

THE HIGH COURT
JUDICIAL REVIEW

[2010 No.683 J.R.]

BETWEEN**D.A. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND N.A.) (PAKISTAN)****APPLICANT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE REFUGEE APPEALS TRIBUNAL, IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Mr. Justice Eagar delivered on the 4th day of March 2015**

1. This is a telescoped application for an order of *certiorari* quashing the decision of the second named Respondent dated the 29th April 2010 and seeking an order and an injunction restraining the first named Respondent from deporting the Applicant or her parents upon whom she relies for support.

The Applicant's claim

2. DA. was born on the 25th November 2008 in Ireland. She is of Pakistani nationality, both of her parents being from Pakistan. She was born into the Ahmadi faith. Both of the parents of the Applicant had made applications for refugee status and their appeals to the Refugee Appeals Tribunal have been unsuccessful.

3. The Applicant's mother explained on behalf of the Applicant that she feared for her child. She claims that the whole family would have the same problems if they returned to Pakistan. She claims that they had to leave Pakistan because her husband was an Ahmadi preacher and they would have problems if they returned. The second named Respondent indicated that the joint appeal of the Applicant's parents had not discharged the burden of proof upon them of showing that there was a reasonable likelihood that they would be persecuted for a Convention reason if returned and that the decision of the second named Respondent was attached to the supplemental affidavit of Brian Byrne, solicitor sworn on the 16th February 2015. Two letters were submitted to the Tribunal to the effect that the Applicant's father is an Ahmadi and working as a preacher and that he used to bring non-Ahmadis for preaching and a second letter which makes reference to a satellite dish centre.

4. In summary the Applicant's mother's evidence is that the Applicant would suffer the same fate as her father if she did the same work as her father. The Applicant's mother was asked whether her two other children were also preachers and she claimed that they were not but perhaps they would become preachers but that the Applicant will definitely become a preacher. The Applicant's mother was asked to explain how she could be so sure and she claimed that she promised God that she would work as a preacher before her birth. She claims that she belongs to a particular group in other words that this child has been enrolled in a particular group named as Tehrik-Waqf-e-Nou which means she would have to work as a preacher. The mother claims that if the Applicant goes back to Pakistan to start working as a preacher she will suffer problems. She was asked when this would happen and she claims at the age of 4 she would go to the preacher training school and then start preaching at the age of 15. The Applicant was asked whether it would be unusual for young girls to preach and the Applicant's mother stated everyone has to preach but because she belongs to this particular group the Applicant would be a special preacher and there would be no guarantee that she would be safe if she went back. A substantial amount of Country of Origin Information indicates both the killing of Ahmadis and the discrimination against Ahmadis. The Applicant's mother stated there was no safety in their country and that the Applicant would be put in jail or she would be killed if she returned and started preaching.

5. The Applicant's mother stated there was no part of Pakistan that would be safe because if you were targeted once if you were a preacher you would not be safe if you moved anywhere else.

Decision of the second named Respondent

6. The second named Respondent indicated that the difficulty inherent in applications for children is that there is no history upon which to rely on other than that of the parents. It was important that a re-examination of a case already dealt with should not be entered into by the Tribunal. An application by a child born to parents who have already been through the refugee determining process and failed is not "a second bite of the cherry". She said that at this particular point in time there was no supporting documentation other than a letter from an Ahmadi group stating that the Applicant's father was an Ahmadi, a letter from an Irish Ahmadi Association (Ahmadiyya Association) and the father's national identity card. She stated that in relation to the evidence that the Applicant is a member of a particular group namely Tehrik-Waqf-e-Nou she stated that she is bearing in mind that people were talking about a child who was not even 2 years of age. She also says that she is presented with the Applicant who is a child of parents who failed to meet the criteria of the Refugee Convention for reasons set out in their decision.

7. She said that the parents had not persuaded her that they were "exceptional Ahmadis" and by association she could not find that this child regardless of whatever argument may be made as to what she might do in the future is anything other than an unexceptional Ahmadi. She referred to decisions referred to in the section 13 report and indicated that there was no real risk of persecution or Article 3 infringing treatment on return to Pakistan for an unexceptional Ahmadi merely by reasons of being an Ahmadi. On that basis she said that she found that the Applicant did not face a real risk of persecution for a Convention reason.

8. In that regard the second named Respondent quoted a decision of UKIAT (2005 UKIAT 00033KK). This was referred to by the Refugee Application Commissioner's report under section 13:-

"Where the IAT found that for the unexceptional Ahmadi there is no real risk of persecutory or Article 3 infringing

treatment on return to Pakistan merely by reason of being an Ahmadi. The unexceptional Ahmadi was defined as a man of the Ahmadi faith who:

- 1) Has no record of active preaching, is not a person in respect of whom any finding has been made that there is a real risk that he will preach on return.
- 2) He has no particular profile in the Ahmadi faith
- 3) He has no history of persecution or other ill treatment in relation to his Ahmadi faith
- 4) Has no other particular features to be given any potential added to the risk to him (by being a convert to the Ahmadi faith)"

Submissions

9. Counsel on behalf of the Applicant pointed out that there exists in Pakistan numerous discriminatory laws and practices restricting the practice of the Applicant's religion and discrimination against members of the Applicant's community. This discrimination manifests itself in numerous manners, including threats to the life and property of the Ahmadi people, violence and intimidation, the prevention of public gatherings of the Ahmadi people, severe restrictions on the practice of religion and the denial of access to higher education. He stated that she would experience persecution as a consequence of her religion and there is no state protection available and relocation within Pakistan is not a viable option.

10. He complained that there was no reference at all in the decision to the copious submissions to the effect that all Ahmadis in Pakistan are persecuted. He submitted that the individual consideration of the Applicant's case was required on the failure to afford that such consideration is an error of law and a breach of fair procedures rendering the decision invalid. He also submitted that the Tribunal Member was obliged to offer cogent reasons for the rejection of the additional evidence forwarded to support the application. He referred to *S.R. (Pakistan) v. The Refugee Appeals Tribunal & Ors* [2013] IEHC 26, a judgment of Clark J. dated 29th January 2013. He also quoted the decision in *MAMA v. Minister for Justice Equality and Law Reform & Ors* [2011] IEHC 147 in which Cooke J. held:-

"That the sole fact that particular facts or events relied upon as evidence of past persecution were disbelieved did not relieve the decision maker of the obligation to consider whether, nevertheless, there was a risk of further persecution of the type alleged in the event of repatriation."

11. Finally counsel for the Applicant quoted a decision of the European Court of Justice in the cases *C-71/11 and C-99/11* in relation to two Ahmadis. He submitted that this decision eliminated the requirement of an Ahmadi to be an exceptional Ahmadi for the purposes of protection. I will return to these judgments later.

12. Counsel on behalf of the Respondents pointed to the parents' application for asylum and subsidiary protection and that the second named Respondent had given a decision in their case on the 23rd February 2009, this decision was never challenged. He points out that the application was refused on credibility grounds.

13. Counsel on behalf of the Respondent said that the Applicant argues that she will be a preacher in the future or she is or will be an "exceptional" Ahmadi. He also suggested that what was being argued in the alternative was that simply being an Ahmadi is sufficient to justify asylum and he quotes from the decisions of this court in *S.Q. v. Refugee Appeals Tribunal* [2014] IEHC 599 and *P.I.M.K. v. Refugee Appeals Tribunal* [2014] IEHC 535 both decisions of this court in 2014. He then summed up the Tribunal decision and indicated that it was important to highlight that the Tribunal Member did not believe that the Applicant's father's account of why he left Pakistan and suggests that the Applicant's case is a re-run of the parents' case. He quotes a decision of McDermott J. in *M.R. v. Refugee Appeals Tribunal* [2013] IEHC 243. In *M.R.* the Applicant stated that they always had difficulties in Pakistan because of their Ahmadiyya religion. The Tribunal did determine that the Applicant's subjective fear of persecution was not supported by his family's current circumstances in Rawalpindi. It determined that his father appeared to be as prominent as the Applicant is an Ahmadi preacher and for a greater length of time than the Applicant. He dealt with the issue of credibility but also said that the Applicant was accepted by the Refugee Applications Commissioner as Ahmadi. McDermott J. quoted from a decision of *M.J. & Z.M. Pakistan* CG UKAIT 00033 (4th April 2008). McDermott J. also quotes from the decision of Clark J. in *S.R. (Pakistan) v. Refugee Appeals Tribunal* [2013] IEHC 26:-

"The court concluded that the Tribunal erred in describing the Applicant as an "unexceptional" Ahmadi who had no record of active preaching and in finding that he was a person in respect of whom there was no real risk if returned to Pakistan."

Discussion

14. This is a difficult case to determine in light of the second named Respondent's decision to reject the Applicant's parents on the basis of issues of credibility relating to the reason why the Applicant's father had left Pakistan. However it is essential that each Applicant's appeal be considered individually and it is inappropriate that the same Tribunal Member considers the child's application. Clearly there was no objection to same raised by the solicitors on behalf of the Applicant. In those circumstances this would not be a ground to set aside the decision of the second named Respondent.

15. The Country of Origin Information provides numerous examples of the difficulties for Ahmadis in Pakistan. The population of Pakistan is stated to be over 187 million of which 95% profess to be Muslim. 75% are Sunni and 20% are Shia. The remaining 5% includes Hindus, Christians and .22% Ahmadis. The Pakistani legal system has added to its penal code relevant issues in which Ahmadis are not able to practice their faith and in effect criminalising that faith. The effect of anti-Ahmadi laws is described as follows:

The overall effect of sanctions 298B and 298C of the code of the Pakistani Penal Code renders it illegal for Ahmadis to:

- 1) Refer to themselves as Muslims or refer to their founder as a prophet.
- 2) Refer to their places of worship as mosques.
- 3) Use the traditional Muslim form of greeting.

- 4) Use the Muslim call to prayer.
- 5) Use the Qur'an or observe Islamic rights.
- 6) Preach or propagate the Ahmadi faith.

16. As well as the penal code anti-Ahmadi sentiment is tolerated by the authorities and the sources referred to in the Country of Origin Information provide for an extraordinary number of killings, kidnappings, attacks on Ahmadis because they are Ahmadis.

17. Counsel for the Respondents quoted two judgments of this court in relation to Applicants from Pakistan but I am satisfied that those decisions relate purely to issues of credibility and do not deal in any way with the present case. It appears to me that the decisive decision is that of the judgment of the European Court of Justice on the 5th September 2012 in *C-71/11 and C-99/11*. The judgment first of all outlines European Union law and quotes from Council Directive 2004/83/EC of the 29th April 2004:-

"It appears from recitals 3, 16 and 17 to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria."

18. The case involved two Ahmadis from Pakistan and questions were referred to the court by the German Court for Preliminary Ruling. The court held that:-

"For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with the 'core areas' ('forum internum') of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported 'core areas'."

19. The court looked at the interpretation which had been put on Article 9 (1) of the Directive that there must be a severe violation of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution. The court's understanding of the interpretation of Article 9 (1) was that for the purpose of determining specifically which acts may be regarded as constituting persecution within the core areas of the basic right to freedom of religion which do not include religious activities in public from acts which affect these purported core areas are incompatible with the broad definition of religion given by Article 10 (1) (b) of the Directive which encompasses all its constituent components, be they public or private, collective or individual. Acts which may constitute a severe violation with the meaning of Article 9 (1) (a) of the Directive includes serious acts which interfere with the Applicant's freedom not only to practice his faith in private circles but also to live that faith publicly:-

"That interpretation is likely to ensure that Article 9(1) of the Directive is applied in such a manner as to enable the competent authorities to assess all kinds of acts which interfere with the basic right of freedom of religion in order to determine whether, by their nature or repetition, they are sufficiently severe as to be regarded as amounting to persecution."

20. It appears to me that this decision of the European Court of Justice states that there is no requirement for a person to be an exceptional Ahmadi to be entitled to protection and that the Directive indicates that serious acts which interfere with the Applicant's freedom not only to practice his faith in private but also to live that faith publicly should be protected.

21. In this case the first named Respondent relied considerably on the decision that she took that the parents did not persuade her that they were exceptional Ahmadis and by association she cannot find that the Applicant is anything other than an exceptional Ahmadi. I accept that the second named Respondent did not have the benefit of the judgment in the European Court of Justice of the 5th September 2012 when making her decision. Nevertheless I feel that it is incumbent upon me to rely on this to bring this to the attention of the Respondents.

22. Having regard to that decision of the European Court of Justice it appears to me that the second named Respondent would not have been aware of the pending decision of the European Court of Justice. Nevertheless the decision of the second named Respondent depends crucially on the issue of the Applicant being "an unexceptional" Ahmadi. In my view the decision of the second named Respondent falls into the second rule of Cooke J. in *I.R. v. The Minister for Justice Equality and Law Reform & Ors* [2009] IEHC 353 in that it is vitiated by the principle of natural or constitutional justice; having regard to the decision of the European Court of Justice.

23. In these circumstances I will grant an order of *certiorari* quashing the decision of the second named Respondent and direct that the Applicant's appeal be determined by another member of the Refugee Appeals Tribunal.