

THE HIGH COURT
JUDICIAL REVIEW

[2013 No. 640 J.R.]

BETWEEN**S.F. (AFGHANISTAN) (A MINOR SUING THROUGH HIS NEXT FRIEND THOMAS DUNNING)****PLAINTIFF****AND****THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM,****RESPONDENTS****JUDGMENT of Mr. Justice Eagar delivered on the 4th day of February 2015**

1. This is a telescoped application for an order of *certiorari* quashing the decision of the first named Respondent and seeking an order remitting the appeal of the Applicant for determination de novo by a separate member of the Refugee Appeals Tribunal

2. The Applicant was born in Bagrami village, Nangarhar province, Afghanistan on the 10th October 1995. He left Afghanistan on the 4th June 2011 and was stopped and arrested by Irish Immigration Authorities in Dublin Airport on the 6th June 2011. The Applicant was then 15 years of age and was taken into the care of the HSE as an unaccompanied minor. He applied for asylum on the 6th November 2011 and completed the written application form on the 17th January 2012. His interview with the Refugee Applications Commissioner took place on the 22nd March 2012 and the Commissioner recommended that the Applicant had not established a well founded fear of persecution as required by s. 2 of the Refugee Act 1996 (as amended).

3. He served notice of appeal against that recommendation to the first named Respondent and the appeal hearing took place on the 11th October 2012. The Applicant gave evidence before the first named Respondent and was cross examined by the presenting officer of the Refugee Applications Commissioner.

The Applicant's claim

4. The Applicant stated he was born in Bagrami village, Jalalabad and he lived there until May 2011 when he moved to the city of Jalalabad with his family. The Applicant stated that he has brothers and sisters and he stated that he was the second eldest. The Applicant stated that his family were currently living in Kabul and that his eldest brother is married in Kabul. The Applicant stated that he stopped attending his school in Bagrami after an explosion in 2011. Two of the Applicant's friends were killed in this explosion. He stated he did not remember the month of the explosion. The Applicant stated that later when attending an English course in Jalalabad City, he was stopped by two people who told him to stop learning English. He stated that his books were taken. When he told his mother this she told him to stop attending this course. He said that he knew one of the men. When he told his mother this she told him to stop attending this course. He explained that the course was conducted far from his house and the security situation was not good. The Applicant stated that he stopped attending this English course but a few days later the Applicant stated that when he was going to buy something, he was stopped by the same two people. The Applicant said he was taken to a jungle and advised to register at the local Madrassa. The Applicant's father agreed to allow him to attend this Madrassa. The Applicant explained that he started studying at the Madrassa in April 2011. After some days the Applicant said that he was told that he would have to become a suicide bomber. When the Applicant told his parents about this his father told the Applicant to tell the people at the Madrassa that he had to go to Kabul with his father who needed medical treatment. When the Applicant advised the Madrassa of this, the people at the Madrassa agreed and told him to come back. The Applicant states that his family left for Jalalabad City the next night. The Applicant stated that his father returned to his village to get some clothes and that his father also registered a complaint at the local police station. After a few days in Jalalabad the Applicant states he received a call on his mobile phone from the people in the Madrassa inquiring where he was living and the Applicant indicated to those people that he was in a hospital in Kabul with his father. At that point the Applicant's father then decided to send the Applicant to his aunt in France who had been recognised by the French authorities as a refugee. The Applicant's travel was organised and he travelled to Ireland via Dubai with another boy. The Applicant said that after he left his family received a letter from the Taliban. The Applicant states that the letter was sent one month after he arrived in Ireland. The Applicant's family then relocated to Kabul from Jalalabad. According to the Applicant, people would ask about him and his family after they left. He stated that as he reported against the Taliban they wanted to find him and kill him. In response to a finding in the s. 13 report, the Applicant explained that his father wanted to remain in Jalalabad but after the family received the letter from the Taliban they had to move to Kabul. He said it would be harder to find his family in Kabul as it was a bigger city. The Applicant stated that were he to go to Kabul he feared that he would be found as the Taliban have a big network and people everywhere. In response to the presenting officer the Applicant said that his family had received a letter from the Taliban a month after he left Afghanistan and that they had also received a letter from the Taliban prior to his departure to Ireland. When asked about his father's view of the Taliban the Applicant said that he thought they were not nice but that his father had supported the idea of attending the Madrassa as the Applicant had nothing to do at this time.

5. When asked how he could be found so easily by the Taliban and his parents had not been found to date the Applicant explained that he was in the Madrassa for a month and that the Taliban had video recordings of him. It was put to the Applicant that if the Taliban had sent his family a letter it was likely they knew where his family were. The Applicant explained that the letter had not been sent to Kabul but had been sent to Jalalabad. The Applicant confirmed that his brothers had not been called on by the Taliban. The Applicant was questioned as to why prior to the appeal hearing there was only mention of one letter being received from the Taliban. The Applicant stated the first letter came to Bagrami and the second letter was sent to Jalalabad. He said that he had not previously mentioned the second letter as he was not asked specifically about it so he did not mention it. The Applicant stated he had finished attending his high school three or four months before travelling to Ireland. He was asked why he had indicated in the questionnaire that he had attended this school until May 2011 and the Applicant stated that he had stopped going regularly to the school and he completely stopped attending a month before he came to Ireland. He stated he did not know when he started attending his English course but he confirmed he had attended his English course for three months. He stated he stopped attending his English course

when stopped by the two men.

6. When asked why he went irregularly to Charbagh High School, if there was a security problem, the Applicant explained that he went to catch up. It was put to the Applicant if he had attended a Madrassa for about a week or two and then lived in Jalalabad for three or four weeks having regard to the fact that he came to Ireland on the 6th June 2011 this timeline did not add up. It was submitted by his solicitor that an assessment of credibility had to take into account the Applicant's mental condition.

The decision by the first named Respondent

7. The first named Respondent found a number of issues which touch upon credibility in her analysis of assessing whether the Applicant had a well-founded fear of being persecuted. It is worth noting in *"The Law of Refugee Status"* by James Hathaway and Michelle Foster (2014) that the first substantive issue which the authors detail is that of the issue of a well-founded fear of persecution:-

"The hallmark of a convention refugee is his or her inability or unwillingness to return home due to a 'well-founded fear of being persecuted.'"

8. At p. 91 they continue:-

"It is generally asserted that 'well-founded fear' entails two requirements. The first criterion is that the person seeking recognition of refugee status perceives him or herself to stand in 'terror of persecution'. His or her very personal response to the prospect of returning to his or her home country must be an extreme form of anxiety that is neither feigned nor over stated. This subjective perception of risk must be consistent with available information on conditions in the state of origin as only those persons whose fear is reasonable can be said to stand in need of international protection."

They continue:-

"The concept of well-founded fear is rather inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution but does not in any sense condition refugee status on the ability to show subjective fear."

9. In relation to the assessment of credibility they quote a case of the US Court of Appeals for the First Circuit in a case called *El Moraghy* in 2003 where the court observed:-

"The testimony of every Applicant for asylum is self-serving. This does not make it untrue."

10. The first named Respondent noted that while the Applicant had some medical difficulties it was notable that he had been unable to remember the month of the explosion which killed his two friends. However he had been able to remember with exactitude his date birth, specific dates pertaining to his travel, his family's ages and any such details. The Applicant has some education and was able to complete a detailed questionnaire. While the Applicant was young at the time of the explosion and has suffered medical problems considering the impact this explosion had on his school life, his family and friends it would be reasonable to expect that he know the month during which this explosion occurred.

11. Security concerns prevented the Applicant attending Charbagh High School and therefore it was not credible that the Applicant would then be allowed to attend English classes in a school in Jalalabad, a school which was located much further from his home.

12. The third issue of credibility was that the Applicant's family fled to Jalalabad to escape the Taliban. One of the Taliban who approached the Applicant appears to have been a local man from a shop or market. Considering that the Applicant's family were forced to flee what appears to be the local Taliban it is not credible that the Applicant's father would return to the home village and later make a complaint to the local police about his son's stated difficulties.

13. In the Applicant's testimony at the appeal hearing he stated his father received two letters from the Taliban, one in Bagrami village before he left Afghanistan and the other one in Jalalabad after the Applicant arrived in Ireland. The second named Respondent described that the Applicant had been in contact with his family after he came to Ireland and had two letters been received by the Taliban it would have been reasonable to expect that the Applicant would have been consistent during his asylum application when recounting the number of letters that were received by his father. This inconsistency further undermined the credibility of the Applicant's account. In describing the Applicant's family and the fact that no other members, brothers or sisters had been called for "Jihad" it is difficult to understand why the Applicant had been particularly singled out for "Jihad".

14. The next issue of credibility was that if the Applicant's account were to be believed his family would be of interest to the Taliban as the Applicant states that his father approached the police about his difficulties and was warned by the Taliban that if anyone told their secrets their families would be killed. If the Applicant and his family were of interest to the Taliban and considering country of origin information on file it is not credible that the Applicant's family could live in Kabul in relative safety without having had further difficulties from the Taliban.

15. The first named Respondent identified that the Applicant had medical and psychological difficulties but suggested that he had been quite clear and articulate in recounting his claim and he has demonstrated an ability to recount detail and events.

16. The first named Respondent again identified that the Applicant had medical difficulties but indicated that considering the credibility issues that arise with this claim it is unlikely that these difficulties arose from the specific asylum claim as recounted by the Applicant. The first named Respondent held that the Applicant's claim that he was sufficiently important to the Taliban to be killed due to his refusal to carry out a suicide mission is not credible.

17. The first named Respondent then dealt with the issue of internal relocation. The Applicant's family currently reside in Kabul and have not been harmed or physically approached since the Applicant's travel to Ireland. This supports the contention that the Applicant could relocate to Kabul. The Applicant stated his family are harder to find in Kabul as opposed to Jalalabad. Bagrami is close to both Kabul and Jalalabad and it supports the premise that the Applicant could reasonably relocate to Kabul.

The role of the court

18. I adopt the principles of the role of the judicial review judge as described by Cooke J. in *I.R. v. Minister for Justice Equality and Law Reform and The Refugee Appeals Tribunal* [2009] IEHC 353:-

"It is because in such cases the judgment of the primary decision-maker must frequently depend on the personal appraisal of an Applicant, that it is not the function of the High Court in judicial review to reassess credibility and to substitute its own view for that of the decision-maker. Its role is confined when a finding of lack of credibility is attacked, to ensuring that the process by which that conclusion has been reached is legally sound and not vitiated by any material error of law."

He continued:-

"While the problems inherent in the lawful assessment of testimony and other evidence going to credibility arise in a variety of forms of litigation and in other areas of judicial review, the guiding principles of the law have received particular attention in the case law relating to asylum in this jurisdiction and elsewhere in recent years and are possibly so well known to practitioners in the field as to have little need of resume by this Court at this stage."

19. Nevertheless it appears to me that it is important to once again set out the steps leading to a decision of the Refugee Appeals Tribunal.

20. The Geneva Convention relating to the status of refugees and the New York Protocol relating to the status of refugees is inserted into Irish law by s. 2 of the Refugee Act 1996 (as amended).

21. Section 11(A)(3) of the Refugee Act 1996 (as amended):-

"Where an Applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee."

22. Section 11(B) requires the Commissioner or the Tribunal to have regard to a number of matters in assessing claims of refugee status. The thirteen matters listed are factors which an adjudicator will have in mind as a matter of common sense.

23. Overlaying this is the European Union Council Directive 2004/83/EC of the 29th April 2004 which provided the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. It is noticeable that Article 4.1 states:-

"Member States may consider it the duty of the Applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the Applicant it is the duty of the Member State to assess the relevant elements of the application."

24. The European Communities (Eligibility for Protection) Regulations 2006 has a number of matters which are to be taken into account by a protection decision maker in particular all relevant matters as they relate to the country of origin at the time of taking the decision, the relevant statements and documentation presented by the protection Applicant, the individual position and personal circumstance of the protection Applicant.

25. It is often discussed in these cases as to what is the status of the UNHCR Handbook on Procedures and Criteria for determining Refugee Status (1992) and in my view it provides AUTHORITATIVE GUIDANCE (my emphasis) as to the approach to be taken in evaluating claims, in handling the burden of proof and according the benefit of the doubt to the Applicant but does not form part of the law of this jurisdiction.

26. In *I.R. v. The Minister for Justice Equality and Law Reform and The Refugee Appeals Tribunal* Cooke J. set out ten principles which might be said to emerge from the case law as a guide to the manner in which evidence going to credibility ought to be treated and a review of conclusions on credibility to be carried out:-

" 1) The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-maker and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision-maker.

2) On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.

3) There are two facets to the issue of credibility, one subjective and the other objective. An Applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded.

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 matters which are merely incidental in the account given.

7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.

8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempting to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in 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."

27. The Applicant's submissions failings are alleged as follows:-

1) A failure to deal adequately with documentary evidence and in particular the letter from the Taliban to the Applicant's father and has suggested that the first named Respondent has not questioned the authenticity of this document. He quotes reg. 5(1) (b) of the European Communities (Eligibility for Protection) Regulations 2006 "*The protection decision maker must take into account the relevant statements and documentation presented by the protection Applicant*". He submitted there was a clear failure to comply with this obligation on behalf of the first named Respondent. These submissions also relate to the Respondent's failure to take into account and afford any weight to the decision of the French authorities granting refugee status to the Applicant's maternal aunt.

2) The second major issue that the Applicant raised was the medical evidence and five psychological/psychiatric reports that had been submitted to the first named Respondent indicating that the Applicant had been deeply traumatised by what he had undergone in Afghanistan. A complaint of the Applicant was that the first named Respondent in her decision failed to engage in any way with the medical evidence or make any attempt to provide an alternative explanation for what may have caused the Applicant's severe condition and it was submitted that the first named Respondent had failed to engage in any meaningful way with the existence of corroborative medical evidence and similar to a strongly worded SPIRASI Report in a case of *J.M. (Cameroon) v. Minister for Justice Equality and Law Reform*.

3) The final complaint was that it was irrational for the first named Respondent having initially accepted that the Applicant's family could live in Kabul in relative safety without having had further difficulties from the Taliban and that the first named Respondent failed to acknowledge the important statements by the Applicant with the effect that his family continued to have problems in Kabul.

4) One further issue that arose was the extension of time for leave to seek an order of *certiorari* but having regard to the age of the Applicant and the involvement of both the HSE and in particular the affidavit of Thomas Dunning, who is described as the principal social worker for separated children seeking asylum, I feel it is appropriate to extend the time for leave to seek an order of *certiorari* quashing the decision of the first named Respondent.

28. Counsel on behalf of the Respondents indicated that in relation to the documentary evidence that the first named Respondent acted in accordance with law and fair procedures and any alleged failure to assess the documentary evidence had not been made out by the Applicant. Counsel for the Respondent indicated that the French determination in relation to the Applicant's aunt had a very different application from that of the Applicant. She was a member of the revolutionary organisation of women of Afghanistan in the city of Jalalabad, she had written articles, participated in the dissemination of the ideology of the organisation and participated in the demonstration of October 2004 denouncing the attempted rape committed against the candidate in the Presidential election. She also notably had a relationship outside marriage from which a child was born at the age of 20 and became a target of fundamentalists and had to go into hiding.

29. In relation to the failure to assess the medical evidence counsel on behalf of the Respondent mentions that the Tribunal Member quoted the decision of Rix L.J. in *S. v. Secretary of State [2006] EWCA Civ 1153* (5th July 2006):-

"...A report should be seen as corroborating the evidence of an Applicant for protection. A doctor does not usually assess the credibility of the Applicant; it is not usually appropriate for him to do so in respect of a patient or client."

30. It appears to me that the Applicant's argument that the submission by the Applicant that in relation to the first named Respondent's failure to take into account and afford any weight to the decision of the French authorities granting refugee status to the Applicant's maternal aunt is not, in my view, substantiated. It is quite clear that the French authorities' decision in relation to the Applicant's maternal aunt was very clear and noted her being a single mother in a state where fundamentalism is strong and her involvement in any women's organisations and issues has no application to the Applicant.

31. I do note from the papers the correspondence which took place between the solicitors for the Applicant and the father of the Applicant in relation to questions which were posed by the solicitors for the Applicant and the replies of the father of the Applicant. Of course these matters were not before the first named Respondent and while they may be of assistance in any application which may be made for subsidiary protection they cannot be used to challenge the decision of the first named Respondent.

32. In relation to the authenticity of the document which is the letter from the Taliban, it is certainly true that the first named Respondent did not question its authenticity and declined to send it to the Garda Technical Bureau. It appears to me that whether or not the letter was sent to the Garda Technical Bureau some measures should be taken to determine its authenticity and if the first named Respondent did accept that they are authentic it raises very substantial issues for the first named Respondent in relation to the credibility issues which were found against the Applicant. The views of Rix L.J. are of interest, and I accept that the role of a psychologist is not to engage in the task which the first named Respondent must engage in, nevertheless there are certain issues which in my view are of importance:-

- 1) The Applicant's very disturbed sleeping pattern and high anxiety levels.
- 2) His withdrawal from social activities and experiences of significant distress if conflict was evident between residents.
- 3) His description as a gentle, well-mannered young man whose natural disposition is quiet and reserved.
- 4) His presentation meets the criteria for post-traumatic stress disorder.

This is in the first report of Jennifer Rylands.

33. I note the Applicant attended Dr. Gannon, Consultant Psychologist at Connolly Norman House and Dr Gannon further diagnosed

post-traumatic stress disorder and that he was subsequently prescribed anti-psychotic medication. It is certainly true that the first named Respondent mentioned these aspects in her decision but failed to take account of the cause of his post-traumatic stress disorder. The fact the Applicant endured two friends being killed in an explosion at his age at the time it is not in my view so incredible that he could not remember the month that this took place and that this finding of the first named Respondent was unreasonable.

34. I believe that the first named Respondent should have dealt with the specifics in these reports and her merely mentioning that the fact that he had some psychiatric difficulties without further analysis constituted a breach of the Applicant's natural rights.

35. I do not propose to deal with the finding in relation to internal relocation as I do not believe that there is sufficient clarity in relation to Country of Origin Information but clearly Kabul is close to Bagrami.

36. Having regard to my findings that the documentary evidence was not challenged by the first named Respondent nor further evidence sought as to its likely origin, together with the failure of the first named Respondent to take into account appropriately the cause of the post-traumatic stress disorder identified by both the senior psychologist and the consultant psychiatrist I propose to grant an order of *certiorari* quashing the decision of the first named Respondent and granting the application of the Applicant for a determination de novo by a separate member of the Refugee Appeals Tribunal.