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Judgment

Title: F.A. (Pakistan) -v- Refugee Appeals Tribunal & anor

Neutral Citation: [2015] IEHC 502

High Court Record Number: 2012 96 JR

Date of Delivery: 28/07/2015

Court: High Court

Judgment by: Eagar J.

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Neutral Citation [2015] IEHC 502

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 96 J.R.]

BETWEEN

F.A. (PAKISTAN)

APPLICANT

AND

**THE REFUGEE APPEALS TRIBUNAL (CONSTITUTED OF BEN GARVEY BL,
TRIBUNAL MEMBER) AND THE MINISTER FOR JUSTICE EQUALITY AND LAW**

REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 28th day of July, 2015

1. The Applicant is a national of Pakistan who arrived in the State on or about 5th day of September, 2009 on foot of a student visa and who applied for asylum in the State on 24th August, 2011. The relief sought by the Applicant was an order of certiorari quashing the decision of the first named Respondent that the Applicant failed to establish a well-founded fear of persecution as defined under s. 2 of the Refugee Act, 1996 (as amended).

2. The grounds upon which relief sought were:-

1) The Refugee Applications Commissioner had accepted that the Applicant's claim could amount to persecution within the meaning of s. 2 of the Refugee Act, 1996 (as amended) (hereinafter "the Act"). Country of origin information was provided which shows there is significant discrimination amounting to persecution of Catholics in Pakistan. The first named Respondent stated that "discrimination can exist in societies without amounting to persecution". The first named Respondent then considered that the Applicant was assaulted once and found this evidence to be lacking in credibility. The first named Respondent therefore expressly, or by necessary implication, held that the situation where a Catholic in Pakistan would not amount to persecution within the meaning of s. 2 of the Act contrary to the Refugee Applications Commissioner's findings (which was not the subject of the appeal, nor was there any cross appeal or suggestion put to the Applicant on notice that it would be an issue in the appeal) and/or contrary to the country of origin information provided. In the alternative this demonstrated that the first named Respondent failed to apply the correct test as to whether there was a forward looking risk of persecution and confined himself to consideration of past acts of persecution only. By reason of the foregoing the stated ground was that the decision is ultra vires, in breach of fair procedures and irrational.

2) The first named Respondent did not deal with any other aspect of the Applicant's claim other than the assault. It was submitted to the Tribunal that due to the blasphemy laws in Pakistan there was a real risk of persecution by the state and this was not considered at all by the first named Respondent. Similarly the Applicant gave evidence (the court's emphasis) of his lifelong fear of persecution in Pakistan as a result of his religion. He cannot live openly in Pakistan as a Christian. This was supported by the country of origin information submitted. However the first named Respondent did not address this at all, and it appears that this falls within the first named Respondent's apparent finding that such discrimination of the Applicant would be subject to does not amount to persecution. As such the first named Respondent has failed to take into account relevant factors, placed undue weight on irrelevant factors and has acted unreasonably, irrationally and is in breach of fair procedures.

3) The first named Respondent did not refer, other than in passing to the country of origin information submitted. The first named Respondent did not give any reasons as to why he did not do so nor did he set out any reasons why the Applicant would not suffer persecution on the basis of country of origin information submitted. This is all the more important in circumstances where the Applicant left Pakistan initially for a period of two

years in the hope that the situation would improve there, but in fact the situation has deteriorated. In the premises, the first named Respondent was under a greater duty to consider the country of origin information and the forward looking test in respect of persecution and was irrational and *ultra vires* not to do so.

4) The first named Respondent held that the Applicant's account of the assault was not credible on three grounds:-

a) The first finding is that he asserts the Applicant gave inconsistent evidence in relation to the August incident. It is not clear exactly how the Applicant's account is not consistent. It may be that the first named Respondent found that there were two different accounts of how the incident terminated. However, all the accounts given by the Applicant are consistent in that it is clear that other people came upon the scheme and he managed to escape.

b) The second finding appears to be that the matter in which the assailants were armed is inconsistent. However, in his questionnaire he stated that they beat him with bats and then one man took out a gun and started firing in the air. At Q. 20 of his interview he stated that they attacked him and he had a painful body and when asked if they were armed he stated they had guns. He gave the same evidence at the Tribunal. (the court's emphasis)

c) The third issue is that the first named Respondent also questioned the motives of the Applicant's assailants in circumstances where the Applicant cannot realistically be expected to account for the actions and motivations of his persecutors.

In the premises, the allegation that the first named Respondent's account of the assault lacks credibility is irrational.

5) The first named Respondent also make credibility findings in respect of the exact dates of the Applicant's medical treatment. The Applicant gave substantially credible and consistent evidence in this regard, and a finding that there was a discrepancy between fifteen days and three weeks is irrational.

6) The first named Respondent states that he considered the Applicant's reasons for failing to apply earlier and finds them implausible on the basis of his assertion and Professor Hathaway's book, which states that "if a person is truly fleeing persecution and delays in seeking international protection, such conduct can go to credibility". The first named Respondent did not give any adequate reasons as to why the reasons were implausible. The Applicant gave clear evidence that when he arrived the Applicant believed the situation in Pakistan would improve over the course of his time in the state. When the matters had not improved, in particular after hearing about the murder of the Governor of Punjab, the murder of the Minister for Minorities and the Aasiya Bibi blasphemy case, where his visa was about to run out he applied for asylum. Aasiya Bibi was a Pakistani Christian woman who was convicted of blasphemy by a Pakistani court and received a sentence of death by hanging. The first named Respondent appears to have misdirected himself in law that where a person does not apply for asylum at the first available opportunity this should be held as a credibility factor and therefore his stated reasons were implausible. The first named Respondent

has to give consideration to the reasons put forward as to why there was a delay. The Applicant put forward his reasons but there was no substantive consideration of these reasons. In the circumstances this finding is irrational and *ultra vires*.

7) The first named Respondent also relied upon a subjective view of the Applicant's demeanour in holding against him on credibility grounds. In the absence of specific issues in relation to his demeanour and presentation at the Tribunal (this court's emphasis), this decision is irrational. The first named Respondent in making adverse credibility findings, also found that "he is not a refugee for any of the reasons set out in s. 2 of the Act". It is submitted that there is clear evidence to support the Applicant's view that he was being persecuted for a specific s. 2 reason namely on religious grounds. This was accepted by the Refugee Applications Commissioner and was not an issue in the appeal. In the circumstances this finding is irrational and the first named Respondent was *ultra vires* to find this type of persecution does not come within the meaning of s. 2 of the Act.

8) The first named Respondent failed to substantially give the benefit of the doubt to the Applicant in considering the Applicant's circumstances and credibility from a culture specific context.

The hearing before the Refugee Appeals Tribunal

3. The decision of the Tribunal mentioned the grounds of appeal as set out in the notice of appeal submitted by the Applicant's solicitors dated the 14th November 2011 and noted that further grounds were advanced prior to the hearing. The first named Respondent noted that the Applicant was born in Karachi, Pakistan in 1983, received sixteen years of education, both of his parents, along with siblings, continued to live in Pakistan. The Applicant was asked why he is seeking refugee status and replied that he was a Christian and feared persecution from the Muslim community in Pakistan. He said the Muslims can be violent on the issues of faith, and he experienced violence from them. He told the first named Respondent that he possessed a visa for this country, that it expired and he must return to Pakistan but is fearful of going back. He says he fears the Muslim community as they blamed the Christians for everything. He claims there is no state protection and the authorities used the blasphemy laws to persecute people.

4. He stated that on 5th August, 2009 he was on his way to his uncle's house where he was approached by an armed group who asked him his name. When he answered, the group recognised he was a Christian and started to beat him. He was punched and kicked and forced to read the Koran. The Applicant claimed that when other people arrived he managed to escape and went home. He claims his father took him to hospital and the Applicant spent three weeks there. A medical report from Pakistan was put in evidence. When asked if he reported the incident, the Applicant replied "my brother did". He said the police told his brother that as the Applicant was alright it was best to leave things alone. The Applicant states that he already obtained a two year visa to study engineering in Ireland and his parents said he should leave. He was asked why he was looking for international protection as he already had a visa. The Applicant replied "maybe the government in Ireland can help me". He was asked to comment on the Commission's observations "the problem was local so the Applicant could relocate". The Applicant said to the first named Respondent "if you move in Pakistan you must bring everything like the furniture with you and the neighbours would know".

5. In replying to the presenting officer, on behalf of the Refugee Applications Commissioner, the Applicant stated that when he applied for the visa he only intended staying in Ireland for two years, but on the third year he applied for refugee status. Asked

why he did not apply earlier he replied that he thought things would get better in Pakistan. He was asked how many Christians are living in Pakistan and he replied 2.5 million. He was asked the population of the country and eventually said 150 million. He was asked what made him different from the 2.5 million other Christians and why they hadn't left and the Applicant replied "I got a chance to come here and I am asking for asylum". He was asked if all his family were still in Pakistan and he replied in the affirmative. He was asked why they had not left. The Applicant replied "the only money they had was put into me. They cannot move". He said it was his plan to bring his family to Ireland as the government cannot protect them.

The analysis of the Applicant's claim by the Refugee Appeals Tribunal

6. In the analysis of the Applicant's claim, the first named Respondent reiterated the evidence that had been given by the Applicant. He then noted country of origin information put in evidence regarding Pakistan, which showed there is a lack of tolerance for Christian and Hindu religions among some Muslim worshippers. Reference was made to a BBC report stating that the Minister for Minorities was killed by fanatics and a Human Rights report that blasphemy laws can be abused by vigilantes. There is also the ongoing friction between the government and the judiciary because of the latter's attitude to laws prohibiting incitement to violence. Along with Christian and Hindu worshippers, intolerance is also shown to Ahmadi followers who number several million. The US Report of 2011 stated that despite the government's attempts to protect religious minorities, societal intolerance and violence against minorities, and Muslims who promote intolerance, have increased and abuses under the blasphemy laws continued. Laws prohibiting blasphemy continue to be used against Christians, Ahmadis and other religious groups including Muslims.

7. The first named Respondent then referred to the UNHCR Handbook on Procedures for establishing Refugee Status. He quoted the Handbook: "It is difficult for an Applicant to prove every part of his case and is therefore frequently necessary to give him the benefit of the doubt. However the benefit of the doubt should only be given when all available evidence has been obtained and checked" and when the examiner is satisfied as to the Applicant's general credibility and he quoted from paras. 37, 42, and 45 of the Handbook and he noted that since the Act, the onus is on the Applicant to prove that he is a refugee. He said the genesis of the Applicant's claim is that because of ongoing intolerance by some Muslims towards Christians, coupled with one assault he claims to have suffered in August 2009 he had a well-founded fear of persecution. The Applicant however gave inconsistent evidence in relation to the August incident. In the ASY1 form he completed, when making the application for refugee status, he claims the seven men who attacked him and forced him to read the Koran ran off when some people came on the scene, thus allowing the Applicant to escape and go home. However in his hand-written narration in the questionnaire, he said that while he was being attacked, his assailants saw people approaching and went towards him. He does not know why. In his questionnaire he claimed the seven men were armed with wooden bats, however in his interview, he claimed they were armed with guns. He gave no coherent reason why men armed with guns allowed him free if they chased him. In one part of his application he claims the gang were searching to kill him, in other evidence he states that the attackers walked away and made minimal efforts to capture him when he was fleeing. The first named Respondent did not find the account of the Applicant's assault, and subsequent escape from his assailants, to be plausible. The Applicant further claims that these armed men came to his home with the intention of killing him but only threw stones at the house. If they were intent on killing him, they would be deterred by his mother knocking on the door. Country of origin information submitted that there is societal discrimination against Christians and other Muslims in Pakistan. However, discrimination can exist in societies without amounting to persecution. The Applicant claims he was assaulted once and the first named Respondent found the evidence to be lacking in credibility, thereby undermining his well-founded fear of persecution. He had told the first named Respondent that he spent three weeks in hospital after his assault on the 5th August. However, when

the Applicant came here he told the interviewer he spent the previous month in his uncle's home away from the Muslim gang that wanted to kill him. A purported medical certificate, dated 19th August, 2009, stated that he was under the author's care from 5th to 19th August and had complete bed rest during that time. The events of 5th August appear to be fortuitous, as the Applicant's visa was issued on 3rd August. When this was put to him the Applicant replied it was a coincidence. The Applicant claimed he fled Pakistan and that he had a well-founded fear of persecution; however he was here for two years before applying for international protection. He stated he was hoping things would get better and he wanted to complete his course. However, he stated earlier he had not finished his course. The first named Respondent considered his reasons for failing to apply earlier but finds them implausible and quoted Professor Hathaway stating: "that if one is truly fleeing persecution and delays in seeking international protection, such conduct can go to credibility". In regard to the evidence provided by the Applicant in assessing the manner by which the evidence was delivered and witnessing his own overall demeanour, I am satisfied the Applicant's subjective fear of persecution is not objectively well-founded, and he is not a refugee for any of the reasons set out in s. 2 of the Act.

Submissions of counsel for the Applicant

8. Counsel on behalf of the Applicant, Ms Sunniva McDonagh, S.C. (with Mr John Noonan, B.L.) set out what she believed the test to be applied in judicial review cases and quoted from *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 IR 701 and *Rawson v. Minister for Defence* [2012] IESC 26, in which the Supreme Court outlined the principles by which a public body can be said to have made an unlawful decision. She noted that both of these decisions were referred to with approval by the Supreme Court in *EMI (Ireland) Ltd v. The Data Protection Commissioner* [2013] IESC 34 and she submitted that the task of the decision-maker in administrative actions is not simply to reach a conclusion and defend it afterwards on the grounds that there was evidence for it. He/she must firstly make an assessment as to what relevant factors he must take into account. If there is evidence submitted or submissions made, he must indicate fairly why he is rejecting certain arguments, while preferring some form of evidence over the other. In particular, counsel submitted, that as pointed out by Murray C.J. (as he then was) in *Meadows* (supra):-

"...a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness."

9. Counsel for the Applicant submitted that the Refugee Applications Commissioner accepted that the Applicant's claim could amount to persecution, within the meaning of s. 2 of the Act, and that country of origin information was provided at the appeal stage which showed that there is significant discrimination amounting to persecution of Christians in Pakistan and quoted from the country of origin information.

10. Counsel pointed out that the first named Respondent refers to the country of origin information and noted that "this confirms that there is societal discrimination against Christians and other Muslims in Pakistan. However, discrimination can exist in societies without amounting to persecution". This is clearly a finding of the first named Respondent and she referred to *S.R (Pakistan) v. the Refugee Appeals Tribunal* [2013] IEHC 26 where Clark J. found that a Tribunal Member's finding that there was state protection to religious minorities, such as Ahmadis, was contrary to all the available country of origin information.

11. Counsel for the Applicant submitted that the first named Respondent made no specific finding as to whether the Applicant was a Christian or not, even if the findings in relation to the credibility of the assault are valid, a finding on this issue must be made, so that the assessment of the Applicant's claim can be properly carried out and quoted *M.A.M.A v.*

Refugee Appeals Tribunal [2011] 2 IR 729. Counsel also submitted, that as no analysis by the situation generally concerning Christians in Pakistan was carried out by the first named Respondent, the first named Respondent erred in law and was irrational in failing to apply the forward looking test and confining herself to considering the acts of past persecution only.

12. She also submitted that the first named Respondent did not deal with any other aspect of the Applicant's claim other than the assault. The first named Respondent did not consider the blasphemy laws in Pakistan, and the lack of state protection generally, together with the increasing extremism, and she submitted that there was a real risk of persecution by the state and this was not considered at all by the first named Respondent.

13. The first named Respondent has stated that "he is not a refugee for any of the reasons set out in s. 2 of the Act". Counsel submitted that persons who are directly targeted because they are Christians clearly have a s. 2 nexus and can be refugees on religious grounds.

14. Counsel for the Applicant dealt with the issue of the credibility findings in relation to the assault and quoted the fourth, fifth and tenth principles set out by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353. He emphasised para. 10, where Cooke J. stated:-

"Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the Applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."

15. Counsel submitted that the first named Respondent had missed two fundamental points in his outline of the evidence. Firstly, the interviewer is intended to ask additional questions to the questionnaire and secondly it was not put to him that he was contradicting what was contained in the questionnaire. The interview notes are a memo of the evidence and they are not an exact transcript.

16. She accepted that it may be that the first named Respondent found there were two different accounts of how the incident terminated, but submitted that all the accounts given by the Applicant are consistent and it is clear that other persons came upon the scene and he managed to escape. She also submitted that in relation to the medical treatment the first named Respondent's finding that there was a discrepancy between fifteen days and three weeks was irrational. The first named Respondent, she submitted, appeared to question the motives of the Applicant's assailants but the Applicant cannot realistically be expected to account for the actions and motivations of his persecutors.

17. She further submitted that the first named Respondent has stated he considered the Applicant's reasons for failing to apply for asylum earlier, and finds them implausible. However, the first named Respondent did not set out any adequate reason as to why the reasons were implausible. The Applicant had given clear evidence that when he arrived the Applicant believed the situation in Pakistan would improve over the course of his time in the state. When matters had not improved, and in particular, after hearing about the murder of the Governor of Punjab, the murder of the Minister for Minorities and the Aasiya Bibi blasphemy case, when his visa was about to run out he applied for asylum. She further submitted that the first named Respondent appeared to have misdirected himself in law when he stated that when a person does not apply for asylum at the first available opportunity it should be held as a credibility factor and therefore his stated reasons were implausible. The first named Respondent has to give consideration to the

reasons put forward as to why there is a delay and whether he found the Applicant's explanation compelling or not he has to set out his reasons for so thinking. It was submitted by counsel that none of the credibility findings go so far as to undermine the essential aspect of the Applicant's case that he is a Christian from Pakistan and has suffered discrimination, amounting to persecution, from which the state is unwilling or unable to protect him.

Submissions of counsel for the Respondent

18. Counsel for the Respondent, Mr Peter Leonard, B.L., outlined that the appeal, which took place before the Refugee Appeals Tribunal, was a *de novo* hearing and that in the course of the hearing, the Applicant was required to discharge the burden of proof that he had a well-founded fear of persecution and quoted from *P. v. Refugee Appeals Tribunal & Anor* [2013] IEHC 448 (High Court, Unreported, MacEochaidh J. 20th September 2013). Counsel argued further that the hearing before the first named Respondent amounted to a fresh consideration of the evidence and that the Applicant was presented with every opportunity to make his case in respect of both his personal circumstances, and the country of origin information from Pakistan. He submitted that the first named Respondent had assessed the country of origin information and said that the Applicant's submission was factually incorrect in suggesting that the first named Respondent had made no specific finding as to whether the Applicant was a Christian or not. He stated that the first named Respondent had clearly considered the country of origin information and quoted from the first named Respondent's report in this regard. In relation to the forward looking test, he considered the report of the US State Department dated 8th April, 2011 and identified that despite government attempts at intervention, a worsening trend of religious intolerance continued.

19. He also submitted that the first named Respondent had referred to the blasphemy laws and government ineffectiveness in addressing these issues, and in fact the Minister for Minorities had been killed by fanatics and that therefore, the first named Respondent was fully cognisant of the situation that would face the Applicant on his return, and he submitted that the Tribunal Member, in his consideration of the country of origin information, did not rely on past circumstances, but instead assessed the latest available country of origin information.

20. In relation to the first named Respondent's reference to "discrimination can exist in societies without amounting to persecution" he suggested that the first named Respondent was positing a scenario that may or may not be the case. He stated that the first named Respondent had not found that discrimination in Pakistan does not amount to persecution and that in this regard the first named Respondent immediately went on to address the credibility of the assault and quoted from Ryan J. in *G.V v. Refugee Appeals Tribunal* [2011] IEHC 262.

21. In respect of credibility, he outlined a number of the principles established by Cooke J. in *I.R. (supra)*, and submitted that the first named Respondent has based his findings on credibility on a number of factors, but in particular, on the account provided by the Applicant of the assault which he claimed occurred on 5th August, 2009. He submitted that the first named Respondent was entitled to find the account of the attack on the Applicant as inconsistent and therefore not credible, and submitted some other factors which featured in his assessment of credibility. He submitted that the conclusions were irrational and were not reached in "the teeth of common sense".

22. In respect of the issue of the demeanour of the Applicant, he quoted from Hogan J. in *O.O. (F) (Nigeria) v. Refugee Appeals Tribunal & Anor* [2012] IEHC 46. He submitted that the first named Respondent referred to the overall demeanour associated with the manner in which the Applicant gave his evidence. He submitted that the reference to demeanour is not a separate heading of consideration, but rather relates to the

observations made in consideration of the entire appeal. Finally, he submitted it was not unreasonable, or irrational, of the first named Respondent to take on board the manner in which the Applicant delivered his evidence as part of his overall assessment of the Applicant's credibility.

Discussion

23. The documentation that a judicial review judge receives in an application for *certiorari* seeking to quash the decision of the Refugee Appeals Tribunal include the following documents:

- a) A copy of the ASY1 form;
- b) A copy of the questionnaire in an application for refugee status;
- c) A copy of the section 11 interview;
- d) A copy of the section 13 report in respect of the application by the Refugee Applications Commissioner;
- e) The notice of appeal and grounds of appeal; and
- f) Detailed country of origin information.

The court never obtains a copy of the evidence in chief and in cross-examination, together with any questions asked by the Refugee Appeals Tribunal at the hearing of the appeal to the Refugee Appeals Tribunal. Occasionally, the judicial review judge is given a copy of the solicitor's note of the proceedings before the Tribunal. This court is aware, from personal experience, of the limitations of notes of solicitors because of their very nature. Invariably the decision of the Tribunal reflects and refers to the evidence given to the Tribunal in making its decision. In this court's view, this is a failure to comply with the clear statements made by the Supreme Court in relation to the determination of administrative decisions and the judicial review of such decisions. Where a decision is made by a public person or body, which has the force of law, and which affects the rights and obligations of an individual (in this case an Applicant for refugee status), then it hardly needs to be said that the courts have jurisdiction to consider whether the decision concerned is lawful. In *Rawson* (supra) Clarke J., in giving judgment of behalf of the Supreme Court, stated as follows:-

"First, the decision must be within the power of the person or body concerned. Second, the process leading to the decision must comply both with fair procedures and with whatever procedural rules may be laid down by law for the making of the decision concerned. Third, the decision maker must address the correct question or questions which need to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence.

24. Clarke J. continued:-

"Sometimes, of course, the process itself will provide for an appeal. It has consistently been held that parties who have a right of appeal within a process are entitled to sufficient information to enable them to consider, and if appropriate to mount, such an appeal."

25. Clarke J. also stated:-

*"While the primary focus of a number of the judgments cited, and indeed aspects of the decision in *Meadows* (*Meadows v. Minister for Justice*,*

Equality and Law Reform [2010] 2 IR 701) itself, were on the need to give reasons as such, there is, perhaps, an even more general principle involved. As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependant on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge. In some cases the material on which a challenge might be considered may be obvious"

26. Clarke J. further stated:-

"Where the challenge is based on the process or procedures followed, again in the majority of cases any party having standing to challenge the decision will have participated in the process (or will be able to point to an arguably unlawful exclusion) and will be likely to be well familiar with what happened and thus able to assess whether there is any legitimate basis for claim.

However, where the possible basis for challenge is concerned with the decision-making itself, then there is the potential for a greater deficit of ready information. Where the possible basis for challenge is founded on an absence of the correct question being addressed, incorrect considerations being applied or an irrational decision, any party wishing to assess the lawfulness of the decision will need to know something about the decision-making process itself."

27. It is clear to this court, whilst the party having challenged the decision has been involved in the process in these cases, it is necessary for the Refugee Appeals Tribunal to ensure that the questions and answers at the hearing of the Refugee Appeals Tribunal are documented and accurately reported for the purposes of a judicial review in these cases.

28. Any judicial review challenge to the decision of the Refugee Appeals Tribunal is therefore limited, in an unsatisfactory way, by the failure of the Refugee Appeals Tribunal to provide the details of what is described obliquely in the report of the Refugee Appeals Tribunal as "the Applicant's claim". However, no objection has been raised by the Applicant in relation to providing this court with a transcript of the evidence and before the Refugee Appeals Tribunal and in those circumstances, and with this serious handicap in mind, the court will seek to determine the lawfulness or otherwise of the decision of the first named Respondent in this case.

29. The first named Respondent stated in regard to the evidence provided by the Applicant and in assessing the manner by which the said evidence was delivered and witnessing his overall demeanour, "I am satisfied that the Applicant's subjective fear of persecution is not objectively well-founded and he is not a refugee for any of the reasons set out in s. 2 of the Act". Whilst counsel for the Respondent has indicated that this related to the overall demeanour of the Applicant, it is quite clear, with regard to the evidence provided by the Applicant and assessing the manner by which the evidence was delivered, that the overall demeanour of the Applicant lead the first named Respondent to find that the Applicant's subjective fear of persecution was not objectively well-founded.

Persecution and discrimination

30. The first named Respondent held that there was societal discrimination against Christians and other Muslims in Pakistan. He stated that discrimination can exist in societies without amounting to persecution. A right to religious freedom at international law includes, according to Hathaway & Foster:- "The freedom not only to hold religious beliefs and values, but also to manifest them either individually or in community with

others or in public or private, and specifically to engage in worship, observance, practice and teaching”.

31. The European Convention for the Protection of Human Rights and Fundamental Freedoms becomes a part of Irish law by virtue of the European Convention on Human Rights Act, 2003. Section 4 of the 2003 Act states as follows:-

“Judicial notice shall be taken of the Convention provisions and of—

(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,

(b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,

(c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction.”

And the Act continues:-

“and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.”

32. In the de Londras and Kelly’s *European Convention on Human Rights Act*, published in 2010 by Thomson Reuters, it states:-

“The potential complexity of this provision arises primarily from the use of mandatory language and from its structure, which together arguable placed different - although at times onerous - obligations on the domestic courts to give “judicial notice” to Council of Europe authorities and to ensure that ‘due account’ is taken of the principles laid down in these authorities ‘when interpreting and applying the Convention provisions’”.

33. It is quite clear that Article 9 is headed “Freedom of Thought, Conscience and Religion”. This heading was added by the provisions of protocol number 11 (No. 155). It states:

“1. Everyone shall have the right to freedom of thought, conscience and religion: This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals or for the protection of the rights freedoms of others.”

34. The International Covenant on Civil and Political Rights (ICCPR) is a multilateral Treaty adopted by the UN General Assembly on 16th December, 1966 and enforced from the 23rd March, 1976. This country signed the Treaty on 1st October, 1973 and ratified the Covenant on the 8th December, 1989. Whilst it has not been brought into force by legislation, it is a persuasive authority.

35. Article 18 of the ICCPR states:-

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or

belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

36. The state of Pakistan signed the Treaty on 17th April, 2008 and ratified it on the 23rd June, 2010.

37. The country of origin information describes:-

"(a) Pakistani Minorities Minister Shahbaz Bhatti has been shot dead by gunmen who ambushed his car in broad daylight in the capital, Islamabad. Mr Bhatti, the cabinet's only Christian Minister, had received death threats for urging reform to blasphemy laws.

(b) Punjab Governor, Salman Taseer, who had also opposed the law, was shot dead by one of his bodyguards.

(c) The blasphemy law carries a death sentence for anyone who insults Islam. Critics say it has been used to persecute minority faiths.

(d) Pakistan's blasphemy law has been in the spotlight since a Christian Aasiya Bibi was sentenced to hang in Punjab last November. In Time Magazine, 21st March, 2011, stated 'It is not news that Pakistan has a lunatic fringe. What is disturbing is that after Taseer's murder, when the silent majority finally spoke up it praised Quadri (the murderer), not his victim. The public reaction exploded the myth of Pakistani's moderate Islam. Quadri belongs to a mainstream sect that routinely condemns the Taliban.

38. The reference made in the first named Respondent's report to fanatics and vigilantes is clearly contradicted by this country of origin information which was available to the first named Respondent.

39. Hathaway & Foster quote from a decision of the Australian High Court in 1999 in a case of *Shan*:-

"The imposition of restrictions in freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution".

40. The European Union's Qualification Directive at Article 10(1) provides:-

"(a) Member States shall take the following elements into account when assessing the reasons for persecution:....

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

In the case of *Bundesrepublik Deutschland v. Y* (C-71/11), the Court of Justice of the European Union affirmed that "religion" encompasses "all its constituent components, be they public or private, collective or individual".

41. In this court's view, the decision of the first named Respondent in respect of the issue of religious persecution not existing in Pakistan, but amounting merely to discrimination is irrational and unreasonable and flies in the face of the country of origin information and the human rights provisions in international Conventions.

42. In the absence of the material identified and in the absence of specific reasons as to what aspects of the demeanour lead the first named Respondent to that conclusion, this court is bound to find that the decision of the first named Respondent with regard to demeanour fails the basic test which is the failure to provide the judicial review judge to have access to sufficient information to determine the lawfulness of the decision.

43. The first named Respondent then held "that in regard to the evidence provided by the Applicant and assessing the manner by which this said evidence was delivered and witnessing his overall demeanour, I am satisfied that the Applicant's subjective fear of persecution is not objectively well founded and he is not a refugee for any of the reasons set out in section 2 of the Act". No description of his demeanour was identified by the first named Respondent and this court has no sufficient information to determine the lawfulness of the decision in this regard.

Credibility

44. The first named Respondent found that the Applicant had given inconsistent evidence in relation to the incident in August of 2009, when the Applicant stated that he was assaulted. Counsel on behalf of the Applicant submits that all the accounts given by the Applicant are consistent, that it is clear that other persons came upon the scene and he managed to escape. This court cannot find reasons for the Tribunal's finding that the account of the Applicant's assault and subsequent escape were implausible. In *I.R. v. Minister for Justice* [2009] IEHC 353, Cooke J. says that:-

"A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding."

45. It appears to this court that the first named Respondent in finding that the account of the Applicant's assault and subsequent escape is not plausible, the first named Respondent appears not to have considered and assessed the secondary information contained in the statements of the Applicant in the questionnaire and the section 11 interview.

Forward looking test

46. Counsel on behalf of the Applicant has argued that the first named Respondent failed to apply the correct test as to whether there was a forward looking risk of persecution.

47. Cooke J. in *M.A.M.A v. Refugee Appeals Tribunal* [2011] IEHC 147 considered and reviewed the authorities and in particular *Da Silveira v. Refugee Appeals Tribunal* [2004] IEHC 436 (Peart J.), *Karanakaran v. The Home Secretary* [2003] 3 All ER 459 and stated:-

"This Court accepts as correct the approach to the standard of proof outlined in this case law. The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage."

48. The finding of lack of credibility on the part of the first named Respondent in relation to the assault does not, in this court's view, relieve the first named Respondent of the obligation of considering whether there was a risk of future persecution of the type alleged in the event of repatriation. The decision of the first named Respondent failed to apply any test as to whether there was a forward looking risk of persecution and confined himself to consideration of past events of persecution only. This decision is in breach of fair procedures, and appears to be irrational and unreasonable.

Blasphemy

49. The only mention of the blasphemy laws in the first named Respondent's report was a reference to the Human Rights Report that "blasphemy laws can be abused by vigilantes" and that the US Report of 2011 stated that despite the government's attempts to protect religious minorities, societal intolerance and violence against minorities and Muslims promoting tolerance has increased, and abuses under the blasphemy laws continue. Those prohibiting blasphemy continued to be used against Christians, Ahmadi and other religious groups including Muslims. This court finds that an essential part of the Applicant's case was that due to the blasphemy laws in Pakistan, promoted by the Government, there was a real risk of persecution by the State, but this appears not to have been properly considered by the first named Respondent. This decision is in breach of fair procedures and appears to be irrational and unreasonable.

Decision

50. This court has expressed itself extremely unhappy with the failure of the Refugee Appeals Tribunal to provide for copies of the evidence in chief and in cross-examination, together with any questions asked by the Refugee Appeals Tribunal at the hearing of the appeals of the Refugee Appeals Tribunal. However, this court has not decided the case on this basis.

51. This court finds that:-

- 1) The first named Respondent, in finding that discrimination does not amount to persecution is an irrational and unreasonable finding.
- 2) Secondly, the court has found that the decision of the first named Respondent with regard to demeanour, fails the basic test which is the failure to provide the judicial review judge to have sufficient access to sufficient information to determine the lawfulness of the decision. Further, that the failure to identify what reasons the first named Respondent had for determining that the evidence of the Applicant displayed a misdemeanour, which the first named Respondent deemed to be conducive to holding against him on credibility grounds.
- 3) The finding of the Tribunal in relation to the credibility of the description of the assault is unreasonable, having regard to the statements and the overall consistency of the account by the Applicant.
- 4) The failure to consider whether there was a forward looking risk of

persecution was in a breach of fair procedures and unreasonable in the view of this court.

52. For the reasons set out above, I formally grant leave to the Applicant and given that these are telescoped proceedings, I will make an order quashing the decision of the first named Respondent, and will make an order remitting the matter for de novo consideration before a different member of the Refugee Appeals Tribunal.

Ms. Sunniva McDonagh, S.C. Mr. Peter Leonard, B.L.

and Mr. John Noonan, B.L. Instructed by the Chief State Solicitor

Instructed by KOD Lyons, Solicitors

for the Applicant

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