

THE HIGH COURT
JUDICIAL REVIEW

[2009 No. 1118 J.R.]

BETWEEN

S.K.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of November, 2014

1. This is a telescoped hearing in which the applicant seeks an order of *certiorari* quashing the decision of the first named respondent (the Tribunal) made on 28th September, 2009, upholding the decision of the Refugee Applications Commissioner not to recommend that the applicant be granted refugee status on the grounds of her membership of a particular social group or alternatively, because of her political opinion.

Background

2. The applicant is a national of Pakistan and comes from Waziristan, part of the Federally Administered Tribal Areas of Pakistan. She states that she is Pashtun and arrived in Ireland on 22nd August, 2008, accompanied by her son, P.K., who was born in 23rd March, 2004.

3. The applicant claims to have fled Pakistan because of fear of Taliban aggression against her and her family. She states in the ORAC questionnaire that her father arranged her marriage to his friend's son, which was customary in her tribe. Her future husband became disabled and the marriage did not proceed. A marriage was then arranged between the applicant and her first cousin, T.K., who was an influential tribal leader.

4. In April, 2004 the applicant's cousin, who was a Taliban member, was released from Guantanamo Bay. The applicant's husband attempted to reassure the Pakistani authorities that her cousin's return would not lead to any civil unrest or disturbances. However, it was claimed that her cousin was killed by the authorities in 2007.

5. The applicant also claims that her former fiancée's brother, who was also a high ranking Taliban member, turned the Taliban against her husband, saying that he was involved in colluding in her cousin's death at the hands of the authorities. This deception was in revenge for the cancelled engagement. The deception led to the applicant's husband being attacked by the Taliban on two separate occasions. The applicant went to live at her father's house in Gomal, and her husband remained in the tribal village. The applicant also claims that her father's home was attacked ten days after her arrival and that a number of people were killed. She presumed that the Taliban were responsible as did the police who attended and investigated the matter as set out in the police report furnished in the course of the application. It should be noted that the father's house at Gomal was situated outside the province of Waziristan.

6. The applicant then left Gomal for Lahore, travelling with her son, a servant and a bodyguard. Her father provided for her financially. The applicant claims that she and her son suffered general discrimination from the authorities and people in Lahore and Karachi by reason of their Pashtun ethnicity. The authorities questioned her about where she came from and the local school allegedly refused to enrol her son. The applicant's presence was also said to be of concern to local people, who allegedly pressurised her landlord into evicting her.

7. While the applicant and her son were in Lahore, the applicant's husband vanished. It is alleged that the Taliban were involved in his disappearance and attempts were made by the applicant's father to find him. This included securing the assistance of Senator Saleh Shah, who made visits to Waziristan in an attempt to find the applicant's husband. A report was also made to local police and a missing person's application was made to the Supreme Court of Pakistan seeking assistance in finding him.

8. The applicant and her son relocated to Karachi in July, 2008 where similar discrimination allegedly occurred. The family was accused of membership of the Taliban. They remained in Karachi for five weeks after which the applicant's father arranged for the applicant and her son to leave Pakistan by paying an agent \$16,000 to convey them out of the country. The applicant states that they travelled on false documents and arrived in Ireland in August, 2008 and applied for asylum.

The ORAC Decision

9. The Office of the Refugee Applications Commissioner (ORAC) investigated the applicant's claim based on the information provided in the questionnaire and following two interviews held with the applicant. The applicant's son was included in the claim. Her application was rejected because the reasons advanced for seeking asylum were found to lack credibility and because internal location and state protection were deemed to be available to her in Pakistan. This finding was appealed to the Refugee Appeals Tribunal.

The Tribunal Decision

10. A notice of appeal issued on 4th March, 2009. The applicant submitted country of origin information to illustrate the current political and social situation in Pakistan, and specifically in the Waziristan area. The appeal was rejected. The tribunal member was satisfied to accept the applicant's credibility in respect of the events upon which her claim was based and, in particular, in respect of her belief that the Taliban were targeting her husband. However, the Tribunal rejected the appeal on the grounds that a system of state protection exists in Pakistan, relying upon the request made to the Supreme Court of Pakistan and Senator Shah for assistance in finding Mr. Khan and the initiation of a police inquiry into the attack on her father's home. Furthermore, internal relocation was availed of successfully in two instances following the attack in Gomal when the applicant moved to Lahore and Karachi. The

disappearance of her husband was also reported to the police. The Tribunal concluded that the difficulties faced by the applicant could not be said to arise out of her Pashtun ethnicity, and that no country of origin information was referred to which illustrated difficulties faced by the Pashtun in moving to large cities such as Lahore and Karachi.

11. The Tribunal considered a number of documents in respect of the disappearance of her husband which she believed was orchestrated by the Taliban who had accused him of spying for the government. The documents contained information very specific to the applicant's case and the events which she described. The Tribunal stated:-

"It appears that the applicant herself fears the Taliban. Nonetheless, the applicant has not identified any specific threat made to her personally and, it must be said, that her assertion that the Taliban had targeted, kidnapped or made accusations against her husband is disputed by that group in the first hand accounts given by the political agent for Waziristan and Senator Saleh Shah, apparently a member of the Pakistani Parliament...In this context, the documentation submitted does not corroborate the specific claim that the applicant's husband was targeted by the Taliban or that her father's house was attacked by the same group; at best it is inconclusive on these issues. Despite the fact that the applicant says that the Taliban's motivation for accusing her husband of spying derives from a jealousy attributable to the brother of the person whom the applicant was originally promised to marry, this does not appear to have resulted in the applicant herself being threatened or specifically targeted by that group...However, because the applicant has sought to corroborate her story by reference to documentation, I am prepared to accept that she is credible insofar as she believes that the Taliban have targeted her husband for the reasons identified. However, it seems to me that whatever fear the applicant may have, all of the evidence provided by her in the form of letters and documentation is indicative of the provision of some form of state protection in Pakistan. In this context, I note that the attack on the applicant's family home has been the subject of an investigation by the relevant authorities. There is a police report on file and details of that investigation are contained in the documents submitted by the applicant.

The applicant also appears to have been able to get help (either herself or through her father) from no less a person than Senator Shah who has made inquiries in relation to the situation with regard to the applicant's husband. In circumstances where the applicant claims to fear persecution from non-state actors, therefore, the information provided by her does not indicate that insofar as she herself is concerned, it is the case that state protection would not be afforded to her. On the contrary the documentation provided indicates that state protection, at least in the form of investigation for what has previously gone on has been made available, and there is nothing in the country of origin information to which I have been referred that indicates that a person of the applicant's position, who herself was not specifically threatened, could not avail of that protection on an ongoing basis."

12. The Tribunal then considered the issue of relocation in the following way:-

"Even if I am wrong in this regard, and the applicant is seen to have a well founded fear of persecution, it is clear... that the applicant could and did relocate successfully to another part of Pakistan. The applicant gave an account of having travelled together with a bodyguard and a servant to Lahore and then to Karachi. She says that her family and that of her husband were wealthy. She says that there were able to afford to spend a large amount of money transferring her son and herself to Ireland...The option of relocating internally within Pakistan is undoubtedly available to the applicant in this case. In fact the applicant herself gave evidence of having moved when she encountered difficulty to Lahore and then to Karachi.

When asked to explain difficulties she encountered in Lahore and Karachi, she made general complaints about the fact that it was difficult for her son to be admitted into school or that because she was a Pashtun from Waziristan, she would be met with discrimination. However, no documentation or country of origin information has been provided to support the contention that it would be very difficult for a Pashtun from Waziristan to relocate to enormous cities such as Lahore or Karachi because of discrimination or prejudice systematically levelled against them. Neither has it been suggested that the type of treatment the applicant is alleged to have received (difficulties with getting her son into school, difficulties with neighbours and her landlord) amounts to or could constitute persecution for the purpose of the Convention. In the circumstances, therefore, the applicant herself having voluntarily relocated to another part of the country where it is clear that she was not being targeted for harm equating to persecution, she is not entitled to the benefit of the Convention."

The Challenge

13. Counsel for the applicant submits that the Tribunal erred in law in the manner in which it assessed the existence of state protection in Pakistan. While it is accepted that investigations occurred concerning the husband's disappearance and the attack on the applicant's father's home, it is submitted that the Tribunal failed to assess whether there was effective state protection available to the applicant. It is submitted that the existence of an investigation is not sufficient to indicate effective state protection, as in the instant case, there was no effective protection against the Taliban in the Waziristan region generally.

14. The applicant relies on a number of matters including her own submission that "the Taliban were quite powerful and dominant in South Waziristan".

15. It is also submitted that country of origin information established that state authorities were unable to defeat the Taliban which appeared to be in full control of certain areas. In that respect the applicant points to the conclusion reached in a letter from Senator Shah to the family submitted as part of the application in which he stated that the Taliban appeared to be in full control of the region and that the political agent there appeared "helpless".

16. The applicant, therefore, claims that the state authorities were unable to exercise proper or any control over Waziristan, let alone operate an effective legal system. In support of this submission, reliance is placed on the judgment of *Horvath v. Secretary of State for the Home Department* [2001] 1 A.C. 489. It is claimed that the existence of state protection was not properly assessed by the Tribunal and that its conclusion in that regard was unreasonable.

17. The applicant also claims that the Tribunal erred in law in failing to assess whether it was reasonable to expect the applicant to relocate within Pakistan. It is submitted that an incorrect legal test was applied in that the Tribunal considered whether it was "very difficult" for her to relocate because of systemic discrimination or prejudice, or because she would be persecuted.

State Protection

18. Regulation 2 of the European Communities (Eligibility for Protection) Regulations 2006 provide, *inter alia*:-

“Protection against persecution or serious harm” shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or substantial part of the territory of that state to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection.”

19. The applicant claims that the overwhelming evidence available from country of origin information, Senator Saleh Shah, and supported by the police report of the attack in Gomal and the subsequent report of the Office of the Assistant Political Agent dated 29th November, 2008, indicating that “no evidence has been acquired up to now” in respect of that attack fourteen months after the event, clearly established in this case that effective state protection was not available to her.

20. The Tribunal concluded that it was available because the involvement of the police and the carrying out of an investigation as evidenced by the police report on the attack at Gomal, indicated that state protection had been made available in the past. It noted that she was not specifically threatened and that there was nothing to indicate that she could not avail of that protection on an ongoing basis. In addition, the services of Senator Saleh Shah were obtained and the assistance of the Office of the Chief Justice following the disappearance of her husband. However, the applicant’s claim is that, though these avenues of protection might be pursued, they were ineffective by reason of the complete breakdown of government authority in Waziristan. Furthermore, insofar as the attack at Gomal occurred outside Waziristan, the police investigation was inconclusive and ineffective. Insofar as the applicant claimed that the targeting of her husband by the Taliban was motivated by lying accusations arising from jealousy attributable to the brother of the person to whom she was originally promised in marriage, it was concluded that this did not result in the applicant herself being threatened or specifically targeted.

21. The test to be applied in respect of the adequacy of state protection was considered in *E.A.E v. Refugee Appeals Tribunal* (Unreported, High Court, 13th November, 2009) in which Clark J. upheld the entitlement of the Tribunal to apply a presumption of state protection and held that the onus was on an applicant to demonstrate ineffective state protection. In *B. v. Minister for Justice* [2008] IEHC 229, Bermingham J. stated:-

“28. I feel I must also have regard to the principle accepted both domestically and internationally, that absent clear and convincing proof to the contrary, a state is to be presumed capable of protecting its citizens. This was established in the seminal case of *Canada (Attorney General) v. Ward* [1993] 2 RCS, which has been approved in a number of Irish cases including the judgments of Hedigan J. in *P.L.O. v. Refugee Appeals Tribunal & Anor* [2007] IEHC 299 and Feeney J. in *O.A.A. v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 169. There must be few police forces in the world against which some criticism could not be laid in respect of which a trawl through the internet would fail to produce documents critical of their effectiveness and sceptical of their capacity to respond.”

22. There is a distinction to be drawn between the helpless state of the authorities in Waziristan despite their best endeavours in maintaining order in providing effective state protection to those subjected to Taliban attack, and conditions outside Waziristan. In particular, there is no evidence that the police failed to investigate the attack at Gomal which involved several murders. There is an extensive police report. It is correct to say that they were unable to bring the perpetrators to justice for a period of over twelve months following the event. That is not an unusual occurrence in police investigations and particularly where such investigations are hampered by fear and intimidation spread by terrorist organisations and their associates which renders it more difficult to pursue the culprits. It is clear that the country of origin documentation supports the proposition that the influence of the Taliban is more extensive in Waziristan and that attempts were being made at the time by the Taliban to extend their influence into neighbouring areas, including the area in which Gomal was situated, but they had not yet succeeded. There is no doubt that state protection was not available to the applicant in Waziristan. State protection was available to her and the family following the attack at Gomal and was availed of. Therefore, the court is not satisfied that the determination by the Tribunal which must be regarded as a determination that state protection was available to her outside Waziristan was unreasonable. The Pakistani armed forces and police are engaged in a conflict with the Taliban which is clearly evidenced in the country of origin information. The court, therefore, is not satisfied that the applicant has succeeded on this ground.

23. It is clear that the applicant and her family are dissatisfied with the State’s ability to apprehend the perpetrators of the atrocity at Gomal. Her fear of the Taliban is perfectly understandable in the light of the events described. However, the determination that objectively, and in particular having regard to country of origin information, state protection is available to the extent described in Gomal also forms part of the evidential backdrop to the Tribunal’s consideration of the relocation issue.

Relocation

24. The applicant and her son travelled to Lahore in November, 2007 with a bodyguard and servant at her father’s expense and remained there for eight months. She was questioned by the authorities there concerning her origins. She complained that a local school refused to enter her son as a pupil because they were Pashtun from Waziristan. People in Lahore were overwhelmingly anti-Taliban and viewed people from Waziristan with suspicion. It was alleged that locals tried to pressurise her landlord into evicting the family from their accommodation. She and her son moved to Karachi in July, 2008. The applicant accepted that the Taliban appeared to be unaware of her presence in Lahore or Karachi, and she went openly about her business. The Tribunal considered country of origin information which did not support the contention that it was “very difficult” for the applicant as a Pashtun to relocate to large and populous cities such as Lahore or Karachi because of prejudice or discrimination against Pashtuns. Complaints advanced in that regard were held to be of a general nature. The nature and extent of the alleged difficulties concerning school admission and the suspicion of neighbours was held not to be so serious as to constitute acts of persecution. They did not emanate from state authorities.

25. Regulation 7 of the Protection Regulations provides:-

“(1) As part of the assessment of protection needs, a protection decision maker may determine that a protection applicant is not in need of protection if the applicant can reasonably be expected to stay in a part of his or her country of origin where there is no wellfounded fear of being persecuted or real risk of suffering serious harm.

(2) In examining whether a part of the country of origin accords with paragraph (1), the protection decision-maker shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.”

The applicant submits that the incorrect test was applied by the Tribunal in imposing upon the applicant an obligation to establish

that "it would be very difficult" for a Pashtun from Waziristan to relocate to Lahore or Karachi because of discrimination or prejudice systemically levelled against them.

26. The UNHCR Guidelines set out in the Handbook on Procedures and Criteria for Determining Refugee Status provide helpful guidance as to how the provisions of the Refugee Act 1996, should be applied (*V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135). Paragraph 91 of the Handbook states:-

"91. The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

27. In *Januzi v. Secretary of State for the Home Department* [2006] 2 A.C. 426, Lord Bingham formulated the following question to be addressed by a decision-maker in this context:-

"The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so...The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly vulnerable in another place within the state. The converse may also be true. All must depend on a fair assessment of the relevant facts."

28. *Cooke J. in D.T. v. Refugee Appeals Tribunal* [2009] IEHC 482 considered the application of Regulation 7 in terms relevant to this case:-

"14. The primary consideration in examining the prospective site of relocation within a country of origin is to ensure that the particular source of persecution will not exist in that place or be likely to be encountered there once again. That is most frequently the primary consideration in cases where the threat is of a general or public character such as a tribal conflict in part of the country or oppression by a political regime which is in power in part of a country. In such cases it may be necessary by recourse to appropriate country of origin information to confirm that such a threat is genuinely absent from the proposed area of relocation.

15. The position is different however, in the Court's judgment, where the specific risk identified is a private or domestic one, such as the threat from a particular family member. Country of origin information is of little relevance in assessing such a risk. It falls to the decision-maker to make the assessment by reference to an objective and common sense appraisal of the reality of the risk... The judgment to be made on that issue is the proper function of the specialist decision-maker.

16. If it is reasonable to conclude that the prospective site is one in which the specific risk of persecution is eliminated or highly improbable, the only remaining question is whether the Tribunal Member erred in not seeking out specific information on the general economic, social or other conditions and circumstances prevailing..."

29. In this case the applicant and her son having experienced the murderous attack on members of her family at Gomal which she attributes to the Taliban, moved and remained safely in Lahore for a period of eight months. She acknowledged that she was able to move about openly and that the Taliban did not appear to know where she was. In addition, she was living in a city that was predominantly anti-Taliban and in which, on her own evidence, the authorities were quick to investigate arrivals from the Waziristan area. The focus of her complaint in respect of life in Lahore and Karachi concerns the suspicions of her neighbours concerning Pashtuns from Waziristan. In effect, the determination by the Tribunal is that it would not be "unduly harsh" for the applicant and her son to have remained in Lahore or Karachi, notwithstanding the complaints made as the complaints were not considered to amount to persecution within the terms of the Convention. The use of the phrase "very difficult" must be considered in the overall context of the decision in which relocation was addressed. The court does not consider the use of the phrase, which is taken in isolation, constituted a deviation from the appropriate legal test established on the case law. The applicant contended that it was difficult to remain in Lahore and Karachi because of discrimination amounting to persecution. The Tribunal did not accept this as a matter of fact. On the contrary, it concluded that she relocated successfully to Lahore. It was, therefore, reasonable for the applicant to relocate to either Lahore or Karachi and it was demonstrably not "unduly harsh" for her to do so. In that context, the court is also satisfied that the Tribunal had regard to the general circumstances prevailing in Lahore and Karachi as set out in the country of origin information and the personal circumstances of the applicant under Regulation 7(2). The court is, therefore, satisfied that the challenge on this ground fails.

Conclusion

30. The court is not satisfied that the applicant has established that the decision of the Tribunal is fundamentally flawed on the grounds advanced, and the application is refused.