membership of a family is membership of a particular social group within the meaning of Reg. 10(1)(d) of the European Communities (Eligibility for Protection) Regulations 2006 and that a claimant who asserts that she would be persecuted for reasons of her family relationships to a particular person or persons does not have to establish that the person in question was or were themselves persecuted for a Convention reason.

22. The Tribunal in approaching this matter applied the legal test formulated in *Gonzalez v. Minister of Citizenship and Immigration* [2002] FCJ 456 (Judgment 27th March, 2002, Federal Court of Canada, Trial Division). In *Gonzalez* the applicant, a Guatemalan citizen, was kidnapped and held for ransom. She escaped but the kidnappers threatened her with revenge. On an application for asylum the Canadian Immigration and Refugee Board found that Ms. Gonzalez was threatened for a criminal reason and not for one of the grounds set out in the definition of Convention refugee. The Board concluded that as a member of a family or particular social group she could not be found to be a Convention refugee "if the family are the primary target and the family was not targeted for a Convention reason". It was argued that particular social group was a ground of persecution which stood on its own and did not need to be related to another of the recognised grounds. Lawson J. delivering judgment in a challenge by way of judicial review held that a family connection did not by itself come within the anti-discrimination objectives of the Convention and that the Board was correct in concluding that Ms. Gonzalez as a member of a family group could not be found to be Convention refugee if the family was not targeted for a Convention reason. The determinative issue in the case was one of nexus. It was clear that the agents of persecution were kidnappers whose motivation was criminal, i.e to kidnap the claimant and extort a ransom from her parents. The threat of harm was for a criminal reason and not upon one of the grounds in the Convention refugee definition of political opinion, race, religion, nationality or membership of particular social group. It was clear the family was not chosen by the criminals for kidnapping and extortion by reason of a Convention ground but because they were perceived as having the means to pay a ransom. Lawson J. concluded that a family connection by itself could not come within the objectives of the Convention. He stated:-

"To find otherwise would be to conclude that persecutory treatment directed at family members in no way related to discrimination or fundamental human rights would attract the protection of the Convention. For example, if children were the victims of persecutory conduct as a result of a parent's failure to forego a commercial opportunity or to cheat in a sporting event, I do not believe that it is intended that the Convention should be engaged to protect the children. That does not mean that the protection ought not to be afforded, or that it would not be afforded, but simply the source of the protection ought not to be the Convention.

17. This interpretation of 'particular social group' also avoids the anomaly that Ms. Gonzalez's parents, as the victims of crime, cannot claim the protection of the Convention, but Ms. Gonzalez could, solely because of the relationship with her parents. It avoids the further anomaly that Ms. Gonzalez cannot claim status as a Convention refugee on the basis of her ordeal as a kidnap victim, but could do so as the daughter of the recipient of the ransom demand."

23. In *Quijano v. Secretary of State for the Home Department* [1997] Imm. A.R. 227, the Court of Appeal for England and Wales (Civil Division) considered firstly whether a step-son as a member of a particular family could be regarded as coming within the category of "membership of a particular social group", and whether it was necessary for the appellant to demonstrate that other members of his family were persecuted for a Convention reason in order to qualify for Convention protection. The appellant was a Colombian whose step-father's food stall had been blown up by a drugs' cartel after he had refused to trade for them. In 1991 his brother arrived in the United Kingdom having suffered at the hands of the same cartel. In August, 1992 the appellant and his cousin were attacked in the street by the gang. The appellant's cousin was shot dead and the appellant suffered gunshot wounds. In 1993 the appellant arrived in the United Kingdom and sought asylum. This application was refused and dismissed on appeal. In the Court of Appeal it was accepted that membership of a particular family was capable of falling within the category of a particular social group. The appellant claimed that he would not be persecuted but for his membership of the family and that this entitled him to the protection of the Geneva Convention. The appeal was dismissed. Thorpe L.J. stated that the persecution arose not because of the appellant's membership of the family, but the step-father's refusal to cooperate with the cartel and the subsequent decision to take punitive action against the appellant was fortuitous and incidental to that fact. That decision was said to be one which would be as fortuitous and incidental as if the criminals decided to take punitive action against the step-father's partners or employees.

24. Morritt L.J. stated at p. 233:-

"It is plain that the fear of the applicant, which is to be assumed, is the consequence of the refusal of his step-father to

> comply with the illegal demands of the drugs cartel in Colombia and the determination of the drugs cartel to take revenge on those they considered to be related to him. It is true that each member of the social group apart from the step-father, is likely to have the same fear and for the same reasons. But the fear of each member of the group is not derived from or a consequence of their relationship with each other or their membership of the group but because of their relationship, actual or as perceived by the drugs cartel, with the step-father of the appellant. The step-father was not persecuted for any Convention reason so that their individual relationship with him cannot cause a fear (for) a Convention reason either."

25. Roche L.J. also stated that to qualify as a member of a particular social group, in this case, the family, the appellant had to be suffering from a fear of persecution as a member of a family one or more of whose members had suffered or were suffering persecution for a Convention reason. The fact that the step-father was not entitled to claim asylum demonstrated that the family was not a social group liable to persecution.

26. It is submitted that the adoption and application of the *Gonzalez* decision by the Tribunal failed to have proper regard to the decision in *K. v. Fornah* [2007] 1 A.C 412.

27. In *K.* the claimant, an Iranian citizen, claimed asylum on the grounds that she left Iran following the arrest and imprisonment of her husband, on grounds of which she was unaware, and that she had been subjected to ill treatment by state agents and been warned of potential danger to her son. Her application was refused but on appeal though no evidence was found of her husband's detention for a Convention reason, it was concluded that although other family members had not been targeted by the authorities, she had a well founded fear of persecution because of her membership of her husband's family which constituted a particular social group. The Immigration Appeal Tribunal in allowing the appeal accepted that the family unit was capable of constituting a particular social group, but on the basis of *Quijano* above, considered that where the primary family member was not persecuted for a Convention reason, she, as a secondary family member, could not be regarded as being persecuted for membership of his family. The Court of Appeal affirmed the Immigration Appeal Tribunal's decision and dismissed the claimant's appeal. The House of Lords allowed the claimant's appeal holding that "a particular social group" constituted a group of persons who shared a common characteristic, other than their risk of persecution, which distinguished the group from the remainder of society, or who were perceived as a group by society. It held that membership of a family could ordinarily be regarded as membership of a particular social group. Furthermore, it was held that a claimant who asserted persecution for reasons of family membership did not have to establish that a primary family member was being persecuted for a Convention reason. It followed that since the adjudicator in *K.'s* case when making findings of fact, accepted that families of those thought to be dissidents or of adverse interest to the authorities in Iran could be persecuted, he had been entitled to infer from his findings as a whole that the claimant had a well founded fear of persecution because of her membership of her husband's family.

28. Lord Hope at para. 44 stated:-

> "44. I do not agree with the approach that the Court of Appeal took to this issue in *Quijano*. It is, of course, well established that the persecution which is feared cannot be used to define a particular social group…But this simply means that there must be some characteristic other than the persecution itself, or the fear of persecution, that sets the group apart from the rest of society. This may be because its members share a common characteristic other than their risk of being persecuted, or because they are perceived as a group by society. It is the latter approach that defines the family as a particular social group. Each family is set apart as a social group from the rest of society because of the ties that link its members to each other, which have nothing to do with the actions of the persecutor…
>
> 47. The reasoning of the Court of Appeal in *Quijano* requires more of an asylum seeker who claims that the particular social group of which he or she is a member is the family than is required of those who claim that the persecution of which they have a well-founded fear is for reasons of race, religion, nationality or political opinion. It is, of course, critical to identify what lies at the root of the threat of persecution. But it is not necessary to show that everyone else of the same race, for example, or every other member of the particular social group, is subject to the same threat. All that needs to be shown is that there is a causative link between his or her race or his or her membership of the particular social group and the threat of the persecution of which there is a well founded fear. The fact that other members of the group are not under the same threat may be relevant to an assessment of the question whether the causative link has actually been established. Especially in a case such as the present, where it is not suggested that any other member of the family is at risk of being persecuted for reasons of membership of the family, the evidence of causation will need to be scrutinised very carefully."

Lord Hope noted at para. 17 of the UNHCR Guidelines on International Protection of 7th May, 2002 stated:-

> "An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group."

He noted that care was needed in applying this guideline to cases such as K's where it contended that the family is a particular social group and the applicant is the only family member who is said to be at risk of persecution because of membership of the family. "The question of causation in such cases is likely to be critical". In the case of K. it was found that the adjudicator at first instance was entitled to hold that the causative link had been proved by the facts which he found to have been established on the evidence.

29. It is submitted that the Tribunal's approach in this case in adopting and applying the approach set out in *Gonzales* adopted the same approach used by the Court of Appeal in *Quijano* but rejected by the House of Lords in *K.* It is submitted that the Tribunal's starting point should have been whether the applicant's membership of the family constituted membership of a particular social group within the meaning of Regulation 10(1)(d) of the 2006 Regulations and that a claimant who asserts that she will be persecuted for reasons for family relationship to a particular person or persons does not have to establish that the person in question was or would themselves be persecuted for a Convention reason. It is common case that the Tribunal accepted that the targeting of family members on the ground of blood feud could constitute persecution on the Convention ground by reason of a membership of a particular social group, namely, the applicant's family. It was specifically accepted by the Tribunal that the extended family was capable of constituting a particular social group in the case of blood feud retribution. However, the court is satisfied that the Tribunal concluded that the facts alleged in the case did not indicate a genuine risk of retribution based on a blood feud. It is not a case in which a Tribunal concluded that because the parents had not been directly targeted in the course of a blood feud that the child applicant could not succeed in her asylum application. The application failed because it was not accepted following a consideration of the facts as to the existence of a blood feud and an application of the guiding principles applied by the UNHCR, that there was any basis upon which to grant asylum for a Convention reason.

30. I am not satisfied that it was necessary in the circumstances for the Tribunal to rely upon the *Gonzales* case the facts and

circumstances of which are dissimilar to this case. I am satisfied that the approach adopted by the Tribunal in assessing the applicant's case was more akin to the approach adopted in the *K.* decision. The Tribunal rejected the existence of the blood feud as a Convention reason upon which the applicant's parents, or indeed any other member of the family, could possibly have succeeded after a full assessment of the facts. This is part of the careful analysis which must occur when the causal connection and the association between membership of the family and the Convention ground is asserted: it is part of the "careful scrutiny" advocated by Lord Hope. It is clear that the Tribunal could not find such a causal connection based on the claim of blood feud. For the above reasons, although I am satisfied that the applicant has established "substantial grounds" upon which to advance the leave application, I am not satisfied having considered the evidence, submissions and statement of opposition that the applicant has established that the decision is vitiated on these grounds.

Grounds (d) and (e)
31. It is submitted that the Tribunal erred in law and misapplied the appropriate test for state protection as set out in *D.K. v. Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2006] 3 I.R. 368. It is said that having found on the basis of country of origin information there had not been a complete breakdown of state structures and protection, the Tribunal treated this fact as conclusive of state protection. It is submitted that the evidence adduced on behalf of the applicant in the form of highly critical reports on the situation in Kosovo from the Council of Europe, and other agencies relating to the lack of effectiveness of the Kosovan legal system rebutted the presumption of state protection by providing clear and convincing proof that the authorities in Kosovo would be unable or unwilling to provide protection. It is said that a proper assessment of this matter did not take place and consequently, the Tribunal erred in law. I am not satisfied that this is so.

32. Herbert J. in *D.K.* held that the Tribunal in that case had not erred in law in applying a presumption that state of origin protection was available in the applicant's country of origin to someone in his position, because the power of the state to provide protection to its nationals was a fundamental feature of sovereignty. Subject to exceptional circumstances, it was rational and just for a requested state to presume that the state of origin was able and willing to provide protection to the applicant from persecution unless the contrary was demonstrated by clear and convincing proof on the part of the applicant for refugee status. The error found in *D.K.* was that the Tribunal wrongly concluded that the failure of the applicant to seek protection from the state authorities in Georgia was sufficient in itself to defeat a claim for refugee status and that the Tribunal did not address at all the question of whether, having regard to the evidence in the case and country of origin information, state protection "might reasonably have been forthcoming" had it been sought.

33. I am satisfied that in this case the Tribunal examined the history of events and developments in Kosovo in order to determine whether state protection was available. In particular, the Tribunal considered whether in 1999 when the child applicant's father was attacked, there was an absence of effective state protection under the Serbian regime. Kosovo was in 2008 an independent state and completely different from the Kosovo in which the initial incident had occurred in 1988 and the assault upon the applicant's father had taken place in 1999. The Tribunal carried out an assessment of the country of origin information to determine the present state of protection available to the child applicant should she return. The Tribunal did not accept there had been a complete breakdown of the state apparatus and while effective state protection will not be perfect, it was not satisfied that the state was unwilling or unable to provide the protection required. This is a finding which was open to the Tribunal on the evidence available and I am not satisfied having reviewed the materials that it can be regarded as irrational or unreasonable or that it is a conclusion that could not reasonably be arrived at having regard to the evidence adduced.

34. I, therefore, decline to grant leave to apply for judicial review on these grounds.

Conclusion
35. For all of the above reasons, this application is refused.