THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 417
RECORD NO: 2020/482 JR

BETWEEN:

NA AND KMA

APPLICANTS

-AND-

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL
AND THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on the 11th June, 2021

General

1. The Applicants are South African citizens. The First Applicant was born in Bangladesh but became a citizen of South Africa in 2009 having married the Second Applicant who is South African. They entered the State on 2 October 2016 and thereupon made a claim for international protection. They have five children who were included in their international protection claim as dependents.

2. On 13 September 2018, an International Protection Officer recommended that the First Applicant be granted neither a refugee or subsidiary protection declaration. The Second Applicant was the subject of a negative recommendation from the Refugee Applications Commissioner on 22 November 2016. Her application was also considered by an International Protection Officer on the coming into force of the International Protection Act 2015, who recommended that she be granted neither a refugee or subsidiary protection declaration. Both Applicants appealed these negative recommendations to the First Respondent who upheld the first instant recommendations.

3. Leave to apply by way of Judicial Review for an order of certiorari quashing the decision of the First Respondent was granted by the High Court on 30 July 2020.

The Protection Claim and the First Respondent's consideration of it

4. The Applicants claimed that if returned to South Africa, the First Applicant would face persecution or was at risk of serious harm because of his Bangladeshi origins. It was asserted that xenophobia and racism is widespread in South Africa and that as a successful business man married to a South African national, he had been subjected to several xenophobic and racially motivated attacks. The Applicants further claimed that there had been police involvement and/or collusion in the attacks which they had been subjected to and that the police were disinterested or reluctant to protect the Applicants.

5. Specifically, it was claimed that the Applicants' family home was attacked in April 2016 by armed men, including policemen, arising from which the First Applicant sustained a gunshot wound; that the First Applicant had been the subject of a kidnapping attempt; that the First Applicant had been subjected to an attack in 2015 in his shop by a mob and threatened to leave the area; that their children had been kidnapped; and that the police were involved or had colluded in the attacks which they had been subjected to, were corrupt and were disinterested or reluctant to protect the Applicants.

6. In a detailed and considered analysis, the First Respondent rejected the Applicants' claims that the Applicants' children had been kidnapped; that the First Applicant had been kidnapped; and that the police had been involved in or colluded in the attacks which they had been subjected to, were corrupt or were disinterested in or reluctant to protect the Applicants.

7. The First Respondent accepted that there had been an attack of the Applicants' family home in 2016 by armed men in the course of which the Applicant sustained a gunshot wound but it did not accept that money had been taken, although demanded, during this attack or that the First Applicant had been threatened verbally by his attackers or otherwise told to leave South Africa. Neither did it accept that there had been police collusion or involvement in this attack. The First Respondent determined that the motivation for this attack was financial and was similar to attacks of this nature worldwide.

8. The First Respondent also accepted that the First Applicant had been subjected to a mob attack in his shop in 2015, although he did not make a complaint to the police about this until May 2016. The genesis of this attack was a dispute between the First Applicant and an Indian man about the First Applicant opening an Asian tuck shop in the area. This matter resolved itself by the local Indian and Bengali communities providing compensation to the Applicant. The First Respondent determined that this dispute was not racially motivated but rather arose from commercial jealousy.

9. The First Respondent rejected the contention that either of these accepted events had been motivated by xenophobia or racism. It set out its conclusions in the following manner:-

> "4.35 The Appellant's solicitor submitted that the Appellant suffered persecution on the basis of his race, and because he was a successful business man who had married a South African woman, and that this was consistent with COI on xenophobia and racism in South Africa, which were 'endemic'. However, the only incidents that the Tribunal considered to have credibly occurred were those of May 2015 (attack on the Appellant's shop) and that of May 2016 (attack on his home). The former incident probably arose from commercial jealousy, the Tribunal has concluded, and was not motivated by race. The latter incident did not contain any direct evidence of racial motivation, even on the Appellant's own case. The Tribunal also notes that the Appellant was able to carry on his business without any difficulty in Delportshoop when he lived there, undermining his claim that the motivation for these two incidents was an endemic racism present in South Africa. The Tribunal also notes that the Appellant did not attribute any of the difficulties he claimed to have encountered to his race or nationality when he made his statement to the police in September 2016, immediately prior to leaving South Africa. The Appellant made no suggestion or claim in his statement about the attack on his home in April 2016 that race or nationality played any part in the incident either.

4.36 The Tribunal has had regard to the possibility that not every racial attack will have an explicitly articulate racial motivation. Whilst xenophobic attacks were a feature of South Africa during 2015 and 2016, there is nothing in the detail of the attack of April 2016 that would suggest that the motive was the race or nationality of the Appellant. COI illustrates that some of the xenophobic attacks in that period were sparked by inflammatory statements made by politicians, or by leaflets, signs, or banners exhorting South Africans to attack foreigners, for example. The attacks on business premises often took the form of mass burning and lootings of those premises…. In the Appellant's case, the attack of April 2016 had none of those features and bore all the hallmarks of the sort of robbery that, unfortunately, is all too often encountered by business persons the world over. The Tribunal has also had regard to the overall credibility of the Appellant's claim, including the fact that he and his family returned to South Africa from Bangladesh notwithstanding that they claimed to fear xenophobic attacks in South Africa. The Tribunal concludes that the April 2016 incident was not, on the balance of probabilities, racially motivated or otherwise grounded in xenophobia."

10. The Applicants do not contest the credibility findings made against them by the First Respondent.

11. The First Respondent then proceeded to determine whether, despite its findings, the Applicants nonetheless had a well-founded fear of persecution because of the First Applicant's race, nationality or ethnicity. It determined that there was a reasonable chance that the First Applicant might be at risk of harm arising from his Bangladeshi ethnicity as xenophobia or racism might be a contributing factor in any future violence which the First Applicant may be subject to. However, it also determined that State protection was available to the Applicant as demonstrated by the police interaction with him to date and having regard to Country of Origin information. It stated:-

> "Based on the documentation assessed and the evidence available to the Tribunal, and having regard to the experience that the Appellants had in South Africa as determined credible by the Tribunal, the Tribunal concludes that state protection from any xenophobic or racist violence or attacks that the Appellants might encounter will be available to them, and that such protection is effective, non-temporary and accessible to the Appellants."

12. It is important to note in this regard that the First Respondent did not determine that there was a reasonable likelihood that the Applicants would be subjected to any future attack or violence but rather determined that if the Applicants were to encounter any future attack or violence, effective state protection would be available to them should such attack or violence be motivated by xenophobia or racism.

13. The First Respondent then proceeded to consider whether there were substantial grounds for believing that the Applicants faced a real risk of serious harm if returned to South Africa, having regard to the accepted experiences of the Applicants and the relevant Country of Origin Information. It determined that substantial grounds did not so exist.

14. With respect to the First Respondent's determination that substantial grounds did not exist for believing that the Applicants would be subjected a real risk of suffering serious harm in the form of torture or degrading or inhuman treatment, the First Respondent stated:-

> "The Tribunal also concludes that the Appellants would not face a real risk of serious harm of this nature. Degrading treatment is treatment that arouses 'feelings of fear anguish and inferiority capable of humiliating or debasing' a person. Whilst the incidents that the Tribunal has found to have occurred in 2015 and 2016 could have evinced fear or anguish in the Appellants, the Tribunal concludes that they would have been capable of humiliating or debasing them such as to meet the minimum level of severity required for something to amount to 'degrading treatment' and, furthermore, those incidents, and the harm endured as a result, were not the result of intentional (or even negligent) treatment meted out to the Appellants by the south African authorities. The Tribunal comes to this conclusion having regard to all the circumstances of the case including the duration or longevity of the treatment and the gender and ages of the Appellants."

15. The Applicants challenge this determination of the First Respondent on the basis of irrationality and unreasonableness and assert an error in fact and in law by the First Respondent.

Failing to have regard to its earlier finding of the possibility of xenophobia and racism

16. The Applicants complain that the First Respondent failed to have regard to its earlier finding that xenophobia or racism might be a contributing factor in any future violence which the First Applicant may be subject to when considering the Applicants future risk of serious harm.

17. As already set out, in the course of its consideration of the Applicants' refugee claims, the First Respondent determined that effective state protection was available to the Applicants with respect to any possible future xenophobic or racist violence or attacks which they might encounter. Accordingly, the First Respondent did not fail to have regard to its earlier finding in this regard as it had already decided the question of the likelihood of future risk of xenophobic or racist attacks and determined that a real risk did not exist as effective state protection was available to the Applicants.

Failure to properly consider the risk of future serious harm aside from xenophobic or racist motivated actions

18. In light of the facts accepted by the First Respondent, namely that the First Applicant was subjected to a mob attack at his shop in 2015 and the family home was entered by armed gunmen resulting in the First Applicant receiving a gunshot wound to his foot in 2016, the Applicants assert that the First Respondent failed to correctly determine whether substantial grounds had been established for believing that the Applicants faced a real future risk of serious harm in the form of inhuman or degrading treatment.

19. In order to qualify for subsidiary protection, substantial grounds must be established for believing that, if returned to their country of origin, the Applicants would face a real risk

of suffering serious harm, in this instance in the nature of torture or degrading or inhuman treatment; that there would not be effective state protection from such serious harm and that there would not be any internal protection alternative. All of these elements must be established in order that subsidiary protection be granted.

20. Actors of serious harm have been defined at s. 30 of the International Protection Act 2015, as including:-

> "(a) a state
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> (b) parties, or organisations controlling a state or a substantial part of the territory of a state, and
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> (c) non-state actors, if it can be demonstrated that the actors referred to in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against…serious harm"

21. The First Respondent assessed the two attacks which it accepted had been perpetrated against the Applicants and determined that the incidents did not amount to inhuman or degrading treatment, as the minimum level of severity required for degrading treatment to be established had not been met. It further determined that the incidents, and the harm endured by the Applicants as a result, were not the result of intentional or negligent treatment by the South African authorities. On that basis, and having considered the Country of Origin information, the First Respondent determined that the Applicants would not face a real risk of future inhuman or degrading treatment.

22. The Applicants submit that there was a failure to give reasons with respect to this finding; that it is an irrational finding; and that there is a material error of law.

Failure to give Reasons

23. In a judgment of this Court in *SKS v. IPAT* [2020] IEHC 560, I summarised the law regarding the duty to give reasons as follows:-

> "21. The duty to give reasons is so well established that perhaps an engagement with the essence of the duty is sometimes overlooked. In *Connelly v. An Bord Plenala* [2018] IESC 31, Clarke CJ set out, at paragraph 5.4 of the report, the purpose behind the duty to give reasons which illuminates a decision maker's duty in this regard. He stated:-
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> > "One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will be rarely sufficient simply to indicate the factors taken into account and assert, that as a result of those factors, the decision goes one way or the other. That does not enlighten any

interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.

Having considered a number of cases in this area, Clarke CJ continued at paragraph 6.15 of the judgment:-

> "Therefore it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Clearly related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

22. Dealing with a situation where the reasons for a decision are not apparent on the face of a document issuing a determination, Clarke CJ referred to the decision of Fennelly J in *Mallak v. Minister for Justice* [2012] IESC 59 wherein Fennelly J stated at paragraph 66 of the judgment:-

> "The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

23. In *YY v. Minister for Justice* [2017] IESC 61, O'Donnell J., made the following remarks regarding the question of whether adequate reasons had been given for the issuance of a deportation order, at paragraph 80 of the report:-

> "I consider that a court should be astute to avoid the type of over-refined scrutiny which seeks to hold civil servants preparing decisions to the more exacting standards sometimes, although not always achieved by judgements of the Superior Courts. All that it necessary is that a party, and in due course a reviewing court can genuinely understand the reasoning process."

Having analysed the reasons given in that case, O'Donnell J continued:-

"I cannot have the level of assurance that is necessary that the decision sets out a clear and reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations of irrelevant legal considerations.""

24. In the short paragraph dealing with the First Respondent's determinations in this regard, the reasons as to why the First Respondent was of the view that the Applicants did not face a future real risk of inhuman or degrading treatment must be inferred as being that the previous two incidents did not amount to such treatment in the First Respondent's view and that these previous two incidents were neither caused by the First Respondent nor contributed to by virtue of the negligence of the South African authorities: therefore a reasonable likelihood that the Applicant would be subject in the future to such a real risk of serious harm had not been established. Accordingly, reasons for the First Respondent's determination in this regard can be inferred from the decision.

Was the determination irrational and does it disclose a material error of law?

25. The fact that the Applicants were accepted to have been the victims of two previous, non-related, random, diverse, criminal attacks cannot of itself lead to a conclusion that there is a reasonable likelihood that they will be subjected to further criminal attacks in the future. This is particularly so having regard to the circumstances and motivation for the criminal attacks as found by the First Respondent: the motivation for the attack in the shop was found to be commercial jealousy and financial; the motivation for the attack on the family home was found to be financial. Crucially, the attacks were not found to be linked in any way by the First Respondent and indeed, neither has this been suggested by the Applicants. Regardless of how the experience of being the victim of any violent crime is categorised, namely whether it invoked feelings of fear and anguish, or whether it also invoked feelings of inferiority capable of humiliating or debasing a person, that is not what is at issue in this determination of the First Respondent. Rather, the First Respondent must determine quite a different question which is whether there are substantial grounds for believing that an applicant faces a real future risk of inhuman or degrading treatment if returned to their country of origin. The determination by the First Respondent that the unfortunate exposure of the Applicants to two previous, unrelated, diverse criminal attacks did not establish a real risk that they would be subjected to inhuman or degrading treatment, was a finding which reasonable and rational and open to the First Respondent to make.

26. The Applicants assert that the reference to these attacks and harm suffered by the Applicants not being caused by the authorities either intentionally or negligently demonstrates a material error of law by the First Respondent, namely that the First Respondent incorrectly was of the opinion that the actor of serious harm must be the State.

27. The wording of this paragraph in the First Respondent's decision is unfortunate and leaves much to be desired. Nonetheless, the complaint made by the Applicants is not made out. The sentence complained of does not reveal a misunderstanding by the First Respondent of the law to the effect that serious harm must emanate from the State authorities.

Rather, the focus of that sentence is that, having regard to the First Respondent's earlier findings that the police were neither complicit in the occurrence of these accepted incidents, or negligent or corrupt in their investigation of the incidents, there was not this added feature to consider when assessing the two earlier incidents in determining whether a reasonable likelihood of future serious harm existed.

28. As the First Respondent determined that substantial grounds had not been established for believing that the Applicants faced a real risk of serious harm if returned to South Africa, the issue of whether effective state protection existed in respect of future incidents which were not racially motivated did not arise for its consideration.

29. Accordingly, the complaints asserted by the Applicants with respect to the First Respondent's determination regarding their subsidiary protection claim have not been made out.

30. I therefore will refuse the relief sought and make an order for the Respondent's costs as against the Applicant.