

**THE HIGH COURT  
JUDICIAL REVIEW**

[2005/959 J.R.]

**BETWEEN****A. B.****APPLICANT****AND****THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENTS****Judgment of Mr. Justice Feeney delivered the 30th day of June 2006.**

1. This is an application brought for leave to appeal by way of judicial review a decision of the Refugee Appeals Tribunal dated the 8th June, 2005. The decision was sent to the Applicant by letter dated the 9th June, 2005. The application for leave to apply for judicial review was made by notice of motion dated the 1st September, 2005 and included within the terms of the notice in sub paragraph D an application for an order for an extension of time within which to bring an application for judicial review, pursuant to section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. The High Court is permitted under that subsection to extend the time if there is good and sufficient reason. Having considered the affidavit of the Applicant, A. B., sworn herein on the 1st September, 2005 and in particular the contents of paragraph 12 thereof I am satisfied that there are good and sufficient grounds to grant an extension of the 14 day period provided for in section 5 up to and including the 1st September, 2005. It is apparent from the averments contained in paragraph 12 that immediately on receipt of the decision that the Respondent contacted the Refugee Legal Service and that thereafter it was their internal procedures, in seeking opinions from counsel, which caused the delay in the commencement of this application. It is apparent that the reason the proceedings were initiated outside the statutory time limit was because legal aid had to be sought and obtained and that it was the time involved in obtaining such legal aid which caused the delay. I have already indicated during the course of the hearing that the time for the making of this application should be extended up to and including the 1st September, 2005.

2. Pursuant to section 5(2)(b) of the 2000 Act this court is obliged to be satisfied that there are substantial grounds for contending that the decision of the Refugee Appeals Tribunal ought to be quashed.

3. The factual background to this application is that the Applicant who is a Kurd from Iraq arrived in the United Kingdom on the 31st July, 2000. It is apparent from documentation received from the United Kingdom Home Office that when the Applicant arrived there he identified himself as Salah Mohamad Rashid Khalil with a date of birth of the 1st July, 1974. The Home Office document indicates that the Applicant arrived without documents and claimed asylum on the day of his arrival using the name Khalil. The application for asylum was pursued with that name and date of birth and the application was refused on the 31st March, 2001 and thereafter the Applicant lodged an appeal to the United Kingdom authorities on the 8th May, 2001. The appeal was dismissed on the 6th February, 2002, with all appeal rights deemed to have been exhausted on the 7th May, 2002.

4. The Applicant subsequently came to Ireland arriving on the 17th November, 2002 and applied for asylum. The application for asylum was made in the name of A. B. and an application for refugee status questionnaire was completed by the Applicant on the 30th November, 2002. The name of A. B. was used and the date of birth which was given was the 21st April, 1980.

5. Thereafter the application proceeded on the basis of that name and date of birth without any reference to the previous application under a different name in the United Kingdom. The fact and existence of the previous application for refugee status in the United Kingdom under a different name was not disclosed by the Applicant until the Home Office of the United Kingdom had confirmed, from fingerprints supplied, a positive match with the fingerprints of the Applicant and the person known in the United Kingdom as Salah Mohamad Rashid Khalil.

6. Initially the Refugee Applications Commissioner recommended that the Applicant be returned to the United Kingdom and that recommendation was overturned by the Refugee Appeals Tribunal by decision dated the 2nd February, 2004. The consequences of that decision was that the Applicant's application for a declaration as a refugee was considered within this State and the Applicant's file was sent to a Refugee Applications Commissioner for the purposes of carrying out an investigation as provided for under section 11 of the Refugee Act 1996 (as amended). As part of that process the Applicant was interviewed on the 6th May, 2004. In the initial questionnaire the applicant had stated that he had left Iraq on the 25th October, 2002. In fact the Applicant had been in the United Kingdom from the 31st July, 2000. During the interview the Applicant indicated that he had left Iraq on the 5th June, 2000 and not in 2002 and purported to explain the discrepancy in relation to different names and dates by claiming that his correct name was the one initially given to the Irish authorities and in respect of which this application is brought and that the failure to inform the Irish authorities of the application in the United Kingdom was because the Applicant claimed that he feared he would be returned to the United Kingdom and that the United Kingdom would return him to Iraq.

7. The Refugee Applications Commissioner completed a report pursuant to section 13(1) of the 1996 Act dated the 10th June, 2004, which recommended that the Applicant should not be declared a refugee and also that the provisions of sections 13(6)(b) and (d) of the 1996 Act be applied to the application. That recommendation was appealed and written submissions were lodged together with various country of origin information by letter dated the 9th July, 2004. The Applicant's appeal was dismissed by a decision dated the 30th July, 2004. That decision was the subject of a judicial review application which resulted in an order of this court of the 11th May, 2005, vacating the decision of the Refugee Appeals Tribunal of the 30th July, 2004. Thereafter the Respondent undertook a re-determination of the Applicant's case and by letter dated the 19th May, 2005, as part of that re-determination process the Applicant's solicitors updated the country of origin information. The matter was reconsidered by a member of the Refugee Appeals Tribunal and a decision of that member was set forth in a written decision dated the 8th June, 2005. It is that decision which is the subject matter of this judicial review application. The decision found that the Applicant was not a refugee within the meaning of section 2 of the Refugee Act 1996 (as amended) and the Tribunal member affirmed the recommendation of the Refugee Applications Commissioner and dismissed the appeal.

8. In his written decision of the 8th June, the member determined that he was satisfied that the Applicant had made an asylum application in another State and was one who made statements of such a false contradictory, misleading and incomplete nature as to lead to the conclusion that the provisions of sections 13(6)(b) and (d) were warranted in the case. The member went on to make an adverse determination as to the Applicant's credibility referring to his claim in the questionnaire that he was subject to persecution in Iraq at the time when in fact he was in the United Kingdom. Further reference was made to the fact that the Applicant changed his story at interview to the effect that he was persecuted in Iraq beginning on the 25th May, 2000. The member determined that such a

change in the Applicant's claim fundamentally undermined the Applicant's credibility with regard to the account he had given of his alleged difficulties in Iraq. The member also considered the Applicant's explanation for using different names and dates of birth in pursuing applications for asylum in the United Kingdom and Ireland. The member also expressly considered the judgment of Peart J. in the case of *Ojelabi* [2004] 405 JR (delivered on the 28th February, 2005) in relation to the legal consequences of a lack of credibility fundamentally infecting the subjective element of a claim of well founded fear of persecution.

9. In the application brought on behalf of the Applicant herein a number of points are raised.

10. Firstly, it is suggested that a finding pursuant to section 13(6)(b) that the application is manifestly unfounded should not have been made in the light of the explanation provided by the Applicant for the making of false statements. I am satisfied that there was material available to the member to allow and permit him to determine that the Applicant had made statements or provided information in support of his application of such a false contradictory, misleading or incomplete nature as to allow and permit the conclusion that the application was manifestly unfounded. The decision of the Tribunal identifies the false contradictory, misleading and incomplete statements and information.

11. It is not for this court in a judicial review application to seek to impose or transplant its view in relation to credibility. It is important for the court to recognise as was expressly stated by Finlay Geoghegan J. in *Bujari v. The Minister for Justice, Equality and Law Reform and Others* judgment of the 7th May, 2003 at p. 5 thereof:

"The assessment of the credibility of the Applicant is a matter for the examiner at the first instance or on appeal by the member of the Tribunal."

12. The process by which such credibility is assessed is a matter which is within the remit of this court to consider upon a judicial review. It is clear from the decision of the Tribunal member that he was aware of the Applicant's explanation for his provision of false contradictory, misleading and incomplete information and statements and that the same was considered by him. In the light of the finding by the member that the Applicant changed his story at the interview to alter the dates of the alleged persecution by some two and a half years and in the light of the finding of the use of a false name and notwithstanding a purported explanation there was material available to allow and permit the member come to an adverse finding in relation to credibility. The process by which such credibility was assessed is sufficiently identified within the decision of the member including the manner in which the purported explanation was addressed.

13. As pointed out by Finlay Geoghegan J. guidance is provided as to the manner in which an assessment should be carried out by examiners in the UNHCR Handbook. It is appropriate to have regard to the fact that in paragraph 196 it is stated that it is a general legal principle that the burden of proof lies on the person submitting a claim. The guidelines at paragraph 197 identifies that the requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an Applicant for refugee status finds himself but that allowance for such possible lack of evidence does not however mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the Applicant. This I view as being a correct approach. It is clear that the guidelines at paragraph 195 identify that it is for the person charged with determining an Applicant's status to assess the validity of any evidence and the credibility of the Applicant's statements.

14. This Applicant had pursued an application for refugee status in the United Kingdom to completion under an entirely different name and date of birth giving different dates for significant and important events. In those circumstances the finding of lack of credibility is based upon an analysis leading to a rational determination that the truth had not been told.

15. Paragraph 196 of the UNHCR Handbook states that the burden of proof lies on the person submitting a claim. The courts in this jurisdiction have also highlighted the central role of the applicant in the Supreme Court decision of *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 at pp. 395 and 396 where it is stated:

"First, it must be observed that a person seeking asylum of refugee status is the Applicant for that status. There is an administrative procedure in place to carry out and assist him or her in the processing of that application. He or she is not a passive participant in that process..."

16. A second ground relied upon by the Applicant in pursuing this application for judicial review is that there was a breach of fair procedures because it is suggested that the Tribunal member failed to consider the Applicant's reason for the change of his story. The obligation which it is suggested was on the member is that to be identified from the decision of Finlay Geoghegan J. in *Bujari v. The Minister for Justice, Equality and Law Reform* (decision of the 7th May, 2003) to the effect that a Tribunal member is under an obligation as a matter of fair procedures in the assessment of an Applicant's claim for refugee status to consider and assess the explanation given to him at the appeal's oral hearing of the reason for which the Applicant did not disclose at an earlier stage and was now disclosing information. It is suggested that there is an obligation on a Tribunal member as a matter of fair procedures in assessing an Applicant's claim for refugee status to consider and assess an explanation given to him. It is clear from the written decision herein that the Applicant's explanation was expressly considered and it follows that such explanation was not accepted. There is a clear basis for same in the light of the inconstancies, false statements and misleading information provided by the Applicant. I am therefore satisfied that even if one were to accept the obligation contended for on the Tribunal member to ensure that as a matter of fair procedures in the assessment of an Applicant's claim for refugee status that the member considers and assesses an explanation provided by an Applicant that on the facts of this case that such occurred.

17. The third ground relied upon to support the application for judicial review relates to the Tribunal member's dismissal of the Applicant's subjective fear on the basis of the Applicant's change of story at the interview. It is apparent from the documentation herein that the Applicant contended that he had a fear of persecution based upon a family history which he had identified. The stated family history contained in the application referred to the Applicant's father's alleged involvement with the Baath party and that he was a collaborator against the Kurd's and that he was murdered. It is claimed on behalf of the Applicant that there was a failure on the part of the Tribunal member to apply country of origin information as contained in the letter of the 19th May, 2005. It is also claimed that the Tribunal member made no finding in respect of what part of the Applicant's account he did not believe and that the finding that the Applicant's subjective fear had no substance should not have been made.

18. The facts of this case demonstrate that there was material available which allowed the Tribunal member to determine that he could not rely upon the Applicant's factual statements as to his background. Since the Applicant's subjective fear of persecution was predicated upon an acceptance of facts provided by him of his family history it was open to the Tribunal member to determine that the Applicant's lack of credibility fundamentally infected the subjective element of the applicant's alleged well founded fear of persecution.

19. The fourth matter identified on behalf of the Applicant and set forth in the Applicant's skeleton argument was a claim that the Tribunal member had failed to apply the correct principles and in particular that as a decision maker he had failed to assess the credibility of the various elements of the Applicant's refugee claim and should not dismiss those parts of the claim that, whilst of doubtful veracity, cannot be dismissed as totally false. I have already in this judgment identified that the finding of lack of credibility was based upon an analysis leading to a rational determination that the truth had not been told. That finding applied to the information provided by the Applicant as to his personal circumstances and family background.

20. This is not a case such as the one considered by Peart J. in *Da Silveira v. The Refugee Appeals Tribunal and Others* judgment delivered the 9th July, 2004, which was a case where on the facts therein a lack of credibility on the part of the Applicant applied in relation to some but not all, past events and therefore did not foreclose or obviate the necessity to consider whether, if returned, it is likely that the Applicant would suffer convention persecution. The lack of credibility in this case related to the Applicant's identification of his true identity, family background, history and the circumstances of his departure from Iraq. This is not a case such as the *Da Silveira* case where simply because the Tribunal on an inference drawn from incorrect facts in relation to a particular matter concluded that the Applicant cannot be believed. In this case it was claimed by the applicant based upon a forward looking allegation of fear of persecution in Iraq that he was in fear of persecution. That fear was claimed to be based upon the Applicant's family history and the subjective fear claimed was dependent on same. This is the type of case consistent with the one referred to by Peart J. in the decision of *Imafu v. The Minister for Justice, Equality and Law Reform and Others* delivered on the 9th December, 2005, wherein he stated (on p. 10):

"In my view, while accepting as a general proposition that the Horvath principle is a good one and in many if not most cases might be appropriate, it does not mean that there cannot be an exceptional type of case where the Tribunal Member can quite adequately and completely assess and reach a conclusion on the personal credibility of the applicant, such that there would be no possible benefit to be derived from seeing whether the applicant's story fits into a factual context in her country of origin."

21. The facts of this case demonstrate that since the factual basis requiring consideration of how the Kurds might treat a member of the family of a former collaborator of the Baath party are dependant upon an acceptance of the Applicant's alleged family history and since such family history was not accepted as being accurate it would follow that no possible benefit could be derived from seeking to ascertain whether the Applicant's alleged story fits into the factual context of the country of origin.

22. A fifth ground relied upon related to the claim that the Tribunal member had made no assessment of the conditions in Iraq and there had been no expressed finding that the Applicant is not from Iraq and he had failed to take into account the dangerous situation pertaining in Iraq and the strong country of origin information in respect of same. It was also claimed that the member had erred in law in failing to apply a forward looking test in determining whether the Applicant had a well founded fear of persecution in Iraq. In the notice of appeal submitted on behalf of the Applicant the apprehension of fear relied upon was that the Applicant feared for his life if returned to Iraq in that he believed that he would be killed by the Kurds in revenge for the actions of his father against them. That subjective fear is predicated upon an acceptance of the Applicant's family history. In the light of the finding made by the member as to credibility that essential ingredient of a credible family history is missing. The Tribunal member expressly referred to and relied upon the judgment of Peart J. in the case of *Ojelabi v. The Refugee Appeals Tribunal and Others* delivered on the 28th February, 2005 referring to the lack of credibility fundamentally infecting the subjective element of a well founded fear of persecution. I have already determined that there was a rational basis for the member in making such a finding of lack of credibility. The approach adopted by Peart J. in *Ojelabi* (at p. 7) is equally applicable to the facts of this case namely:

"It is quite clear that the applicant was simply not found to be believable to any extent at all, and that even if a large measure of allowance was allowed to him in relation to alleged facts, even then he would not come within the meaning of persecution. But credibility was totally absent."

23. I am satisfied that this court can find no reason to fault the manner in which credibility was assessed

24. It follows from the above findings that none of the grounds by which it is sought to impugn the decision can succeed and that there are rational and cogent reasons set out for such decision. This is a case where the lack of credibility fundamentally infects the subjective element of an alleged well founded fear of persecution. It is against that background that the court rejects the grounds raised concerning a lack of consideration of country of origin information and the alleged failure to apply a forward looking test in determining whether the Applicant had a well founded fear of persecution in Iraq.

25. The court is not satisfied that there are substantial grounds for contending that the decision of the Refugee Appeals Tribunal ought to be quashed and so determines.