Neutral Citation Number: [2011] IEHC 16

THE HIGH COURT

2010 1455 JR

BETWEEN

H. M.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 21st January, 2011

1. The concept of the refugee *sur place* is one of the most difficult in the entirety of immigration and refugee law. Events which take place since the applicant left his country of origin may now expose him or her to a well founded fear of persecution or a real risk of suffering serious harm.

2. There are, of course, straightforward cases where external events such as the outbreak of war, revolutions and coups have created a new generation of *émigré* refugees. There are, however, less straightforward cases where the applicant engages in self-serving actions in order to bolster a case for refugee status in his chosen country. Thus, an applicant with no interest in political activity might nonetheless take advantage of the freedoms available in his chosen country by, for example, writing a letter to a newspaper which denounced the regime of his country of origin and availing of this as a pretext and justification for a refugee claim. Examples from other jurisdictions include *Somaghi v. Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 F.C.R. 100 (where two Iranians had sent letters criticising the Iranian regime to the Iranian Embassy in Canberra with a view to bolstering their asylum claim) and *Re HB* (1994) (where the New Zealand Refugee Status Appeals Authority found that an Iranian had falsely claimed on New Zealand television that he had purchased a copy of The *Satanic Verses* and brought this copy with him to Iran as a pretext for his asylum claim).

3. The difficulty, however, is that while contracting states are fully entitled to view such claims with circumspection and even suspicion, there may be examples where the bad faith and mendaciousness of such an applicant actually succeed to the point whereby such actions nonetheless places him at serious risk were he to be deported.

4. The question of the ambit of the refugee *sur place* is raised directly in this application for an interlocutory injunction. Put briefly, the applicant claims to be an Afghan who first left Afghanistan in 1999 and travelled to Iran. He claims that while he was in Iran he was introduced to Christianity by his employer. He then says that following the overthrow of the Taliban in late 2001, the Iranian authorities began the return of Afghanis to their country of origin. At that point he fled Iran because he contended that his life would be in danger by reason of his Christian beliefs if he returned to Afghanistan.

5. The applicant arrived in Ireland in 2005. At one point he appears to have been heavily involved with the Jehovah Witnesses, a fact attested to by various testimonials submitted on his behalf to the Refugee Appeals Tribunal and subsequently to the Minister. At the hearing before me I was informed by Mr. Noonan that the applicant had now become involved with an evangelical Christian Church. This, however, was not put on affidavit and no details were given. For the purposes of this application I will assume that the applicant has sought to involve himself in at least two different Christian churches.

6. There is no doubt but that the applicant's engagement with the asylum system in this State has a number of distinctly unsatisfactory features. Thus, for example, whereas the applicant had originally denied that he had applied for asylum elsewhere in the EU, it transpired that he had, in fact, applied for asylum in both Greece and the United Kingdom. It is equally clear that the applicant did not cite his religious views when grounding his application for asylum, as the reason given was race. I should add here that the applicant claims to be an ethnic Hazara, one of the larger ethnic minority groups in Afghanistan who have in the past suffered persecution, discrimination and neglect.

7. The applicant's asylum claim was ultimately rejected by the Refugee Appeals Tribunal in a very elaborate and comprehensive decision given by Ms. Elizabeth O'Brien on 7th October, 2008. The Tribunal essentially found against the applicant on credibility grounds and it should be noted that these findings were never challenged by way of judicial review. The applicant did, however, apply for subsidiary protection in November 2009, but this was refused by the Minister on 12th October, 2010. The Minister made a deportation order on 20th October, 2010. These proceedings were commenced within the 14 day statutory time limit specified by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

The availability of State protection in Afghanistan

8. The present application for interlocutory relief focussed principally on the question of whether the applicant could realistically claim to be a refugee *sur place*. Before turning to that question, it may be appropriate to address the question of whether the applicant could seek State protection in Afghanistan, assuming for the moment that the applicant can be regarded as a Christian convert from Islam.

9. The latest country of origin reports for Afghanistan dating from 2009 (and which were before the Minister in the examination of file for the purposes of s. 3 of the Immigration Act 1999) all suggest that the position of Christians in Afghanistan is, putting matters as their very best, a very difficult one. It is true that there may be instances where certain expatriates such as diplomats, visiting politicians or members of the International Security Assistance Force may engage in Christian worship. This, however, is likely either to be within the precincts of the diplomatic quarters in Kabul or perhaps within the confines of a military camp. As the country of origin information notes, however, this option is not available to the small number of Afghan Christians who would still fear for their safety.

10. The position of Afghans who have converted from Islam is even more fraught. This is considered apostasy and which is punishable by death under some interpretations of the Shar'ia law. Many of the country of origin reports refer to the *cause celebré* involving one Abdul Rahman in 2006, a convert to Catholicism, who was later denounced by his family and charged with apostasy. Rahman was later deemed mentally unfit to stand trial by the Afghan judiciary. He was then released from prison and given asylum by Italy. Some members of the Afghan judiciary are reported publicly to have criticized the decision to release him.

11. The US State Department's report for 2009 observed that the Afghan judiciary was "subject to political influence and pervasive corruption." The UK Border Agency's Report for 2010 quoted a Freedom House report for 2009 which said:

> "The judicial system operates haphazardly, and justice in many places is administered on the basis of a mixture of legal codes by inadequately trained judges. Corruption in the judiciary is extensive and judges and lawyers are often subject to threats from local leaders or armed groups. Traditional justice remains the main recourse for the population, particularly in rural areas. The Supreme Court, composed of religious scholars who have little knowledge of civil jurisprudence, is particularly in need of reform."

12. The UK Home Office Report for 2009 further stated that "sufficient protection should not be considered to be available for apostates in Afghanistan."

13. Against that background, it was somewhat surprising to encounter statements from the respondent which suggested the contrary. The consideration of the file on the subsidiary protection question took the view that "the applicant has [not] demonstrated that he is without protection in his country of origin." The consideration of the file with regard to deportation stated:

> "It is noted that there is a police force and a judicial system in place from which it would be open to the applicant to seek protection if needed."

14. In view of the available country of origin information, these statements seem to be hopelessly optimistic. In the course of the hearing before me, Ms. Stack indicated that she did not propose to stand over them, at least for the purposes of the interlocutory injunction application. But she made the point that the Minister's deportation order could stand independently of this in so far as the analysis of whether the applicant is an refugee *sur place* is concerned. It is to this issue that we can now turn.

The analysis of whether the applicant is a refugee *sur place*

15. The Minister's analysis - both in respect of the subsidiary protection issue and the deportation question - relied heavily on the findings of the Tribunal with regard to credibility, as indeed, he was in principle fully entitled to. As we shall presently see, the Tribunal made adverse credibility findings as against the applicant on this and other questions. But it may be more convenient to start first with an analysis of the concept of a refugee *sur place*.

16. There is no doubt but that the concept of a refugee *sur place* lends itself to possible abuse at the hands of those who are prepared to be opportunistic, cynical and deceitful. The dangers involved have led many commentators to suggest that the Geneva Convention should not be interpreted in a fashion which opened the way to such bad faith claims. This was well put by Petrine, "*Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim*" (1981) 56 *Notre Dame Law Review* 719 at 729:

> "Asylum law protects those who in good faith need to be sheltered from persecution. This protection was not meant to encompass those who made political statements for the sole purpose of becoming refugees."

17. This thinking is reflected in the New Zealand immigration decision of *Re HB* and the Australian case of *Somaghi* to which I have already briefly alluded. While the decision of Lockhart J. in the latter case that the letter which the applicants wrote to the Iranian Embassy had not been written in good faith was set aside on appeal because the applicants had not been given an opportunity to be heard on the point, Gummow J. nonetheless endorsed the following statement of the trial judge:

> "There is some conflict of opinion as to whether an applicant for refugee status who has deliberately created circumstances in the country of residence exclusively for the purpose of subsequently justifying a claim for refugee status is entitled to be treated as a refugee *sur place*....I cannot accept that a person who has deliberately created the circumstances to which I have just referred is entitled to recognition as a refugee *sur place*, for to accept it would be to place in the hands of the applicant for refugee status means of unilaterally determining in the country of residence his status as a refugee and deny to the sovereign state of his residence the right to determine his refugee status."

18. I might pause here respectfully to observe that I cannot quite accept this reasoning. It would, I think, be more accurate to say that while the expansion of the concept of the refugee *sur place* in this fashion opens the way to mendacious claims and cynical abuse, it cannot be suggested that the receiving State is thereby rendered helpless to scrutinise such claims or that it must automatically yield in the face of such claims. Indeed, this point is at least tacitly acknowledged in a subsequent judgment of the Australian Federal Court in *Mohammed v. Minister for Immigration and Multicultural Affairs* [1999] F.C.A. 868.

19. At all events, some of this thinking is also evident in an English High Court judgment, *R v. Immigration Appeal Tribunal, ex p. B*. [1989] Imm A.R. 166. Here an Iranian applicant for asylum had engaged in minimal political activities in Iran. On his arrival in the United Kingdom, however, he became a prominent member of an Iranian Monarchist society. He also participated in demonstrations against the regime of the Ayatollah Khomeini and was photographed at such events.

20. The UK immigration authorities rejected the asylum claim saying that such activities amounted to an endeavour to manufacture grounds on which the applicant could later bolster his asylum claim, even though it appears that it was also accepted that the applicant did face the risk of persecution if he were returned to Iran. On this point Simon Brown J. first observed [1989] Imm A.R. 166 at 171:

> "It will readily be apparent that there must exist some principle whereby an immigrant cannot become entitled to political asylum merely by choosing so to conduct himself in the host country as to create the very risk of persecution which then founds his claim to refugee status. But the precise limits of such a principle are not altogether easily determined."

21. The judge nevertheless acknowledged the difficulties involved in this concept and he concluded:

> "It is I think sufficient for the purposes of the instant application to conclude as I do, that not only bad faith will disqualify an applicant for asylum from relying upon post-arrival activities; so, too, on occasions will unreasonable conduct. How unreasonable must be left to be decided hereafter on a case by case basis.
>
> The plain fact here is that the adjudicator and the Tribunal found this applicant's case to fall at the bad faith end of the spectrum. They have found that he deliberately conducted himself pursuant to 'a calculated policy to enhance his claim to asylum ... deliberately placing himself in jeopardy for this purpose'. This finding is clearly one of bad faith, the cynical tailoring of the applicant's activities so as to create a false claim to refugee status. At the very least his conduct cannot but be viewed as totally unreasonable: a quite gratuitous exposure to risk."

22. I pause here to note that the reasoning in *B.* can no longer be regarded as good law in England in view of the later decision of the English Court of Appeal in *Danian v. Home Secretary* [2000] Imm A.R. 96, a decision to which I will presently return.

23. Another example of this problem is presented by the decision of the US Court of Appeals for the 7th Circuit, *Bastanipour v. Immigration and Naturalisation Service* 980 F.2d 1129 (1992). In this case an Iranian had been convicted of serious drugs offences in the US. Following the completion of his prison sentence, the US authorities sought to have him deported to Iran, but the appellant contended that he had renounced Islam while in prison. Delivering the judgment of the Court, Posner J. set aside a decision of the Immigration Board, saying (980 F2d. 1129 at 1132-133) that:

> "The opinion does not consider what *would* count as conversion in the eyes of an Iranian religious judge, which is the only thing that would count so far as the danger to Bastanipour is concerned. The offense in Muslim religious law is apostasy--abandoning Islam for another religion…..That is what Bastanipour did. He renounced Islam for Christianity. He has not been baptised or joined a church but he has made clear, to the satisfaction of witnesses whom the Board did not deem discredited, that he believes in Christianity rather than in Islam—and *that* is the apostasy, not compliance with formalities of affiliation. Whether Bastanipour believes the tenets of Christianity in his heart of hearts or, as hinted but not found by the Board, is acting opportunistically (though at great risk to himself) in the hope of staving off deportation would not, we imagine, matter to an Iranian religious judge. The Board might have taken the position that an insincere profession of faith is not a ground for asylum no matter what danger the profession places the applicant in. It might have said that a nonbelieving Christian is not really a Christian and thus does not fall within the scope of the asylum statute. But there is no mention of such a ground for denying Bastanipour's application; and the Board did not make a finding that he is insincere."

24. Posner J. went on to hold that the applicant had a well founded fear of persecution as a result. It is true that there were important differences between this case and the present one. Unlike the protections of anonymity contained in the Refugee Act 1996, the US INS apparently made no efforts to conceal such cases from the possible attention of foreign governments. Likewise, it was conceded that Mr. Bastanipour's brother had come to the attention of the Iranian authorities for his political activities, so that it was inherently likely that such conversion would come to the attention of the Iranian authorities. The decision in *Bastanipour* nevertheless illustrates the point that the actions of the applicant in the country of residence cannot be regarded on *a priori* basis as being inconsistent with the notion of a refugee *sur place*.

25. Perhaps the fullest examination of this question is to be found in the judgment of Brooke LJ in *Danian.* In this case a Nigerian asylum seeker wrote articles in the British media about the Nigerian military regime and participated in public demonstrations in support of the return of democracy in Nigeria. The UK Immigration Tribunal had found that:

> "The Nigerian pro-democracy campaign activities which he did become involved in from May 1995 were tailored solely with the intention of creating a false claim. [The Adjudication Officer] found that the appellant's actions were not motivated by genuine political opinions but by a desire to enhance his claim for asylum. His actions in deliberately trying to bring himself to the attention of the Nigerian authorities by writing to the

> Nigerian High Commission were in the Tribunal's view a blatant and cynical attempt to manipulate circumstances to his own advantage.
>
> In the Tribunal's view this behaviour is wholly inconsistent with the behaviour of someone who has a genuine fear of persecution. On his own account the appellant has voluntarily exposed himself to a risk of persecution..... In our view, however, his activities fell within the broad category of a 'cynical tailoring ... so as to create a false claim for refugee status.' Thus, the appellant fails within that category of person who is a refugee *sur place*, but who has acted in bad faith. As he has acted in bad faith, he fails out with the Geneva Convention. He is not a person to whom the Convention applies; this would be our view regardless of whether his activities post 1995 may have brought him to the attention of the Nigerians and regardless of whether his fear of persecution may be well founded."

26. The Court of Appeal allowed the appeal and Brooke L.J.'s judgment is a masterly analysis of this difficult question. Brooke L.J. first noted that the Geneva Convention contained no exclusion of such bad faith claims, even though Article 1 and Article 33(2) contained other express exclusions. Brooke LJ then rejected the argument that the Geneva Convention should be interpreted as containing an implied term which excluded such bad faith activities. The judge pointed out, however, that the basis for such an implied term rested on the general principle of international law that Contracting States were required to perform their treaty obligations in good faith ("*pacta sunt servanda*"). This principle applied only to States and not to private individuals and, hence, was inapplicable as a basis for implying such a term as against such individuals.

27. Brooke L.J. then concluded by stressing that the essential question remained whether the applicant had a well founded fear of persecution, even if had subsequently acted in bad faith:

> "....I do not accept the Tribunal's conclusion that a refugee *sur place* who has acted in bad faith falls out with the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered."

28. The decision in *FV v. Refugee Appeals Tribunal* [2009] IEHC 268 appears to be the only Irish case where the issue of the refugee *sur place* has arisen. Here the question was whether the applicant's status as a failed asylum seeker might *in itself*give rise to a well founded fear of persecution given the manner in which it was contended that the applicant's country of origin (Togo) treated returned deportees who had made asylum claims abroad. Irvine J. said:

> "The court is conscious that there is scope for asylum seekers to abuse the statutory asylum process by making an initial unfounded application for asylum and subsequently claiming a fear of persecution as a failed asylum seeker. The making of a self-serving, unfounded initial claim must, of course, not exclude any person from the protection of the Refugee Act 1996, but it seems reasonable that it be taken into account and accorded some weight by the decision-makers when credibility is being assessed. Indeed, such a person might properly be called upon to explain why they deliberately exposed themselves to a risk of persecution by creating the

> conditions that would make them a failed asylum seeker. Moreover, given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown."

29. As it happens, the applicant's claim failed on the facts given that Irvine J. was satisfied from current country of origin information that the Togolese practice of routinely arresting such deportees on their return to Togo had been discontinued. Nevertheless, I entirely agree with the views of Irvine J. on this question. As Brooke L.J. pointed out in *Dainan,* the Convention contains no express exclusion of such self serving claims and the question remains whether, objectively, there the applicant has a well-founded fear. Of course, Contracting States are entitled to treat such claims with a heightened degree of scepticism, precisely because of their self-serving nature. The key point remains, however, whether the applicant has a well founded fear.

The applicant's case

30. In the light of this, we can next examine whether the applicant has established that he has established that a sufficiently arguable case for the purposes of this application. While the applicant has not challenged the Tribunal findings, these findings were highly influential (and, indeed, in some respects decisive) so far as the Minister's treatment of both the subsidiary protection and the deportation issues are concerned. In that context, it seems appropriate to look at that decision.

31. First, it is clear that the Tribunal proceeded on the basis of the existence of an implied good faith principle within the Geneva Convention itself. For the reasons set out above, I do not believe that this correctly sets out the modern understanding of the Convention's requirements.

32. Second, the Tribunal went on to say:

> "I have set out the above discussions of the principle of a good faith requirement to provide support for my conclusion that this appellant's appeal must fail. I am not satisfied that the appellant converted to Christianity in good faith and, given the discrepancies in his evidence, I am not inclined to give him the benefit of the doubt. Furthermore, even if the appellant is now attending study classes for the Jehovah Witnesses religion, I am not satisfied that his alleged conversion or attempted conversion is anything other than opportunistic."

33. Both this passage and other passages from the Tribunal's decision figured prominently in the assessment of the file for the purposes of both the deportation and the subsidiary protection questions, so that the Minister must be taken as having adopted this reasoning for the purposes of these decisions.

34. This reasoning, however, begs a number of questions. There is, after all, a difference between a conversion for opportunistic reasons and a person who simply pretends to convert, but who has not in fact done so. Judged by the passage quoted above, the Tribunal appears to have found that the applicant did, in fact, convert, albeit for base or opportunistic reasons. At another point, however, (at p. 30 of the decision), there is a statement to the effect that the Tribunal "was not satisfied that the appellant had genuinely converted", which suggests that the applicant was only engaged in a pretence and had not, in fact, actually done so. This is a vital distinction and one which the Tribunal's decision appears at time to conflate.

35. Either way, this is arguably to miss the point, since as Posner J. observed in *Bastanipour*, the real question is how, for example, an Afghan religious judge would

be likely to treat the applicant's apostasy, *i.e.*, his apparent renunciation of Islam. The real question, therefore, is whether the applicant objectively has a well founded fear of persecution if returned to Afghanistan, although, of course, the applicant's credibility in this regard may properly be the subject of close scrutiny, not least given that his account of asylum applications in other countries is quite unsatisfactory.

36. These are issues with which the Minister arguably should have engaged before concluding that the applicant was not entitled to subsidiary protection and that he should be deported. As I have already indicated, both decisions rely heavily on the Tribunal's reasoning on the credibility and refugee *sur place* issues. This in itself is in principle perfectly acceptable, but where such reasoning is itself open to objection, then it will also infect the Minister's decision, even where the decision of the Tribunal has not been challenged in judicial review proceedings.

37. In this regard, it might also be noted that Article 5(1)(d) of the European Communities (Eligibility for Protection) Regulations 2006 (SI No. 518 of 2006) expressly addresses this issue in a way which the Geneva Convention does not, since one of the issues which the Minister is required to consider for subsidiary protection purposes is:

> "Whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country."

38. The 2006 Regulations were intended to transpose the Qualification Directive 2004/83/EC, Article 5 of which provides:

> 1. A well-founded fear of being persecuted or a real risk of suffering serious harm *may be based on events which have taken place since the applicant left the country of origin.*
>
> 2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin…

39. This has to be read together with Article 4(3), which says:

> "The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
>
> ……..(d) whether the applicant's activities *since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country.*" (emphasis supplied)

40. The language of Article 5(2) naturally encompasses the actions of the classic political dissident who courageously opposes the oppression prevalent in his own state and, having later escaped from or left that state, continues that struggle in the host state where asylum is sought. But Article 5(2) also expressly envisages that other types of conduct taken by the applicant in the host state are also capable of creating refugee *sur place* status. The difference is that Article 4(3)(to which Article 5(1)(d) of the 2006 Regulations corresponds) seems to require Member States to assess whether opportunistic conduct in the host state is likely realistically to expose the applicant to a risk of persecution or serious hard if they are returned to that country.

41. This is thus a variant of the problem posed in *Bastanipour*: in the present case the issue under Article 5(1)(d) whether the hypothetical Afghan judge is likely to disregard the applicant's engagement with Christianity on the ground that it was not seriously meant and that this was simply opportunistic, so that in truth there was little risk of persecution. While Article 5(1)(d) of the 2006 Regulations is certainly mentioned in the Minister's decision on subsidiary protection, the Minister does not appear to have engaged with the issue in the way I have just indicated.

42. For all of these reasons, it is clear that the applicant can readily demonstrate that there are serious issues to be tried at the full hearing. Given that it is inherent in the applicant's case that he will face persecution (and perhaps worse) if he his deported, this case is clearly different from *A. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 297. A. was a classic case concerning the effect of deportation on family life and did not raise any implications for the protection of the life or person (Article 40.3.2) or any Article 3 ECHR issues. Cooke J. found that any temporary interruption in family life could be compensated in damages and refused the interlocutory injunction on this ground.

43. The present case plainly does not fall into this category and I have accordingly concluded that the balance of convenience clearly favours the preservation of the *status quo* and damages could not be said to constitute an adequate remedy. For these reasons, I consider it appropriate to grant the interlocutory injunction sought pending the determination of the application for leave.

44. There is another independent reason for that conclusion. Shortly after this case was argued, I gave judgment in *LA v. Minister for Justice, Equality and Law Reform* on 21st December, 2010 in which I held that the Minister is impliedly precluded from giving effect to a deportation order pending the determination of the leave application in those cases where (as here) the proceedings have been commenced within the statutory time period, save in those cases where the application is clearly unsustainable. Since the present application raises significant issues and as the proceedings were commenced within time, I would also grant the relief sought on this basis also pending the outcome of the leave application.