Neutral Citation Number: [2011] IEHC 412

THE HIGH COURT

JUDICIAL REVIEW

2008 667 JR

BETWEEN

A. B.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 10th day of November 2011

1. By order of the 3rd May, 2011, leave was granted to the applicant to bring the present application for judicial review of a decision of the second named respondent ("the Minister") dated the 14th May, 2008, which refused the applicant's application for a declaration of refugee status under the Refugee Act 1996 (as amended). Leave was also granted to apply for an order of *certiorari* quashing the decision of the first named respondent (the "Tribunal",) of 16th April, 2008, which had affirmed the negative recommendation of the Refugee Applications Commissioner made in a report under s. 13 of the Act of 1996, dated 11th July, 2007. Leave for judicial review was granted on the basis of a single ground expressed as follows:

> "The Tribunal failed to conduct the individualised assessment of the applicant's complicity – if complicity there was – in the Taliban's crime against humanity in the manner required by the Court of Justice in *B. und D."*

2. The background to the proceedings can be summarised as follows. The applicant is a national of Afghanistan and an ethnic Pashtun from the Helmand province, who claims to have fled that country out of a fear of serious harm. He arrived in the State in the December 2006 and claimed asylum. His claim to asylum was based upon his asserted fear of persecution if returned to Afghanistan because of his involvement in, membership of and activities on behalf of the Hezb-I-Islami organisation and the Taliban and particularly his involvement in military activities of opposition to the Karzai government in Kabul and the NATO forces in the years prior to his leaving the country.

3. The applicant is well educated, had qualified as a lawyer and had obtained employment with the Taliban working as an investigator cum prosecutor in Helmand province between July 2000 and October 2001. This employment ceased with the invasion of the NATO forces in October 2001. His father had been actively involved as a commander in a group of Mujahadeen fighters and a member of Hezb-I-Islami. He claims that his father was killed in heavy fighting in Kundoz province and that as a result

he was appointed to become commander of that group on behalf of the Taliban in Helmand. He claims that he then was involved in active combat over a period of four years against the International Security Assistance Force (ISAF). When the Taliban lost control of the area in which he was operating he took his family to safety in Nangahar. The applicant claimed that, like his father, he had been a member of a particular faction of the Hezb-I-Islami under the leadership of a commander or warlord called Hekmatyar. This particular faction, it is said, was opposed to any compromise with the Karzai government in Kabul and rejected the general amnesty offered to all Taliban fighters which had resulted in many laying down their arms and even accepting positions in the Kabul administration.

4. The applicant claims to fear that if repatriated to Afghanistan he will be arrested, detained in degrading and inhuman conditions, tortured and possibly killed because of his previous membership of Hezb-I-Islami and activities as a Taliban fighter.

5. It is important to note that while the applicant claimed to have been a commander of a group fighting against the government of Afghanistan and the foreign forces in occupation of his country, he denied in the s. 11 interview ever having been involved in atrocities or attacks in which civilians were killed.

6. In the contested decision of the 16th April, 2008, the Tribunal member came to a number of conclusions. He found first that the applicant "presents with a credible fear of harm". This is based on the fact that the applicant was believed when he said who he was and what his past history had been. Accordingly, as an active member of Hezb-I-Islami and a Taliban commander, country of origin information suggested that his fear of harm if returned to Afghanistan would be well founded.

7. Next the Tribunal member agreed with the conclusion of the Commissioner in the s. 13 Report that the applicant's fear of harm was not attributable to likely persecution but was a fear of prosecution for his past activities by the Afghan authorities. On this issue the Tribunal member concluded:

> "No evidence was placed before the Tribunal member to suggest that the authorities intended to behave unreasonably towards the applicant in the context of these activities. I have no difficulty in agreeing with the Commissioner therefore, in concluding that the applicant is in fact fleeing prosecution as a result of those activities which he volunteered to the Tribunal that he had participated in and the same cannot be said to amount to persecution for the purposes of the Convention."

8. The Tribunal member then went on to consider an issue which is referred to in the s. 13 Report and which had been the subject of "some debate" at the appeal hearing as to whether the applicant's activities as described above attracted the application of the exclusion clause contained in Article 1F of the Geneva Convention. It is this part of the Tribunal decision which forms the basis of the ground in respect of which leave was granted by Hogan J.

9. As the passage is relatively short and was the focus of opposing submissions as to how it should be construed, it is necessary to quote this part of the decision in full:

> "Some debate took place at the oral hearing as to the application of the exclusion clause contained in Article 1F of the Refugee Convention. In the s. 13 report (again, notified to the applicant in advance of the hearing) there is some discussion of the possible application of the exclusion clause to the applicant. The Convention makes clear that in order for exclusion to apply, the applicant must otherwise be somebody who would be entitled to the protection of the Convention. Since I do not accept that the applicant

is a refugee, it is not necessary for me to reach a definitive conclusion on this point. Nonetheless, I agree with the conclusion implicit in the s. 13 report to the effect that if the applicant were otherwise entitled to protection, then he should be excluded by virtue of his participation in fighting on behalf of the Taliban and Hezb-I-Islami, both of which it is accepted are classified nationally and internationally as terrorist organisations. The applicant made much of the fact that he denied at the oral hearing that he had participated in the killing of civilians. I would not expect any person to say otherwise if asked such a question. The test to be applied is whether there are "serious reasons for considering" that the applicant has participated in such crimes or events. I am satisfied that there are. Membership of terrorist organisations that are known to carry out such atrocities is indicative of such a consideration. Where a person volunteers that he participated in what he described as a "war" against the democratically elected government of this country of origin, I believe therefore that there are "serious reasons" for considering that he has participated in the acts contemplated in Article 1F of the Refugee Convention. Therefore, if he were a refugee, I would have no difficult in concluding that he is excluded from the protection afforded by the Convention, in the light of his relatively senior position in both Hezb-I-Islami and the Taliban."

10. The text of Article 1F of the Geneva Convention is as follows:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

11. The argument advanced in support of the ground for which leave was granted is that in the passage quoted in para. 9 above, the Tribunal member has made a definitive finding that this exclusion clause applies to the applicant and this finding is an operative part of the decision upon which the affirmation of the negative recommendation of the Refugee Applications Commissioner is based. It is submitted that the finding is one of law in respect of the status or conduct of the applicant and that it is unlawful because it has been made in disregard of the requirement that such a finding should only be made on the basis of a specific individualised assessment of the applicant's involvement or complicity with others in the crimes or acts identified in the exclusion clause. As a matter of law, it is argued, it is not sufficient to presume that because an individual admits or is shown to have been a member of an organisation which has engaged in such crimes or activities, the exclusion clause will apply. It is necessary to conduct an assessment of the individual's actual role and conduct as a member of the organisation in question before any such finding can be made. Here, it is said, the sole basis for the conclusion embodied in the quoted passage of the decision is a presumption that because the applicant admitted to membership of and involvement with the Taliban and Hezb-I-Islami, there are "serious reasons" for considering that he has participated in acts and crimes covered by the clause.

12. The general principle upon which this argument is based is not in dispute. It is drawn from case law which is binding on this Court. In particular, the issue has been considered by the Court of Justice of the European Union in its judgment of 9th November, 2010, in cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v. B & D* [2010] E.C.R. 1-000. In this judgment the Court of Justice gave a preliminary ruling on the series of questions referred to it as to the interpretation of Article 12(2) of Council Directive 2004/83/EC of 29th April, 2004, on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees. That Article is based upon the exclusion clause in Article 1F of the Convention and is transposed into Irish law as Regulation 13 of the European Communities (Eligibility for Subsidiary Protection) Regulations 2006. In its ruling upon the questions referred the Court of Justice held that:

> "The fact that person has been a member of an organisation which, because of its involvement in terrorist acts…and that the person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations". A finding that there are such serious reasons for considering that a person has committed such a crime or been guilty of such acts is "conditional on an assessment on a case-by-case basis of the specific facts with the view to determining whether the acts committed by the organisation concerned meet the condition laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive."

13. The rationale of the approach to the exclusion clause adopted by the Court of Justice is obvious. A finding that the exclusion applies to an individual is a finding that the individual was at least complicit in atrocities of the most serious kind which attract universal condemnation. A finding to that effect should only therefore be made where there are genuinely serious reasons based upon specific evidence for considering that the individual in question bears a degree of responsibility for the acts alleged and ought not therefore to be entitled to evade accountability for them as a refugee. Known terrorist organisations may be splintered into a variety of factions each pursuing different means of achieving one or more common aims. Thus, mere membership of an organisation does not create a presumption that a particular individual can be fixed with the necessary degree of involvement and responsibility which will exclude him from refugee status without an examination of the nature, extent, duration and level of responsibility of his involvement. In the present case it is submitted that the passage quoted in para. 9 above is not based on any such investigation or assessment.

14. If that passage in the Tribunal decision is to be interpreted as constituting a definitive and operative finding on the part of the Tribunal that the exclusion clause of Article 1F applies to the applicant, the Court might readily agree that the basis of the finding is inadequate having regard to that case-law. Most obviously, although the passage refers to the applicant's denial that he had "participated in the killing of civilians" and then says that there are serious reasons for considering that he had "participated in such crimes", there is no identification of the particular heading of Article 1F which is considered to apply to the applicant. The killing of civilians could come within any one of the crimes and acts identified in subparas. (a), (b) and (c) of the Article.

15. Although it is possibly true that the Tribunal member is careful not to rely upon a presumption of culpability based on mere membership of a terrorist organisation because he says that membership of an organisation known to carry out atrocities is "indicative" of such a consideration, it is questionable whether, in the light of the case law, it is sufficient to base the necessary attribution of the required level of responsibility

upon the fact that the applicant had voluntarily engaged in a war against the democratically elected government of Afghanistan. Accordingly, if there were no more to the issue than this, the Court would be inclined to hold that the "finding" of the application of the exclusion clause to the applicant was not based upon an adequately individualised assessment of the nature, extent and level of responsibility of his involvement in atrocities which come within the terms of Article 1F.

16. The position in this case is, however, complicated by the fact that the clear implication of the passage quoted in para. 9 above in the context of the decision when taken as a whole is that the somewhat cursory basis of the finding in favour of application of the exclusion clause is probably attributable to the fact that the Tribunal member did not there consider himself to be making any definitive and operative finding at all.

17. The Tribunal member's approach to the issue is quite explicit. He says:

> "Since I do not accept that the applicant is a refugee, it is not necessary for me to reach a definitive conclusion on this point."

He then concludes the passage by saying:

> "If he were a refugee I would have no difficulty in concluding that he is excluded from the protection afforded by the Convention."

It is true, as counsel for the applicant points out, that the Tribunal member also says:

> "Nonetheless I agree with the conclusion implicit in the s. 13 report."

But this agreement is expressed on the conditional basis that:

> "If the applicant were otherwise entitled to protection, he should be excluded by virtue of his participation in the terrorist organisations in question."

18. In the judgment of the Court the definitive finding on the appeal and the operative basis of the decision to affirm the negative recommendation in the s. 13 report is very clear. In the first part of the analysis the Tribunal member finds in express terms that the applicant has a credible fear of harm but that he is not a refugee on that account because he is "in fact fleeing prosecution rather than persecution". The conclusion is then made explicit at the end of this part of the analysis:

> "I have no difficulty in agreeing with the Commissioner therefore in concluding that the applicant is in fact fleeing prosecution as result of those activities which he volunteered to the Tribunal that he had participated in and that the same cannot be said to amount to persecution for the purposes of the Convention."

19. What follows in the second part of the analysis is, as stated above, an expressly *obiter* observation on a secondary issue which had been the subject of "some debate at the oral hearing". It is expressed in purely conditional terms and predicated on the fact that for the exclusion clause to apply there would have first been a finding that the applicant was a refugee and that finding has not been made.

20. Understandably, counsel for the applicant points to the basis upon which leave was granted for the above ground in the judgment of Hogan J. of the 5th May, 2011. Counsel argues that this Court is bound by and/or should follow the interpretation made of the Tribunal decision in that judgment. He points out that Hogan J. interpreted the first part of the analysis as suggesting "that the Tribunal must have found that the applicant was in principle entitled to refugee status" because of the unquestioned finding that the applicant presented with a credible fear of harm. Accordingly, Hogan J. considered that "the real question" and thus the operative basis for the rejection of the appeal was "whether the applicant comes within any of the exclusions to that primary definition of refugee".

21. It is not possible, however, for this Court to approach the issue now before it on foot of the ground for which leave was granted on that basis. The jurisdiction of this Court is limited by the terms of the ground for which leave has been granted and the function of the Court in this substantive hearing of the judicial review application is to decide whether that ground has been made out. It must do so upon the basis of its own appraisal of the illegality alleged in the context of the challenged decision when construed as a whole.

22. Counsel for the applicant urges the Court to take into consideration the fact that leave had originally been sought in respect of a number of grounds including a ground directed at the alleged error of law by the Tribunal member in finding that the applicant had fled prosecution rather than persecution. He argues that leave was not granted in respect of those grounds because of the manner in which Hogan J. interpreted the first part of the analysis namely, that the Tribunal member had implicitly found the applicant to be entitled to refugee status.

23. This Court, however, cannot take into consideration grounds in respect of which leave has not been granted. In *L.R. v Minister for Justice* [2002] 1 I.R.260 McKechnie J. considered an application made at a substantive judicial review hearing to amend the grounds with a view to reinstating grounds in respect of which leave had been refused. He said: "By not granting leave on these other grounds one must conclude that the application made on behalf of the applicants was therefore refused by the High Court Judge who granted the leave order. This being the situation, it seems to me that in the same proceedings and on identical grounds, another judge of the High Court does not have jurisdiction to effectively overrule an earlier order of the same court. Such authority or power does not in my view exist. The only court which could, but was not invited to do so, would be the Supreme Court. It is not now I feel possible for this court to re-insert or re-instate grounds which previously a judge of this court refused to grant leave on."

24. Furthermore, the reasoning which has led to the grant of leave in respect of a particular ground cannot bind the Court deciding the substantive issue. The function of the judge hearing the leave application under Order 84 of the Rules of the Superior Courts and s.5 of the Illegal Immigrants (Trafficking) Act 2000 is to assess whether a substantial ground as to the unlawfulness of the challenged decision is raised and to define that ground for the purpose of the substantive hearing of the judicial review application. (See in that regard the judgment of the Supreme Court in *Scott v An Bord Pleanala* [1995] 1 I.L.R.M. 424.) The judge hearing the leave application does not exercise the jurisdiction of the High Court to grant or refuse an order of *certiorari*. It is the function of the Court on the substantive hearing to decide whether the allowed ground has been made out and, if so, whether the discretion of the Court to quash the challenged decision should then be exercised in the light of all the relevant considerations at that point. These would necessarily include the Court's appraisal of the impact of any illegality found on the effect of the challenged measure or decision. There may well be reasons for not quashing the measure or decision having regard to the picture that emerges at the conclusion of the hearing. (See for example, *The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] I.R. 381)

25. To hold that the reasoning which led the leave judge to define a particular ground as warranting a substantive hearing must bind the judge hearing the substantive application for review would deny a respondent a fair hearing of the arguments which had been advanced against the grant of leave and which the leave judge may have considered to have some force. It may well be the same judge who is called upon at both stages. It could hardly be suggested that in such a case the judge would not be entitled, in the light of the full submissions of the parties to revise his initial assessment including for example, his initial view as to the correct interpretation of the measure or

decision under challenge. There is no logical reason why, if a second judge hears the substantive application, a respondent should be in a different and more disadvantageous position.

26. In the present case the Court considers that it is not possible to quash the appeal decision of the Tribunal because its definitive finding and the operative basis for the rejection of the appeal is the determination that the applicant was not a refugee as set out in the first part of the analysis and for the same reason as that given in the s.13 report. The validity of that finding is not before this court.

27. Nevertheless the Court accepts that a finding that the exclusion clause of Article 1F applies is a finding of immense importance to any individual and one capable of causing severe prejudice unless made soundly in accordance with the requirements of law and particularly on the basis of an individualised assessment by reference to one or more of the classes of crime or act which the article covers. Clearly, in a case such as the present where the individual has been found to have a credible fear of persecution but has been found not to be a refugee there is every likelihood of an application for subsidiary protection being made. As that application will be made to the respondent Minister and the outcome of the asylum process will be available to him for the purpose, the possibility that the decision may be influenced by the previous examination of the exclusion issue cannot be discounted. This is so even though, as counsel for the respondents points out, the result of the present judicial review of the Tribunal decision will be to the effect that there has been no operative finding on that issue.

28. In these circumstances the Court considers that it is just and appropriate for it to exercise its discretion to grant the applicant declaratory relief the object of which is to remove any implication that the final outcome of the asylum process in this case had any basis in a consideration that the exclusion clause of Article 1F of the Geneva Convention applied to the applicant. The declaration will be in the following terms:

> "The observations as to the possible application of Article 1 F of the Geneva Convention to the applicant's asylum claim contained in the appeal decision of the first named respondent dated 16th April 2008, are to be construed as conditional and as *obiter* to the determination of that appeal; and as constituting no operative part of the definitive adjudication of that appeal."

29. Save as aforesaid, the application for judicial review of the appeal decision is refused.