Neutral Citation Number [2010] IEHC 141

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2007 1412 JR**

**BETWEEN**

**M.U.Z.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL**

**(Tribunal Member, Elizabeth O'Brien)**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Edwards delivered the 12th day of February, 2010.**

**Introduction**
The applicant in this matter is an Afghani national of Pashtun ethnicity. He arrived in Ireland on the 16th of February, 2005 and sought refugee status. He did so on the basis of a fear of persecution by the Government of Afghanistan on account of his political opinions. His application for asylum was considered in the first instance by the Refugee Applications Commissioner who ruled that the applicant had failed to establish a well-founded fear of persecution in accordance with s. 2 of the Refugee Act, 1996 (as amended) and recommended that the applicant should not be declared a refugee. The applicant appealed against the commissioner's s.13 report and recommendation to the Refugee Appeals Tribunal. In a decision dated the 27th August, 2007, the Tribunal Member ruled that that the applicant had failed to "satisfy the appropriate standard of proof, low though it is, in showing that there is a reasonable likelihood that he would be persecuted for a Convention reason, as opposed to any other reason, or indeed as opposed to being prosecuted for any other reason, if returned to his country of origin." and, accordingly, pursuant to s. 16(2) of the Refugee Act, 1996 she affirmed the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of that Act.

On 26th February, 2009 the applicant applied for, and was successful in obtaining, an Order of the High Court (Peart J.) granting him leave to apply by way of application for judicial review for various reliefs as are now set forth in his amended Statement of Grounds, including an *Order of Certiorari* quashing the decision of the first named respondent dated the 27th August, 2007 rejecting the applicant's refugee appeal, which said decision was notified to the applicant on the 6th September, 2007.

The grounds upon which the applicant successfully obtained leave were:-

> "The decision of the Tribunal Member contains and relies on factual error of a material nature and/or the Tribunal Member relied on an erroneous understanding of the information and evidence before her and has relied on material error of fact in reaching her conclusions and/or has misunderstood or misconstrued the information before her and/or has failed to take account of directly relevant information.

**Background to the Applicant's Claim**
The background to the applicant's claim, as understood by the first named respondent, is set out in Part 3 of the decision, and it is appropriate to recite it. The Tribunal Member stated:

> "3. THE APPLICANTS CLAIM
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> The applicant was born on the 1st October 1972 in Pakhtia, he is Pashtun, he has had the benefit of 2 years education, he has never been employed, according to his questionnaire. The applicant is married and has 4 dependant children.
>
> The applicant claims that he is a member of Hezb-i-Islami, the Hekmatyar faction. He claims that he joined in 1361 (1990), when he was approximately 17 years of age. He claims that they were then fighting the government of the time; he claims that they fought in Gardez, Khost and Logar. He claims that in 1992 they started fighting the government of Masood; they established headquarters in Chahar-Aziab. The applicant claims that he was very involved with the party; he claims that he was involved in fighting in Chahar-Aziab and Pol-e-Charkhi. He claims that in 1373 the Taliban came to power in their area, he claims that they fought them in Ghazni also. He claims that in 1380 the Taliban fell, and that at the time Hekmatyar was in Iran, he claims that they were not offered a strong position within the government, and accordingly they started fighting against the current government. He claims that his commander was Said Khamal, and he asked the applicant to gather people to fight. He claims that he was in Zazai, close to the border with Pakistan and that they needed money and weapons to fight against the foreign forces. He claims that they were waiting for orders to fight but they did not fight, he claims that they were in fact never ordered to fight; he claims that he waited for 2 to 3 months in Zazai, for orders that never came.
>
> The applicant states that Haji Amir is a friend of his who works for the government, he claims that this man told the applicant that his name was on a government blacklist and that he was to be arrested. He claims that Haji Amir is the Maluk in their village; he claims that he is a contact between the people and the government and that he saw letters that referred to the applicant and told him that he should be careful. The applicant was told this in the third month of 1383. The applicant stated that he was not so worried about this at first, however then another leader of a group was arrested

in Logar, a man by the name of Daoud Moslih, this man had Islamic party files, he was tortured and gave a lot of information about the applicant. The applicant was asked how he knew this, he claims that this must have been what happened because a government helicopter came to their home at the end of the eighth month in 1383, and the house was searched, the applicant claims that they were looking for him. He claims that he did not return home but went to another nearby village, where he spent 3 to 4 days; ultimately he went to Pakistan where he arranged with a smuggler who took him to Iran. He claims that he stayed in Iran for 1½ to 2 months and then travelled to a Russian speaking country; he then travelled for approximately one month ultimately arriving in Ireland. The applicant was asked whether he was safe in Iran or the Russian country, the applicant answered a different question, stating that he was under the control of the trafficker at all times, the applicant was asked this question twice, and twice he answered a different question. It was put to the applicant that he had been asked twice why he was not safe in the other countries, yet he had answered with the typical response that is given to the question of why an applicant does not apply for asylum in those countries. The applicant states that when they talked to the smuggler, the smuggler agreed with the applicant to take him somewhere safe, and the smuggler did not leave him in either Iran or Russia and that therefore he assumed they were not safe. The applicant states that he had no input. He claims that he would be killed if he returns to Afghanistan.

The applicant states that he was a Commander of between 11 and 19 people. It was pointed out to the applicant that if he had control of operations in 3 different places that would suggest that he had more control, it was also pointed out to the applicant that if he was named by a high profile individual, this would also suggest that he had more control than he claims he did. The applicant again reiterated that he only had 11 to 19 ordinary soldiers operating with him.

The applicant states that his family are now moving from place to place, he submits a newspaper article that he says was sent to him by a villager with a business in Kabul city, this man told him that there was an article about him and so he sent it to him.

The applicant was asked whether he had lived in Jaje between 2001 and 2005, he responded that he did, he claimed that he was never apprehended during this time, the applicant stated that they did nothing during this time, they were simply preparing.

The applicant submits a Hezb-i-Islami card, two newspapers and two letters. These letters are (i) a notice for the arrest of the applicant issued by the Director General of National Security; and (ii) an inquiry by the Security Commander of Kabul for the arrest of the applicant.

The applicant also submits a newspaper from Anis Daily News, containing an announcement requesting information on the applicant, and also another document relating to the applicant stating that there is a photograph attached (noting that there is no photograph attached on this particular article), requesting information in relation to the applicant.

The applicant also submits a BBC persian.com article referring to the death of an ex-Commander of the Islamic government, he also submits two photographs.

The applicant was asked why the stamp on the Hezb-i-Islami card was written in English, he did not know. He was also asked why the word "refugee comm" appears on the card, he could not explain.

The applicant states that he received the letters he submits from Haji Amir. The applicant was asked whether the newspaper articles that he submitted were genuine as far as he was aware, he stated that they were.

The applicant was asked why he had no beard on the Hezb-i-Islami card, he claims that he was only 18 years of age at the time, and he was not required to have a full beard.

It was pointed out to the applicant that the translation of document 6, a newspaper article, refers to a photograph being attached, yet there is no photograph attached. The applicant claims that he does not know why this is the case, and that perhaps they made a mistake.

Again it was pointed out to the applicant that it was difficult to understand how he could have been responsible for military operations in Gardez, Logar and Kabul with only 19 men. He claims that he was responsible for supplies, and that he was identified as a supplier of weapons, he claims that these weapons came from Pakistan."

**The Decision of the Refugee Appeals Tribunal**
The applicant's claim was analysed, and the Tribunal set forth its conclusion, in Parts 6 & 7 respectively of the Decision: The Tribunal stated:

"6. ANALYSIS OF THE APPLICANT'S CLAIM

There are a number of areas of concern in relation to this particular applicant's evidence, notably the documentary evidence that he submits in support of his claim. While I accept that newspaper evidence or reports only constitute secondary evidence and are of minor persuasive value, one of the articles that the applicant submits in support of his claim refers to a photograph being attached, yet there was no photograph attached.

I also refer to the issues that I raised in relation to the Hezb-i-Islami card presented by the applicant, there is no explanation given as to why the details of the stamp appear in English, or indeed any explanation as to what the different terms mean. While the applicant claims that he was only 18 years of age at the time that the photograph was taken, and that he was not required to have a beard at this stage, I do not find this explanation reasonable, in the absence of the applicant being able to provide evidence to the effect that he was not able to grow a beard at this age. The fact that the applicant does not wear a beard in a photograph that is appended to a Hezb-i-Islami card raises questions as to the provenance of this card.

I have no way of verifying the letters that the applicant submits in support of his claim, the evidence that the applicant presents could just as easily point to the applicant being a high profile or influential commander of the Hekmatyar faction of an organisation that is described by some as a terrorist organisation, as to a conclusion that the applicant was simply a minor operator. I point to the applicant's evidence that he was a top commander, and to his control of operations in three different places, yet he claims that he was a commander of only 11 to 19 people.

I refer to Section 11B of the Refugee Act 1996, as amended, and to the importance of proving identity and nationality, I am not satisfied that the evidence that the applicant has submitted in this regard is reliable enough to support a claim as to his nationality and identity. I also refer to the fact that the applicant did not claim asylum in the first safe country in which he arrived, I refer in this regard to the fact that the applicant travelled through Russia or a Russian-speaking country. While the applicant of course gave the standard answer to the effect that he was under the control of the trafficker at all times, when asked why he would not be safe in either Iran or the Russian country (noting that the applicant in fact provided the answer to the question of why he did not apply for asylum in those countries, that was not the question asked), the fact remains that the applicant did travel through those countries.

I also point out that this applicant allies himself with Hekmatyar, who has been described by some as an international terrorist. If the applicant is indeed being sought out by the Afghan authorities, there may be a very valid reason, this applicant has given evidence that he is involved in transporting arms from Pakistan to Afghanistan, and that he has been involved in operations in three different places. In summary, his evidence in this regard is vague, there are simply too many gaps to enable me to simply arrive at a conclusion that this applicant is at risk for a Convention reason.

I find that he does not satisfy the appropriate standard of proof, low though it is, in showing that there is a reasonable likelihood that he would be persecuted for a Convention reason, as opposed to any other reason, or indeed as opposed to being prosecuted for any other reason, if returned to his country of origin."

"7. CONCLUSION

The Tribunal has considered all relevant documentation in connection with this appeal including the Notice of Appeal, country of origin information, the applicant's Asylum Questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to section 13 of the Act.

Accordingly, pursuant to section 16(2) of the Act, I affirm the recommendation of the Refugee Applications Commissioner made in accordance with section 13 of the Act."

**Submissions**
Both the applicant and the respondent, respectively, have furnished extensive written legal submissions to the Court. These were developed and somewhat amplified in oral argument at the hearing. The Court wishes to express its gratitude for Counsel for their considerable assistance.

**The Applicant's Case**
The applicant has submitted that the Tribunal Member made a significant error of fact when considering the applicant's evidence and then relied on this erroneous understanding of the applicant's evidence to ground a negative credibility finding.

The Tribunal stated at page 3 of the decision (page 216 of the Exhibits):

> *"The applicant states that he was a Commander of between 11 and 19 people."*

The Tribunal went on to state in the operative part of the decision at page 16 (page 229 of the Exhibits):

> *"I have no way of verifying the letters that the applicant submits in support of his claim, the evidence that the applicant presents could just as easily point to the applicant being a high profile or influential commander of the Hekmatyar faction of an organisation that has been described by some as a terrorist organisation, as to a conclusion that the applicant was simply a minor operator. I point to the applicant's evidence that he was a top commander, and to his control of operations in three different places, yet he claims that he was a commander of only 11 to 19 people."*

The applicant submitted that the Tribunal materially erred in fact in pointing to the applicant's *"evidence that he was a top commander"* and was in control of operations in three different places. The term "top commander" had been in the English translation of the standard questionnaire completed in respect of the applicant's application. But the applicant, when he was interviewed by the Office of the Refugee Applications Commissioner clarified that the term had been mistakenly used in the questionnaire due to a language difficulty.

It was submitted that the standard questionnaire given to the applicant in connection with his refugee status application was in the Dari language whereas the applicant's first language is Pashto. As the applicant was unable to read or write Dari, the applicant enlisted the assistance of another man from his hostel to write in the answers for him. The applicant could understand some spoken Dari but he and the man who helped him had great difficulty completing the questionnaire.

At the outset of the applicant's first s. 11 interview, which took place on 26 August 2005 and at which he spoke through a Pashto interpreter, he explained the language difficulty that compromised his answering the questionnaire to the interviewer. The interviewer then suggested that they go through the questionnaire and note any necessary clarifications.

The English translation of the answer to question 24 of the questionnaire, which sought details about service in a military organisation or grouping, stated:

> *"Yes. I was a commander of the Islamic Party of Afghanistan and the date that I became a commander was 2/5/1374."*

At page 11 of the interview report it is written that the applicant specifically made a correction to question 24 stating:

> *"I was a 'group leader' not a commander."*

The English translation of the answer to question 29 of the questionnaire, which sought details of the nature of the fear of return to the country of origin held by the applicant, stated inter alia:

> *"I am scared of being killed if I go back to Afghanistan because I was one of the top commander's of Islamic Party in Afghanistan and every body in the area knows me ... "*

At page 13 of the interview report it is written that the applicant made a correction to question 29 stating:

*"I was a 'group leader' not a 'commander'." (Emphasis in original)*

The applicant attended a second s. 11 interview on 15 September 2005. At this second interview the applicant was specifically asked at question 46 about his rank in Hezb-i-Islami and he stated that he was a group leader (page 33 of the second interview report). Then at question 47 of that interview the applicant was asked:

*"Is that different to being a Commander?"*

He answered:

*"Under the command of the commander there are 8 to 15 group leaders."*

Then at questions 50 to 52 (page 34 of the second interview report) the following exchange took place:

*"Q 50: You say at Q 29 of your Questionnaire you were one of the top leaders of Islamic Party?*

*A: It means I was a top group leader - the Farsi guy who translated the Questionnaire for me said there was no word for 'group leader' so he had to use the word 'commander'.*

*Q 51: During the last interview we corrected that at pg. 13 but what is meant by 'top'?*

*A: What is meant by 'top' is that I was actively working.*

*Q 52: Explain that?*

*A: I had subordinates + I was actively working for the party"*

Counsel for the applicant submitted that it is clear that had the Tribunal Member considered the interview notes the error of fact would not have been made in the decision; the decision-maker would have realised that there was in fact no contradiction in the applicant's evidence on the central issue of his role in the Hekmatyar faction of Hezb-i-Islami.

The Court's attention was drawn to paragraph 14 of the applicant's Affidavit where it is averred that:

"At my appeal hearing in my evidence I again told the Tribunal Member that when I used the word 'top' I meant that I was a very active member in my region and I explained to her that I was involved in supplying arms."

It was also pointed out that he stated in paragraph 15 of the same document that:

"I say that I made every effort both at my interview and at the appeal hearing to explain the command structure and that I was a grou[p] leader and not a commander and to explain that when I used the word 'top' I meant that I was a very active member in my region ... I explained to the Tribunal Member that I was in control of a unit of between 11 and 19 men that I was concerned with the supply of arms and soldiers to other provinces. I explained how I went to Pakistan to smuggle in arms for the cause. The Tribunal Member put it to me if I was in charge of military operations for three provinces how could I be in command of so few men. I told the Tribunal Member that I never said I was responsible for military operations. I told her that I was responsible for my people and was involved with supplying arms and men for the cause in three provinces."

Thus, says the applicant, the Tribunal erred in fact in pointing to the applicant's evidence that he was a top commander having control of operations in three different places. It is contended that this was an error as to a matter of fact central to the applicant's claim, and that the Tribunal Member relied upon this central error of fact to question the reliability of the applicant's evidence.

The applicant has submitted that this significant error as to the applicant's evidence on a core issue which was relied on to reject his credibility renders the decision invalid.

The applicant further says that other aspects of the Tribunal's decision make it clear that the interview notes were not considered by the Tribunal Member. The decision-maker stated at page 3, in the section of the decision summarising the applicant's claim:

*"The applicant stated that he was not so worried about this at first, however then another leader of a group was arrested in Logar**, a man by the name of Daoud Moslih, this man had Islamic party files**, he was tortured and gave a lot of information about the applicant." (Emphasis added)*

Counsel for the applicant submits that it is clear that the Tribunal Member sourced the "name" Daoud Moslih, and the fact that he had Islamic party files, from page 9 of the English translation of the applicant's questionnaire where it was stated:

*"During that time one of men [sic], by the name of Daud Moslih, was captured with files from the Islamic party of Afghanistan."*

He has submitted that the evidence justifying such an inference is the fact that at the outset of the applicant's s. 11 interview he clarified and corrected some of the inaccurate contents of his questionnaire. The s. 11 interview notes record (at page 10 thereof) that the applicant stated:

"'files' - it was not 'files' but leaflets that Daud Moslih was distributing which stated that Hacmaytar [sic] was declaring Jihad on Karzai + the American forces. Daud Moslih had given my identity to the government.

Daud is the man's name. Moslih means he was armed. Moslih is not a part of his name. Therefore it should read 'Daud who was armed ...".

It was submitted that the Tribunal Member, by referring in her summary of the claim made by the applicant to *"a man by the name of Daoud Moslih"* who *"had Islamic party files"*, demonstrated beyond doubt that she had not taken account of the s. 11 interview notes when making her decision. Had those notes been considered by the Tribunal, the Tribunal would have realised that Moslih was not a part of the man's name and that he had been carrying leaflets rather than files.

Moreover, Counsel has submitted. had the interview notes been considered, the Tribunal Member would not have made the significant error of fact regarding the applicant's evidence on the core issue of his position within the Hekmatyar faction of Hezb-i-Islami which was relied on to deem his evidence unreliable and ultimately to dismiss his appeal.

The Court has been referred to the terms of section 16(16) (e) of the Refugee Act 1996 (as amended), which is in the following terms:

> "Before deciding an appeal under this section, the Tribunal shall consider the following:
>
> > (e) any documents, representations in writing or other information furnished to the Commissioner pursuant to section 11."

Section 11(2) of the 1996 Act (as amended) provides in the material part:

> " ... the Commissioner shall ... direct an authorised officer or officers to interview the applicant concerned and the officer or officers shall comply with any such direction and furnish a report in writing in relation to the interview concerned to the Commissioner and an interview under this subsection shall, where necessary and possible, be conducted with the assistance of an interpreter."

It has been submitted that the Tribunal Member's failure to take account of the interview report constitutes a breach of s. 16(16)(e) of the Refugee Act 1996 (as amended) and amounts to a failure to take into account directly relevant information. The applicant says that in the circumstances the decision is invalid, and that it is appropriate that an *Order of Certiorari* should issue.

Counsel for the applicant goes on to cite various authorities as support for the proposition that an error of fact relied on to make an adverse credibility finding can warrant the grant of certiorari. He has quoted extensively from *A.M.T. v The Refugee Appeals Tribunal* [2004] 2 I.R. 607, and also relies upon my decision in *D.V.T.S. v The Minister for Justice Equality & Law Reform & The Refugee Appeals Tribunal* [2008] 3.I.R. 476; the decision of Herbert J in *Keagnene v The Minister for Justice Equality & Law Reform & The Refugee Appeals Tribunal* (unreported, High Court, Herbert J., 31st January, 2007); and the judgment of Peart J on the leave application in *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436.

The applicant contends that the general reliability of his evidence was questioned based on the Tribunal's finding concerning his evidence as to what his position was in the political organisation of which he claimed he was a member. That finding was insupportable, says counsel for the applicant. It was submitted that the applicant's position in the Hekmatyar faction of Hezb-i-Islami was a core issue; indeed it was central to his claim of entitlement to refugee status. The applicant submitted that where an error of fact is made on such a core and crucial issue that it must infect and undermine the adverse credibility conclusion and thus the Tribunal decision itself.

The Court was further referred to the case of *RR. v The Refugee Appeals Tribunal* [2008] IEHC 406 (Unreported, High Court, McCarthy J, 28 November 2008) where, in a judgment on a substantive judicial review application, McCarthy J held at paragraph 22 of the judgment:

> "It seems to me that in its conclusions, the tribunal appears to have clearly misunderstood or misstated the evidence. In this respect, I do not think that it could be successfully asserted that the point upon which the misconception or misstatement arose is peripheral since it bears upon political views of the applicant. in a case where he alleges that because of those views he has a well-founded fear of persecution. The other matters addressed giving rise to adverse findings as to credibility are peripheral to the core issue of persecution on political grounds. At the risk of repetition, I stress that credibility is frequently judged by reference to collateral matters; thus, it seems to me, that there could not be any criticism of a decision, say, of the Refugee Appeals Tribunal if extensive findings of want of credibility on collateral or peripheral matters founded a conclusion as to credibility on what might be the main question (e.g. whether or not a person might be subject to persecution on political grounds). It seems to me further, that as a matter of principle, there is no reason why a decision should not stand even if it is not possible to sustain some one, if not more than one, adverse credibility finding on such collateral matters or peripheral matters, per se. Further, it seems to me that a misstatement, misconception or misunderstanding in relation to a factual matter (even one relied upon in reaching a conclusion) may, in very many cases, not be fatal in as much as it may be severable from any ultimate conclusion. It is hard, however, to see how severability could arise in respect of a misconception as to the evidence on such a core point as that which arises here. It seems to me that it must infect and undermine the adverse conclusion on credibility as to the main issue here, which actuated the Tribunal in affirming the adverse decision of the Commissioner."

The applicant also relies on *Carciu v The Minister for Justice Equality & Law Reform & The Refugee Appeals Tribunal* [2003] IEHC 41, (unreported, High Court, Finlay Geoghegan J, 4th July 2003), where in a judgment on a leave application in which the applicant sought to challenge a decision of the Tribunal which was based upon erroneous fact, the Court stated at pages 9 to 10:

> "It seems to me that whether one puts it as a matter of fair procedures or a failure to take into account relevant material, or indeed as being an allegation that it is an unreasonable decision that if a decision maker is assessing the credibility of an applicant and that decision is based on an incorrect, undisputed fact, that unless it can be established that that incorrect fact is clearly so insignificant that it was not material to the decision maker, that there is a potential breach of an obligation to observe fair procedures, or it may be asserted that the decision is unreasonable or irrational as based upon erroneous fact."

The applicant has submitted that it cannot be established that the error of fact in the decision in this case was so insignificant that it was not material to the decision. On the contrary, the applicant submits, the error of fact was clearly material to the decision in that the misconception caused the decision-maker to question the applicant's evidence on an issue central to his claim. Further this questioning of the reliability of the applicant's evidence on such a core issue was given a substantial significance in the credibility assessment.

**The Respondents' Submissions**

The respondents have submitted that the test to be applied by the Court in determining whether to exercise its discretion to quash a decision of the Refugee Appeals Tribunal was specified by Mr. Justice Peart in (unreported, High Court, 27th July 2007) in the following terms:

> "The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read

in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion".

The respondents have submitted that that on any reasonable reading of the decision taken as a whole the conclusion reached must stand.

The Court has been urged to note that the Tribunal Member made a number of findings in her decision which are unchallenged (or where leave was not granted to proceed with a challenge) in these proceedings. The applicant's case focuses simply on one paragraph of that part of the decision entitled '6. ANALYSIS OF THE APPLICANT'S CLAIM'. The respondents say that it is clear from a consideration of the decision as a whole that the Tribunal Member made certain express negative findings as well as certain observations, including those in this passage complained of, which do not amount to express negative findings.

The respondents submit that express negative findings which go to the core of the decision include the conclusions expressed with regard to the Hezb-i-Islami identity card; the inability on the part of the applicant to establish his identity and nationality in the light of Section 11B of the Refugee Act, 1996; the failure by the applicant to seek asylum in the country or countries he travelled through prior to arriving in Ireland and the link made by the applicant himself with Hekmatyar who has been described as an international terrorist. It was urged that the Tribunal Member furthermore found that the evidence given in relation to his account was "vague and there are simply too many gaps to enable me to simply arrive at a conclusion that this applicant is at risk for a Convention reason".

It was submitted that the observations of the Tribunal Member do not amount to conclusions, and certainly do not bear the characterisation ascribed to them by the applicant in his submissions, viz that they were negative credibility findings. Included amongst these are the one passage disputed in these proceedings and the possibility, raised by the Tribunal Member, that the Afghan authorities may well be seeking the applicant for a valid reason owing to his acknowledged association with Hekmatyar.

The respondents have submitted that the applicant's challenge in the current proceedings is not to any core finding but rather to an observation from which the Tribunal Member was unable to arrive at any definite conclusion. In the circumstances they say there was no finding and certainly no adverse credibility finding. Therefore even if the Tribunal Member was in error, which the respondents do not accept, the challenge is to a peripheral observation which did not constitute a core finding.

The respondents seek to address in the following way the alleged significant error of fact that the Tribunal Member is said to have relied upon in assessing credibility:

The applicant claims that the finding by the Tribunal Member to the effect that the applicant gave evidence that he was a top commander was a significant error of fact from which material and adverse credibility findings were made. The respondent says that two issues arise for determination in the circumstances. The first is whether there was an error of fact which was of a material nature, and the second is whether, if that be the case, the Tribunal Member made material and adverse credibility findings on foot of that error.

As to the first issue, the respondents contend that it is important to note the context of the controversial finding. The relevant passage in the decision reads:

> "I have no way of verifying the letters that the applicant submits in support of his claim, the evidence that the applicant presents could just as easily point to the applicant being a high profile or influential commander of the Hekmatyar faction of an organisation that is described by some as a terrorist organisation, as to a conclusion that the applicant was simply a minor operator. I point to the applicant's evidence that he was a top commander and to his control of operations in three different places, yet he claims that he was commander of only eleven to nineteen people".

The applicant in his submissions emphasises that the use of the word "top" was misunderstood by the Tribunal Member and that the applicant was never a "commander" but rather a "group leader". However, the respondents submit that if the evidence as recorded by the Tribunal is examined no error of fact is disclosed. The evidence as recorded by the Tribunal Member is noted in Part 3 of the Decision as follows:

> "The applicant states that he 'was a commander of between 11 and 19 people, It was pointed out to the applicant that if he had control of operations in three different places that would suggest that he had more control, it was also pointed out to the applicant that if he was named by a high profile individual, this would also suggest that he had more control than he claims he did. The applicant again reiterated that he only had 11 to 19 ordinary soldiers operating with him".

The respondents contend that it is clear on the face of the decision that the Tribunal Member was simply considering whether the applicant was a person of rank and importance within the Hekmatyar faction or whether his role was lowlier. The fact that the applicant was a group leader rather than a commander is entirely immaterial as the applicant himself gave evidence that that he was "top group leader" (question 50 of second interview). Furthermore the applicant gave rather confusing evidence in relation to the meaning of the word "top". At question 51 of the second interview he stated that what he meant by the word top was that he was actively working. When asked to explain at question 52 he answered *"I had subordinates and I was actively working for the Party*". At paragraph 14 of the applicant's Affidavit he stated that what he meant he was a "*very active member in my region and I explained to her that I was involved in supplying arms".* At paragraph 15 of the Affidavit the applicant states that he told the Tribunal Member at the hearing that *"I was responsible for my people and was involved with supplying arms and men for the cause in three Provinces".*

It has been submitted that in this regard the applicant simply takes issue with the choice of words used by the Tribunal Member and that no significance can be placed on this choice. It was further submitted that the choice of words used were reasonable. Any confusion in this regard was caused by the applicant himself and insofar as there is any error of fact which is not admitted the same was caused by the applicant and is of a minor nature. In this regard the respondents assert that a decision of a Tribunal Member or decision maker must be looked at in the round and that immaterial and minor deficiencies do not detract from the overall validity of the decision. The respondents rely upon *Moisei and Efremov v. Jim Nicholson sitting as the Refugee Appeals Tribunal*, (unreported, High Court, Peart J., 14th July 2004) in support of their argument.

It was also urged upon the Court that no general or specific adverse credibility finding was reached or indeed could have been reached by the Tribunal Member having regard to the nature of the evidence given on this issue by the applicant. The observation made in this regard by the Tribunal Member is quite unlike certain of the other matters dealt with in the analysis where it is abundantly clear that adverse credibility findings are being made e.g. *'no explanation given',* or *'I do not find this explanation reasonable'*, or *'his evidence in this regard is vague, there are simply too many gaps ... '*. These findings do not form part of the challenge before the Court. The text used by the Tribunal Member in relation to his military rank is by contrast tentative and non-

conclusive in nature. The Tribunal Member merely canvasses the difficulty faced but makes no decision on the point. Therefore it is not correct to state that an adverse credibility finding was drawn in this regard by the Tribunal in relation to the applicant. The Tribunal Member simply stated that the evidence as presented could point either way.

In this regard the respondents have submitted that the relevant legal authorities emphasise that the Courts will only very reluctantly interfere with credibility findings as only the decision maker - and not the Court - has had the benefit of testing the evidence and assessing the applicant in person. They have further contended that it is even more important that the Courts should not interfere with a finding that the evidence given was vague such that the decision maker felt herself unable to reach a decision on a particular issue, especially where the confusion was caused or contributed to by the applicant concerned.

The applicant has sought to rely upon the case of *A.M.T. v. The Refugee Appeals Tribunal* [2004] 2 IR 607. The respondents contend that the case is not applicable as it related to a specific finding of fact by a Tribunal Member where there was no relevant material on which this finding of fact could have been based. Furthermore, in that case the Tribunal Member had relied upon the controversial finding of fact in a manner adverse to the applicant and had thereby concluded that the applicant's story was not credible. The respondents submit that in the present case there has been no finding of fact in the passage complained of. Furthermore, they submit there is no negative credibility finding against the applicant in the passage complained of, merely an observation to the effect that the evidence on the matter at issue was equivocal (although that particular label was not expressly used).

Furthermore the respondents say that the relevant observations were reasonable in all the circumstances, and that such findings as are in fact made in the Decision are justified on the basis that they are based upon reasonable inferences to be drawn, or deductions to be made, from the evidence that was before the Tribunal Member. They rely upon *Sibanda v. The Minister for Justice, Equality & Law Reform* (ex tempore, unreported, High Court, Birmingham J.,15th January 2009) where Mr Justice Birmingham stated:

> "There is no doubt that a Tribunal Member must not base a decision on speculation, but this does not mean that a Tribunal Member is expected to put their ability to reason to one side. The standard direction to a jury in a criminal case, that they should avoid speculation but are free to draw inferences or make deductions, is one that comes to mind. It seems to me that what the Tribunal Member did here was to draw inferences and make deductions. It also seems to me that the conclusions drawn or the deductions made were ones that were reasonably open ... "

Finally, although it is not dealt with in the respondent's written submissions, it was submitted by Counsel for the respondents in the course of the hearing that, as regards the applicant's contention that prima facie evidence exists that the Tribunal Member did not read or take into account the interview notes, the Court was entitled to have regard to the Tribunal Member's express assertion in Part 7 of the document under the heading "CONCLUSION" that:

> "The Tribunal has considered all relevant documentation in connection with this appeal including the Notice of Appeal, country of origin information, the applicant's Asylum Questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to section 13 of the Act."

**The Court's decision**
The Court agrees with the respondent that the correct approach to the review of any adverse credibility decision is to view the decision as a whole and then to consider whether the matter complained of, in the event of the complaint being upheld, represents a core finding upon which the adverse credibility decision was based, either in whole or in part. If it does go to the core of the matter then the decision must fall in the event of the complaint being upheld. However if it does not go to the core of the decision, then even if the complaint be upheld, the decision ought to stand providing, of course, that there was other unimpugned evidence capable of supporting it.

The most comprehensive recent decision in this jurisdiction, of which the Court is aware, on the proper approach to the assessment of credibility is a judgment of Mr Justice Cooke delivered on the 24th July 2009 in a case of *Radzuik v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* (unreported, High Court, Cooke J, 24th July, 2009). In his judgment in that case Mr Justice Cooke has reviewed the key decisions relevant to the assessment of credibility handed down prior to his judgment. They are listed at paragraph ten of his judgment. Having considered those decisions, Mr Justice Cooke says:

> "So far as relevant to the issues dealt with in this judgment, it seems to the court that the following principles might be said to emerge from that case law as a guide to the manner in which evidence going to credibility ought to be treated and the review of conclusions on credibility to be carried out.
>
> 1. The determination as to whether a claim to a well founded fear or 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 makers.
>
> 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 to facts 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 attempts 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."

I regard this distillation or summary of the applicable principles to be extremely helpful and in accordance, indeed, with the Court's own understanding of the law.

Applying these principles to the present case the Court finds itself in agreement with the submission made by Counsel for the respondents to the effect that the matters complained of in the controversial paragraph represent the observations of the Tribunal Member to the effect that, as regards the particular issue under consideration viz whether the applicant was a person of rank and importance within the Hekmatyar faction or whether his role was lowlier, the evidence was equivocal. The Court considers that Counsel for the respondents is ostensibly right in his submission that there was no actual finding one way or the other on this particular issue, and consequently it cannot be said that the adverse credibility decision was based upon a finding in that regard. Accordingly, the complaint made by the applicant in this regard cannot be upheld.

The Court was somewhat more troubled and found it more difficult to decide upon the secondary argument or submission put forward by the applicant, namely, that the decision should stand impugned on the basis that there is prima facie evidence that the Tribunal Member failed to consider and take into account the contents of the interview notes.

In *G.K. v. The Minister for Justice, Equality & Law Reform* [2002] 2 IR 418 Hardiman J. stated that:

> "A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case." (p. 426/7)

This has been applied by the High Court in *Banzuzi v. The Minister for Justice, Equality & Law Reform* [2007] IEHC 3; *A.W.S. v. The Refugee Appeals Tribunal* [2007] IEHC 276; *T.G. v. The Refugee Appeals Tribunal* [2007] IEHC 377 and *M.T.J. v. The Refugee Appeals Tribunal* [2008] IEHC 102; among other cases.

In the present case the Tribunal Member has expressly asserted in Part 7 of the decision that she "considered all relevant documentation in connection with this appeal". That being so the Court must take this statement at face value unless there is some evidence, direct or inferential, that she did not do so. There is certainly no direct evidence that the notes were not read. Is there sufficient evidence to justify an inference, or is the state of the applicant's evidence only such as to give rise to suspicion and invite speculation? The evidence produced by the applicant is sufficient to give rise to some concern. On one view of it the reference in the decision to *"a man by the name of Daoud Moslin"* is very difficult to reconcile with the idea that the Tribunal Member had read the interview notes, having regard to the explanation that was given by the applicant on page 10 of the notes in answer to a question that had been asked of him. He had clearly stated: *"Daud is the man's name. Moslih means he was armed. Moslih is not a part of his name."* On the other hand, the view might equally be taken that the exact name of the man was a minor detail, that the important thing was this man's role in the applicant's story, and that even after reading the interview notes, the Tribunal Member might easily fail to recall the clarification of a minor detail of that type, particularly if the notes had been read some period of time before the Tribunal Member retired to consider her decision. On balance, the Court has arrived at the view that the evidence does not go far enough to justify the Court in drawing the inference that the applicant submits should be drawn. In circumstances where an inference cannot be drawn it is not the business of this Court to engage in speculation.

While it is undoubtedly the case that the Tribunal Member failed to appreciate that exact name of the man in question the Court does not consider that there any failure to take account of directly relevant information as the applicant alleges. She was fully aware that the applicant was contending that there was this man, whatever his name was, who played a particular role in the applicant's story and she fully appreciated the nature of the role that he was said to have played. There was no misunderstanding or failure to appreciate the applicant's core story.

The applicant's claim was rejected because the Tribunal Member regarded his evidence as vague, and considered that there are simply too many gaps to enable her to simply arrive at a conclusion that the applicant is at risk for a Convention reason. These were views that were legitimately open to her on the evidence before her. She found, as she was entitled to do, that "he does not satisfy the appropriate standard of proof, low though it is, in showing that there is a reasonable likelihood that he would be persecuted for a Convention reason, as opposed to any other reason, or indeed as opposed to being prosecuted for any other reason, if returned to his country of origin."

The Court is satisfied that the challenge must fail and accordingly dismisses the applicant's claim.