

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3 (1)

[2010 No. 1456 J.R.]

BETWEEN

S.H. (PAKISTAN) I.H. (PAKISTAN) S.K.F. (A MINOR SUING BY HER FATHER AND NEXT FRIEND S.H.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND LAW REFORM, ATTORNEY GENERAL IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 18th day of February, 2015

1. This is a telescoped hearing seeking orders of *certiorari* in respect of the decision of the Refugee Appeals Tribunal (hereinafter referred to as RAT) to affirm the decision of the Refugee Applications Commissioner that the applicants not be declared refugees. The decision of the RAT was made on the 14th day of October, 2010, and was notified to the applicants no earlier than the 24th day of October, 2010.

BACKGROUND

2. The applicants comprise a family unit namely as follows:

The first named applicant (hereinafter referred to as the husband) was born on the 29th day of January, 1970; the second named applicant (hereinafter referred to as the wife) was born on the 18th day of November, 1971; and the third named applicant is the daughter of the first and second named applicants and she was born on the 24th day of April, 2001 (and will be hereinafter referred to as the daughter).

3. The husband and the wife were married on the 26th June, 1992 in Pakistan. The applicants allege that since their marriage they have lived through a reign of terror. The cause of this terror allegedly lies in the fact that the wife's family is Sunni Muslim (wahhabi) who work for an extremist militant group and are of the Malik caste. The husband is a Shia Muslim, and is from the Sayed caste, classified as inferior in Pakistan society. The wife's marriage to a third party had been arranged but instead she married the first applicant without her family's permission and, as a result, the applicants allege that each of them has suffered assault and the daughter has also suffered abduction attempts. They further assert that their limited financial circumstances constrained their ability to escape from the reign of terror.

4. The applicants claim that the alleged persecution, at the hands of the wife's family, occurred over a period of seventeen years. Over that period, a number of incidents are alleged to have occurred, that the applicants submit amounts to persecution, inter alia, that the wife was assaulted; there was an attempted abduction of the daughter; their family home was attacked; the husband received a head injury; and the extended family home was attacked and a cousin was killed. The applicants state that the wife's family is intent on taking some form of revenge on the daughter, and third applicant in these proceedings, as she is a result of a marriage to which they were opposed.

5. The husband's sister resides in Ireland and they maintain they finally left Pakistan with the assistance of the husband's sister in 2009. The applicants arrived in Ireland on the 15th August, 2009, having travelled here on three-month tourist visas which were issued by the Honorary Consul of Ireland in Karachi. The tourist visas expired on the 14th day of November, 2009. After that date the applicants remained in this country without any lawful permission.

6. The applicants resided with the husband's sister and her family until around the time that their tourist visas expired. At that stage they moved out of the husband's sister's home in Cork and went to reside in a town some miles away. The first applicant states that he resided in that town until they ran out of money and decided to seek asylum in this jurisdiction. He stated that he did not apply for asylum before that time as he did not know about the asylum process but was advised by people in the town in which he had moved to, who were Bengali-speaking asylum seekers, of the possibility of so applying. The applicants applied for asylum on 10th March, 2010.

7. The husband, wife and daughter each made separate applications, firstly, to the Office of the Refugee Appeals Commissioner (ORAC), with the third named applicant, the daughter's application, being brought by her father and next friend, the first named applicant. All three applications were refused and recommendations made that the applicants should not be granted refugee status.

IMPUGNED DECISION

8. All three applicants appealed against that recommendation of ORAC to the RAT and three separate decisions were issued in respect of each three claimants. In the RAT decisions it states that the applicants had failed to establish general credibility. Further, the tribunal found that state protection may have been available to the applicants had they sought it, rejecting the applicants claim that they had sought such assistance to no avail in the past. The tribunal further made findings in respect of internal relocation because the applicants had lived in another area of Pakistan where they were relatively safe for a number of years.

SUBMISSIONS

9. It was indicated to the Court by Mr. Mark de Blacam, S.C. on behalf of all three applicants that this Court could effectively deal with this matter by determining the husband's claim and whatever the outcome of the said decision of this Court, that the wife and

daughter would abide by the said outcome.

10. Written submissions were filed by both the applicants and the respondents. At the hearing, counsel on behalf of the applicants submitted that there seemed to be a different approach adopted by the Commissioner and the RAT. While the Commissioner made findings against the applicants, the Commissioner also acknowledged that it was difficult to establish whether or not the events alleged by the applicants had occurred or not. The applicants submit that when viewed in that context, the decision of the RAT comprised of a sweeping rejection of the applicants' credibility. It is also important to note that the Commissioner at the conclusion of the s.13(1) report, at p.7 para.4, under the heading "Section 13(6) Findings" found that the applicant stated that he arrived in Ireland on the 15th August, 2009. The applicant did not seek asylum until the 10th March, 2010 (see para. 3.3.5). The applicant stated:

"I was very upset and did not know what to do, and had run out of funds and met a Bengali man and told him my problems and he told me the government is good and can give you protection and he told me to claim asylum, as I had no ID here and no legal status and could not work and was under tension."

This is a reference to p.17 of the s.11 interview.

11. The Commissioner goes on:

"This is not considered a reasonable response for delaying 7 months before seeking asylum. Having regard to the above, section 13(6)(c) of the Refugee Act 1996 (as amended) applies to this application,

That the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the state."

12. The upshot of the s.13(6)(c) finding was that the appeal by the applicants to the RAT was a paper-only appeal.

13. It is accepted on behalf of the applicants that the legislation and the relevant procedures allow for a paper-only appeal when certain specific findings are made by the Commissioner. However the applicants referred the Court to *V.M. (Kenya) v. Refugee Appeals Tribunal & ors.* [2013] IEHC 24, a decision of Ms. Justice Clark, delivered on the 29th January, 2013. That case concerned a finding pursuant to s.13(6)(a) of the Refugee Act 1996 (as amended) and, therefore, involved a paper-only appeal through the RAT. At para.21 of her judgment she states as follows:

"One further aspect of this case of serious concern to the Court is that the appeal was conducted without an oral hearing. The Court is powerless at this remove to review or amend the Commissioner's finding that s.13(6) of the Refugee Act 1996 applied on the facts relied on in the applicant's claim. The Court therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his/her claim. Unlike when the appeal is conducted orally, the Tribunal had no particular advantage over the Court in the assessment of credibility of an appellant as the same papers are before the Court as were considered by the Tribunal. At its core, the appeal concerned the evaluation of the validity of the s.13 negative recommendation and the applicant's written submissions on the availability of state protection for Mungiki defectors."

The quotation continues at para. 22:

"It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing."

14. I fully endorse the views expressed by Ms. Justice Clark in the aforementioned decision.

15. Further, the Court was referred to a recent decision of my colleague Mr. Justice Barr, delivered on the 25th November, 2014 (*C.C.A. v. Minister for Justice & Equality & anor.* [2014] IEHC 569), and again at p.9 of the judgment, para. 25, the decision of the RAT was quashed and Mr. Justice Barr stated as follows:

"I am satisfied that the three findings on credibility at issue in these proceedings were arrived at without adequate reasons being stated. Each of them is discounted with the bald assertion that they are not credible. This was not sufficient. If the Tribunal Member was not going to accept the explanations given, it was necessary to set out in clear terms why this was so. This was not done in this case."

16. Counsel for the applicants, in his submissions, went through the findings made in the analysis of the applicants' claim by the tribunal member. The first finding related to delay and is set out at p.414 of the booklet. Page 494 of the booklet in the applicant's notice of appeal sets out its response to the finding made by the Commissioner. It is suggested that the tribunal member's decision can be criticised because he fails to engage with the explanation given by the applicant in relation to the finding that the applicant did not leave Pakistan at an earlier date as referred to on p.415 of the decision. Again the applicant, at p.492 in his notice of appeal, said that he did not leave during that period because he had no support from either side of the family and it was only when his sister in Ireland offered help via a visitor visa that he was in a position to leave Pakistan with his family. The tribunal member appears to engage by simply saying: "I do not accept that the applicant did not have the funds or financial support to leave at any stage before August 2009".

17. The tribunal member goes on to state that this flies in the face of the applicant's own evidence at his s.11 interview when he alleged that he bought a house in Pakistan in 2001. No reason of substance is given in the absence of any information available to the tribunal member with regard to the respective relevant costs of, on the one hand, purchasing or acquiring a home in Pakistan and, on the other hand, the associated costs of uprooting the entire family and travelling to Ireland. The tribunal member complained that the applicants presented no documentation whatsoever to support the claim of ownership to the property. The applicants stated that the title deeds and other documents were left in a locked room in that property and as such are no longer available to him. The tribunal member did not believe the applicants would so casually leave the title deeds in a room of a house and lease the house to a third party, as he claimed, so he does not accept the applicant's answer. The first applicant stated at the s.11 interview that there was 'no trend' in Pakistan to leave such documentation in the custody of a bank or solicitor. This reason was not utilised by the Commissioner, it is submitted, and I would accept, in the light of the comments above that fairness requires the tribunal member would notify the applicants of any potential new finding and give him an opportunity to respond to it either by referring the matter

back to the Commissioner or reconvening the s.11 interview and/or correspondence with the applicant and/or his legal representatives.

18. In the *V.M. (Kenya) (supra)* decision, Ms. Justice Clark pointed out that if a reason is not utilised by the tribunal, fairness dictates that the tribunal member approach the applicants and seek the applicants' comments upon it. The tribunal member simply states: "I don't believe you in respect of the 'no trend' question" but does not elaborate on any evidence upon which that belief is based.

19. The applicants concede that the criticism of the Commissioner in respect of the failure of both the husband and wife, in the initial questionnaire, to refer to the eye injury sustained by the daughter, in an alleged attacked, before leaving Pakistan was a finding that was open to the tribunal member.

20. The next ground of adverse finding against the applicants was that they are criticised for having returned to the Faisalabad area, despite alleging that he and his family were at risk of persecution from his wife's family within that area. However, the applicant did explain and give an account of his reasons for returning to that area and, in particular, in relation to his need to attend a doctor in traditional medicine in relation to his own epilepsy; the tribunal member fails to engage with the explanation given by the applicant. This position equally applies to the criticism of the tribunal member in relation to the fact that the applicants lived in Karachi for a period of five years.

21. It is clear from the authorities opened to the Court and referred to above that the tribunal member has an obligation to engage with the case made by the applicants. It has to be an engagement with the facts of this particular case. There is a consideration of the state protection point; however, the tribunal member appears to brush that aside by making sweeping statements in relation to the applicants' credibility. The applicants submitted, and I accept, that the reasons for rejecting the credibility of the applicants are flawed because it fails to engage with what the applicants say in relation to those issues.

22. Again, there is an adverse credibility finding made in relation to alleged failure of the applicants to go to the police. However, it is clear that the applicants provided testimony at the interview and before the Commissioner that he had approached the police on numerous occasions from the outset and the police would do nothing about the applicant and his family's situation. The tribunal member failed to engage or deal with these explanations and give a reasoned decision for rejecting them as required.

23. In relation to the possibility of relocation, the tribunal member states that Pakistan is a large country, has a large population and that the applicant has an education and, therefore, relocation was a possibility. However, it is also clear from the decision of *K.D. (Nigeria) v. Refugee Appeals Tribunal & anor.* [2013] IEHC 481, a decision of Ms. Justice Clark, that in considering relocation that the tribunal member must identify an area, notify that area to the applicants and consider the conditions there and ask the applicants if it is reasonable for the applicants to move/relocate there.

24. It seems to me that the tribunal member made sweeping statements with regard to the applicants' credibility which were not open to him in a paper-only appeal. The applicants did furnish medical certificates which are contained in the documentation. These documents are case specific. It is not a matter for this Court to determine the veracity or otherwise of the documentation and/or whether or not it is capable of corroborating the applicants' claim. However, what is clear is that there was an obligation and onus on the tribunal member to look at these case specific documents to assess them and to give a reasoned decision as to why they did not support the applicant's claim.

25. On behalf of the respondents Ms. Elizabeth Cogan, B.L. argued both in her written and oral submission before the Court that the tribunal member considered the explanations given and found them to be wanting.

DECISION

26. However for the reasons outlined above I am satisfied that on a paper-only appeal that the level of diligence and caution which must be applied to such a process and the careful consideration that ought to be applied to the documentary evidence upon which the appeal was based was absent. Accordingly, I am satisfied to grant leave and to grant orders of *certiorari* to quash the decision of the tribunal member in respect of all three applicants and I would remit the matter back for a *de novo* hearing before a different tribunal member.