

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2012 No. 490 J.R.]**

**IN THE MATTER OF THE REFUGEE ACT 1996, THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, THE EC (ELIGIBILITY FOR PROTECTION) REGULATIONS 2006, COUNCIL DIRECTIVE 2005/85/EC AND THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

**BETWEEN**

**S.A. (SYRIA)**

**APPLICANT**

**AND**

**MICHELLE O’GORMAN SITTING AS THE REFUGEE APPEALS TRIBUNAL, AND THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENTS**

**AND**

**THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice McDermott delivered on the 12th day of April, 2013**

**Relief Sought**

1. The applicant, a Syrian national, by notice of motion dated 31st May, 2012, sought leave to apply for judicial review for orders of *certiorari* in respect of the recommendation of the first named respondent dated 16th April, 2012, affirming the recommendation of the Office of the Refugee Applications Commissioner made the 30th December, 2011, that he should not be declared a refugee.

2. The grounds upon which the application was made are set out at paras. A.I, to V. of the original statement of grounds. The relief sought in para. A.VI was not pursued. Those grounds were summarised in the following way in the course of submissions:-

- (1) The Tribunal failed to assess the risk of persecution faced by the applicant in Syria (Grounds 6.A.I. and II.);
- (2) The Tribunal failed to assess the applicant’s explanations for his lack of documents, his failure to claim asylum in Turkey, the Ukraine and Denmark and his delay in claiming asylum fairly (Ground 6.A.III);
- (3) The Tribunal unreasonably held the applicant’s lack of documents against him (Ground 6.A.IV);
- (4) The Tribunal’s treatment of country of origin information was unreasonable in respect of conscription in Syria (Ground 6.A.V) (related to (1) above).

3. The parties agreed that the application seeking leave to apply for judicial review and any substantive application that might follow the grant of such leave should be heard and determined by way of a single hearing. Submissions were prepared and furnished to the court on that basis. Application was made to the court for an early hearing. On the basis that the parties would confine themselves to twenty minutes each in oral argument with ten minutes for reply, the court granted the parties an early hearing on 30th January, 2013.

**Background**

4. The applicant, a Syrian national, was born in 1988 and resided with his family near Homs, Syria until he left to study in Moldova in 2005 at the age of seventeen. He remained in Moldova on a student visa until he completed his studies at which point he was obliged to return to Syria in July, 2011 aged 23. He hoped on his return home to commence work and support his family. During the summers of 2005 and 2006, the applicant was obliged to do military training in Syria: this was before the outbreak of the recent civil unrest in March 2011. However, when he returned to Damascus on 4th July, 2011, he claimed that he was taken to what he described as the “secret police office”. His passport, mobile phone and bag were taken from him and he was questioned and inducted into the army. He was taken to Al Gazlania training camp and remained there for three days after which he was taken to an area called Jesir Al Shaqor where he remained between 8th July and 11th July, 2011. He was part of a unit directed to break up demonstrations and was armed with a Kalashnikov rifle. He described how he was ordered to engage in crowd control by shooting in the air but denied that he had shot or abused any person. He stated that there was another unit in the army which was engaged in shooting people who did not disperse. He witnessed the killing of a large number of people by the army and decided to desert. On 12th July, 2011, during a rest period he went to a village wearing his army uniform, took it off and told the people there that he wished to leave Syria. He did so. He is now afraid that he would be shot for desertion if he returned to Syria.

5. Following his desertion, he claimed that he travelled across the Turkish border at night and made his way to Istanbul where he met his cousin. He was then smuggled out of Turkey with his cousin’s help by ship to the Ukraine. On arrival in the Ukraine he was met at the port by his cousin who arranged his travel to Ireland where he arrived on 10th August, 2011, having stayed overnight in Denmark in transit.

6. He stated that he travelled on a false Romanian passport. He claimed that he did not seek asylum immediately because he was told by a failed asylum seeker whom he met in Dublin that obtaining asylum in Ireland was next to impossible. He lived illegally in the state

until he tried to obtain a PPS number in October, 2011 at which stage he was arrested. On 24th October, 2011, he made an application for asylum at Cloverhill Prison. He claims that he would be persecuted in Syria on the basis of his political opinion and fears that if returned he would be treated as a deserter and face the death penalty.

7. In the course of his application for asylum the applicant completed a questionnaire on 9th November, 2011, and submitted to a s. 11 interview on the 17th November. Thereafter, the Refugee Applications Commissioner recommended that he not be declared a refugee. The applicant appealed this decision to the Refugee Appeals Tribunal. The Tribunal affirmed the recommendation of the Refugee Applications Commissioner on 16th April, 2012 and the applicant was notified of the decision by letter dated 18th April, 2012, received by the applicant's solicitors on 19th April, 2012.

### **The Tribunal Decision**

8. It is clear from the "analysis of the applicant's claim" at para. 5 of the Tribunal decision that the credibility of the applicant's account was determined "prior to considering the question of the particular social group" of which he claimed to be a member namely "forced conscription males". The distinction sought to be drawn in the decision between the credibility of the applicant's account and whether he was a member of the social group of "forced conscription males" is unsustainable in this case. His claim to be a deserter following conscription is clearly at the core of his account. His description of his return to Damascus and what transpired at the airport and thereafter, was clearly an account of being inducted into a group of "forced conscription males". The Tribunal's decision focuses upon four issues in respect of the credibility of the applicant's account:-

- (a) The credibility of the applicant's claim that he returned to seek employment in Syria in July, 2011 notwithstanding the outbreak of civil unrest and what it presumed to be his knowledge as to the conscription of males arriving at Damascus airport;
- (b) The absence of documentary evidence to support his account of how he travelled from Syria to Ireland;
- (c) The failure of the applicant to apply for asylum at the time of his arrival in the State;
- (d) The failure of the applicant to apply for asylum in Turkey, the Ukraine or Denmark.

The Tribunal assessed the applicant's claim that every male who arrived in Syria was forced to join the army. The Tribunal acknowledged that country of origin information on [file:-](#)

"...states that Syrians who have been abroad and who have not yet performed military service are routinely interrogated at the airport and may be sentenced or ordered to perform military service. Border Control in Syria is "known" to be strict, especially at airports."

9. The Tribunal then stated that:-

"Considering the situation in Syria in July 2011, the fact that the applicant was already familiar with the Syrian army having performed some military service and the applicant's claim that males returning to the country are forced to join the army, it is not credible that the applicant would return to seek employment in Syria in July, 2011."

This is the only reference to the applicant's credibility by the Tribunal concerning his experience in Syria that is separate from his description of events after he deserted. Other issues concerning the applicant's credibility concern the account of his journey to Ireland, the absence of documentation in respect of that journey, his failure to apply for asylum as soon as possible on entering the State and his failure to seek asylum in Turkey, the Ukraine or Denmark. These issues were relevant to the assessment of the applicant's credibility in accordance with s. 11(B) of the Refugee Act 1996, as amended. Amongst the matters to which the Tribunal must have regard are:-

- (i) Whether the applicant possessed identification for identity documents and if not, whether he provided a reasonable explanation for the absence of the documents;
- (ii) Whether the applicant had provided a full and true explanation of how he travelled to and arrived in the state;
- (iii) Whether the applicant has provided a reasonable explanation to support his claim that the State is the first safe country in which he has arrived since leaving his country or origin; and
- (iv) Whether, where the application was made at a place other than the point of arrival, the applicant provided a reasonable explanation as to why asylum was not claimed immediately upon arrival in the state.

Though these are matters to which the Tribunal was obliged to have regard, care must be taken to ensure that a disproportionate emphasis is not placed upon them in the overall assessment of the applicant's claim.

### **Credibility of the applicant's claim concerning his return to Syria – Grounds 6.A.I, II And V**

10. It is well settled that this Court is not a court of appeal from the decision of the Tribunal. In this case, the decision is challenged on the basis that it was unreasonable or irrational in the assessment made of the credibility of the applicant's account of his return to Syria and induction into the army which was the core issue for the Tribunal.

11. It was for the applicant to demonstrate a "well founded fear of being persecuted", which has both a subjective and an objective element. The UNHCR Handbook states at para. 41:-

"41. Due to the importance the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on

conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

12. In *IR v. Refugee Appeals Tribunal* [2009] IEHC 353, Cooke J. provided the following guidance as to how evidence as to credibility ought to be considered and how a judicial review of a decision based on credibility should be conducted. He said (*inter alia*):-

"4. The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.

5. 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.

6. The reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental to the account given...

8. When subjected to judicial review a decision on credibility must be read as a whole and the court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination and disregard of the cumulative impression made upon the decision maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.

9. Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is *prima facie* relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.

10. 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."

13. Leaving aside the matters considered by the Tribunal concerning the applicant's journey to Ireland, his late application for asylum, the absence of travel documents and his failure to seek asylum in Turkey, the Ukraine or Denmark, the core facts in relation to the credibility of the applicant's account of his personal circumstances relating to his education and family are undisputed and are to a significant degree supported by the documentation supplied.

14. As already noted the applicant claimed that on his return to Damascus on 4th July, 2011, he was conscripted into the army, following which he deserted due to his unwillingness to engage in the suppression of his fellow citizens. The Tribunal assessed his credibility in this matter as follows:-

"According to country of origin information the difficulties in Syria began in March, 2011 and in May, 2011 army tanks entered Homs and the suburbs of Damascus in an effort to crush anti-regime protests (Appendix B). In June, 2011 over 10,000 people fled to Turkey. The applicant states that every male who arrives in Syria is forced to join the army (Question 77, Interview) and country of origin information on file states that Syrians who have been abroad and who have not yet performed military service are routinely interrogated at the airport and may be sentenced or ordered to perform military service. Border Control in Syria is "known" to be strict, especially at airports. Considering the situation in Syria in July 2011, the fact that the applicant was already familiar with the Syrian army having performed some military service and the applicant's claim that males returning to the country are forced to join the army, it is not credible that the applicant would return to seek employment in Syria in July, 2011 (Q. 62, Interview)."

15. The applicant's account that he was a member of a particular social group namely "forced conscription males" was supported by country of origin information submitted to the Tribunal by the applicant on 2nd February, 2012. It supported the proposition that Syrian males were required to register for military service when they reached eighteen years of age and may be conscripted between the ages of eighteen and forty years. There were penalties for evasion. The information also confirmed that Syrian nationals living outside the country were often subjected to questioning upon re-entry to Syria and may be charged with draft evasion. Some Syrian immigrants who were visiting the country were jailed for failing to pay an exemption fee for military service. This country of origin information was offered in support of the contention that the applicant had a legitimate fear supported by the objective evidence that he would be stopped on re-entry to Syria and detained and questioned in relation to his military service and desertion. The Tribunal failed to regard this information as objectively sourced material supportive of the applicant's contention. Instead the Tribunal used this information to conclude that it was incredible that a person in the applicant's position would ever have decided to return to his homeland if there were a chance that he would be conscripted.

16. That finding involves the acceptance by the Tribunal that the country of origin information was correct before it could measure the applicant's claim against it. It was noted by Kelly J. in *Camara v. The Refugee Appeals Tribunal* (Unreported, High Court, Kelly J., 26th July, 2000) in respect of the assessment of credibility:-

"...simply considered there are just two issues. First, could the applicant's story have happened or could his apprehension come to pass on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent, with what is known about the country of origin, then the basis for the right inference has been laid."

The court is satisfied that in this instance there was no evidence to support the conclusion that the applicant would not have returned home to seek employment in July, 2011. The Tribunal laid great emphasis on the fact that the applicant was "already familiar with the Syrian army having performed some military service". The evidence in that regard was that over two summers the applicant received some limited military training from which the Tribunal inferred that the applicant would have concluded that he should not have returned home in July, 2011. It is not the applicant's case and he never asserted that, before he travelled home, he was fully aware of the country of origin information supplied to the Tribunal in February 2012, to the effect that he would be detained and

conscripted into the Syrian army when he arrived at Damascus airport in July 2011, nor was there any evidence to support that proposition. He did not contend that this had happened to him on previous occasions prior to the outbreak of unrest when he had returned home for the summer. There was nothing in the evidence to suggest that he was aware of this danger or that it had existed prior to the outbreak of the civil unrest in March 2011. The only evidence in this regard is that he had completed his course as a student in Moldova and was no longer able to remain in Moldova on a student visa. In addition, his passport was due to expire which also required him to return home.

17. The court notes that the country of origin information supplied on this matter at the appeal stage by the applicant's solicitors followed a finding by the Refugee Applications Commissioner that there was no evidence that returnees to Syria were detained and conscripted. Curiously, the Tribunal found that the additional country of origin information which clearly provided objective support for the proposition that a young man of his age returning to Damascus in July, 2011 was at risk of conscription, undermined his account of events because, it concluded that he, knowing of this risk, nevertheless returned to this homeland. Apart from the fact that this information could not have been compiled unless men of conscription age had in fact returned to Damascus and been treated in this manner, there was no evidence to suggest that the country of origin information submitted at the appeal stage was well known to the applicant when he made his decision to return.

18. Further, there were a number of important aspects of the applicant's case which were not the subject of an adverse credibility finding:-

- (a) There was no issue as to the applicant's identity or age – it was accepted that he was Syrian and was 23 on his return;
- (b) There was no suggestion that the applicant's account that he had travelled to Moldova as a student where he had graduated was untrue;
- (c) The applicant had produced documentary evidence of his graduation in Moldova having successfully completed his pharmaceutical studies as described;
- (d) The applicant had submitted a copy of the passport which he claimed had been seized by the Syrian authorities on his return to Damascus in July, 2011. His solicitors had furnished the authorities with an explanation as to how he was in possession of a copy of the passport in that he was required to submit his passport from time to time to the Moldovan authorities and he was able to obtain a copy which they had retained on file;
- (e) The applicant's account that his family was still in Syria was not doubted;
- (f) The applicant's account that he had returned home in the summers of 2005 and 2006, and received military training during that period was accepted;
- (g) The country of origin information relied upon by the Tribunal Member was furnished by the applicant in the course of his appeal to substantiate his contention that young men returning to Damascus were, at that time, routinely detained and compelled to enter military service.

19. The court is satisfied that the Tribunal gave inadequate consideration to the country of origin information submitted on the applicant's behalf at the appeal stage and, in particular, the fact that it was consistent with the applicant's account of his experience when he returned to Damascus in July 2011. It is clear, therefore, that the inference was open to the Tribunal that his story could have happened in that it was consistent with the country of origin information submitted. The court is satisfied that the inference drawn by the Tribunal was not sustainable on the evidence and involved a degree of speculation on the part of the Tribunal. This speculation failed to take account of the other elements of the applicant's account relating to his family, studentship in Moldova and the fact that he was obliged to return to Syria at that time. The court is, therefore, satisfied that the Tribunal's assessment of credibility in this case failed to take account of "the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed". This aspect of the finding cannot be regarded by the court as based on facts "untainted by conjecture or speculation". The court is satisfied in all the circumstances that the treatment by the Tribunal of the country of origin information which was crucial to its determination on credibility in this case, was unreasonable. Therefore, the court is satisfied that substantial grounds have been demonstrated in respect of Grounds 6.A.I, III and V, upon which to grant leave to apply for judicial review for an order of *certiorari* to quash the Tribunal's decision. Further, the court, having considered all of the evidence and information in the case and the submissions of the parties together with the notice of opposition filed, is satisfied that the decision of the Tribunal was fundamentally flawed and unreasonable in its assessment of the country of origin information submitted on appeal on the same grounds.

#### **The applicant's failure to claim asylum elsewhere, or promptly on arrival in the State and lack of documentation – Grounds 6.A.II and IV**

20. The applicant contends that the Tribunal failed to assess his explanations for not claiming asylum in Turkey, the Ukraine and Denmark prior to this arrival in Ireland and his delay of some ten weeks in claiming asylum following his arrival. The applicant also claims that the Tribunal acted unreasonably in reaching an adverse credibility conclusion based on his lack of documents.

21. The applicant claimed that he did not seek asylum in Turkey because he feared that by reason of Turkey's close relations with the Syrian Government in the past, he might be returned to Syria if relations between the countries improved from their present state. A similar explanation was furnished in respect of his failure to claim asylum in the Ukraine. He stated that as a former part of the Soviet Union, the Ukraine had a very close relationship with Syria. In respect of Denmark, the applicant explained that he had only spent a very short time in Denmark prior to his arrival in Ireland and that he believed his destination to be the United Kingdom, where he was told the government protected refugees. It was submitted that the Tribunal failed to consider the reasonableness of any of these explanations.

22. Further, the absence of travel documents and the false passport on which he travelled, and a failure to provide any reasonable explanation for their absence was relied upon by the Tribunal in reaching its adverse finding of credibility against him. The applicant also claimed that this was unreasonable. It was submitted that in many cases persons fleeing their country because of alleged persecution arrived with very little and frequently without personal documents. This was acknowledged by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 2011 at paras. 196 – 197, which stated that the requirement of documentary evidence should not be too strictly applied in view of the difficulty of proof inherent to the special situation in which an applicant for refugee status finds himself.

23. The first named respondent submitted that the decision on these matters was in accordance with the provisions of s. 11(B) of the Refugee Act 1996, as amended, referred to earlier in this judgment. The court is satisfied that this is so. Though it was open to the Tribunal to conclude that the explanations offered by the applicant were reasonable, it was equally open to the Tribunal to reach the opposite conclusion on these matters in accordance with the provisions of section 11(B). The court is not satisfied that the Tribunal's consideration and determination in respect of those aspects of the case were unreasonable or irrational in all the circumstances. Therefore, the court is not satisfied to grant leave to apply for judicial review in respect of Grounds 6.A.II and IV. A challenge to the impugned decision could not have succeeded if based on those grounds alone. However, for the reasons already furnished the court is satisfied to grant relief in respect of Grounds 6.A.I, III and V.

#### **Conclusion**

24. The court is, therefore, satisfied that the determination of the Tribunal of 16th April, 2012, should be quashed and that the case should be remitted to the Tribunal for determination by a different Tribunal Member.