

THE HIGH COURT
JUDICIAL REVIEW

Record Number 2012/121 J.R.

Between:/

A. M. K. (A MINOR) [AFGHANISTAN]

APPLICANT

- AND -

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

-AND-

THE IRISH REFUGEE COUNCIL

NOTICE PARTY

JUDGMENT OF MR JUSTICE DANIEL O'KEEFFE, delivered on the 20th day of November 2012

1. The applicant is a national of Afghanistan who seeks leave to apply for an order of *certiorari* quashing the decision of the respondent Tribunal dated 26th April 2011 to affirm the recommendation of the Refugee Applications Commissioner that the applicant should not be granted a declaration of refugee status. The leave application was heard on 23rd October 2012. Mr Colin Smith B.L. appeared for the applicant instructed by the Refugee Legal Service (RLS) and Ms Sinéad McGrath B.L. appeared for the respondents instructed by the Chief State Solicitor's Office. The applicant's case is essentially that the Tribunal's assessment of his credibility was deficient having regard to his age and his mental health difficulties. He requires a substantial extension of time to bring the application.

The Applicant's Age

2. When the applicant applied for asylum on 23rd April 2010 he gave his date of birth as 2nd May 1994, making him a few days short of 16. After an age assessment interview took place he was informed that he was not accepted to be an unaccompanied minor on the basis that he had not provided a passport or any reliable or verifiable documentation to prove his age and identity, he appeared older in his appearance than his stated age and he seemed to have the maturity of an adult. He was then placed in adult direct provision accommodation and the Commissioner treated him as an adult for the purposes of his asylum application.

3. At his s. 11 interview in June 2010 the applicant furnished an un-translated document which he described as his "national ID". Shortly afterwards the RLS furnished a translation of that document to the Commissioner and indicated that the applicant wished to contest the age assessment. The translated document, which is stated to be a "registration certificate", is dated May 2008 and states that the applicant was determined to be 14 years of age in 2008. His date of birth is not marked on the document. Over the next number of months the Commissioner's office declined on a number of occasions to undertake a re-assessment of his age. It was decided that since the certificate did not contain his date of birth, it could not be authenticated. The Commissioner's officials invited the applicant to submit a genuine passport or verifiable documentation containing bio-metric data.

4. In March 2011, before the oral appeal hearing, the RLS furnished the Commissioner and Tribunal a number of documents including a report from Dr Karin White, a social anthropologist with knowledge of Afghanistan who had spoken to the applicant. She placed him at approximately 16 years of age based on various cultural indicators. In April 2011, after the appeal hearing, the RLS furnished the Commissioner and the Tribunal with a letter from Dr Leonard of the SPIRASI Centre for the Care of Survivors of Torture (CCST) confirming that, following a meeting with the applicant at the CCST, it was the combined opinion of a doctor, psychotherapist and social worker that he was a minor. The Tribunal Member was requested to consider him an age disputed minor.

5. A further letter from Dr Leonard and a CCST therapy coordinator to the RLS dated 20th February 2012 is also before the Court; it was exhibited in an affidavit grounding a preliminary motion in these proceedings. The authors suggest that insufficient consideration has been given to the applicant's youth and they state that "*At all stages his age was a factor in the mechanics of his asylum seeking.*" That letter was not before the Tribunal Member.

6. If the applicant's stated date of birth is correct he was 15 when he arrived in Ireland, a fortnight short of 17 when his oral appeal hearing took place and he turned 18 in May 2012.

The Asylum Application

7. The applicant presented to the asylum authorities as a Sunni Muslim of Pashtun ethnicity who speaks Pashto and Dari / Farsi. According to his narrative he was born in Kabul but lived in Ghorband district, Parwan province. He did not attend school but was home-schooled from 2007 to 2009. His father was a powerful Taliban commander and his brother was head of groups. When the Taliban was overthrown and President Karzai came to power, his father was unable to work with the government and was blamed for killing innocent Panjsheri and Hazara people and for taking their land and shops, which have since been returned. Relatives of his father and brother's victims reported their crimes to the new government and in December 2002 two named Commanders, who were part of the new government and members of the Afghan army, came to his home in the village of Sarbara, took his father and brother away and killed them. After his father's death the applicant lived for eight years with his mother at his maternal uncle's house in Alam Khel village, about 15 minutes away from Sarbara. He did not go to school because the people who killed his father and brother could have harmed him. As he was growing up he was bullied and assaulted in the village. At his s. 11 interview in June 2010 he said that about a year and a half previously (i.e. roughly December 2008 – January 2009) he was caught by villagers who hit him. The next day villagers who had suffered at his father's hands pushed him off a high, rocky mountain. He fell, hit his head, fainted, bled heavily and injured his head and neck. His doctor prescribed medication and he was in hospital for a few days. His neck was in a cast and he

could not move. After that he stayed at home doing nothing.

8. As he grew older his life became more difficult and the local people informed the Commanders when he reached his "adulthood". Fearing that the applicant would continue the crimes of his father and brother, the Commanders' relatives requested them to take revenge. Seven or eight months before the s. 11 interview (i.e. November / December 2009) the two Commanders who had killed his father and brother sent letters to the applicant's uncle saying the applicant should be handed over. There were four or five letters and the last letter threatened that if the applicant was not handed over, the uncle and his son and the applicant would be killed. The Commanders sent these letters because it would be unmanly to attack without prior notice. His uncle went to the local police station and told them how he feared the applicant might be harmed but they said they could not offer protection. They said to go to Kabul which was nearby and ask a government agency for help. The applicant could not do that as it was people from the government who were sending the letters.

9. In March 2010 he went to Mazar-e-Sharif in Balkh province and spent 1 ½ to 2 weeks with his two married sisters and his uncles. During that time, people came to his uncle's home in Alam Khel looking to take him away and kill him. They destroyed his uncle's home. His mother sent word that he should not return as they were looking for him. His uncles in Mazar-e-Sharif said they could no longer keep him as they would be in danger so an uncle entered negotiations with the trafficker. His uncle and mother paid \$12,000 between them for his travel with an agent by sea and by road through Iran, Turkey and other unknown countries. He arrived in Ireland by sea and took a train to Dublin.

The Commissioner's Decision

10. By decision dated 20th October 2010 the Commissioner made a negative recommendation. It was found to be difficult to substantiate in any real or meaningful way if the events described actually occurred. A number of credibility issues were identified. It was considered that someone who is in genuine fear of persecution would flee as soon as possible; it was not credible that the applicant would have stayed in his village after being assaulted and after letters were received from the Commanders, and the explanation given for not fleeing was not reasonable. It was considered implausible that the Commanders would have sent letters over a period of months. He was not correct when he said there are no Pashtun in government. It was found to be reasonable to expect that he might have applied for asylum in Iran or Turkey where the UNHCR operate, and his explanation for not applying in those countries was considered unreasonable.

11. Notwithstanding the credibility findings the Commissioner went on to assess the availability of state protection. It was found that if the applicant's version of events were to be accepted, it was plausible the local police might not want to help him. However, it was found by reference to country of origin information (COI) that protection is available from different security forces and it was stated that the applicant could have gone to another police station or government authority for protection. With respect to internal relocation it was noted that he was not well known in Afghanistan, only to the villagers and commanders who showed enmity towards him, and it was reasonable to expect that he could live safely in another part of a country of 28 million people.

The Appeal

12. In November 2010 the applicant appealed to the respondent Tribunal through the RLS. 14 grounds of appeal were identified, some general and some specific, which addressed the various findings made by the Commissioner. In February 2011 two letters were furnished from a police station in Kabul province signed by the two Commanders named by the applicant as being responsible for his father's death. The letters were dated December 2009 and March 2010 respectively. English translations were also produced.

13. In March 2011 the RLS furnished three further letters, (i) from the RLS to a community health nurse, asking her to meet with the applicant and provide guidance on access to mental health assistance; (ii) from a HSE senior clinical psychologist to a child and adolescent psychiatrist, asking him to see the applicant for psychiatric assessment and treatment arising from "*significant anxiety / depression difficulties and Panic Disorder / OCD symptoms*" and expressing concern he may present a suicide risk; and (iii) from a HSE regional services coordinator for asylum seekers enclosing the report of the social anthropologist regarding the applicant's age, discussed at paragraph 4 above.

14. On 1st April 2011, the RLS furnished extracts from UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan* dated December 2010. They also furnished a report by Dr McDonald, Senior Registrar to a Consultant Child and Adolescent Psychiatrist dated March 2011, which notes by way of background that the applicant said the new government were concerned that he may take out revenge for the death of his father and brother and tried to have him captured. He described how on one occasion he was captured and beaten up and received ongoing warnings and threats. The report indicates that he had a history of mental problems arising from previous trauma and bereavement which were exacerbated since coming to Ireland. The report states that he had obsessive thoughts and visual memories of war when he closes his eyes, and he gave an impression of mixed depressive anxiety.

15. At his oral appeal hearing which took place on 5th April 2011 the applicant handed in a letter from his GP regarding an injury to his finger and a letter from SPIRASI confirming that he was a client. After the hearing, as noted above, the Tribunal was furnished with a further SPIRASI letter expressing the opinion that he is a minor.

The Impugned Decision

16. By decision dated 26th April 2011, the respondent Tribunal rejected the applicant's appeal. At the outset the Tribunal Member stated "*There was some controversy as to whether the appellant was a minor or not and the Tribunal will err on the side of caution and treat the appellant as if he were a minor.*" In his analysis of the claim, the Tribunal Member stated that he was not generally satisfied with the applicant's credibility in relation to his claim and that "*Some of his evidence just ran contrary to common sense and was implausible and on other occasions his evidence was contradictory. Some examples are set out hereunder.*" There follows a summary of the credibility issues noted:-

(i) As the Commissioner noted, someone in genuine fear of persecution would flee as soon as possible and the applicant's failure in this regard was not indicative of a genuine fear of persecution.

(ii) He said he faced persecution as a Pashtun because there were no Pashtun in government. This is at variance with the reality in Afghanistan where the Pashtun are in the majority and President Karzai himself is Pashtun.

(iii) The continued presence of the applicant's mother and uncle in Afghanistan belies his claim that his persecutors are intent on his destruction because of his blood relationship to Taliban members. His explanation that the tribes do not target women is undermined by their alleged attack on his home in which his mother resided, and the fact that his uncle is not female.

(iv) He said at his s. 11 interview that he was aware of asylum before coming to Ireland but at his appeal hearing he said he first became aware from a stranger on a train.

(v) He failed to claim asylum in Iran or Turkey which was not generally indicative of a genuine fear of persecution. His explanation was that it was impossible to claim asylum in either of those countries. This was neither reasonable nor credible and was not in accordance with reality as the UNHCR operates asylum systems in Iran and Turkey.

(vi) The history given in the medical report of Dr McDonald was that the new government tried to have him captured because he might try to take revenge for the murder of his father and brother.

(vii) The letters furnished by the applicant were from Kabul province police whereas the applicant said he had been targeted by local commanders. The applicant could not explain that discrepancy. The Tribunal Member therefore gave the documents no weight.

(viii) The other personal documents presented by the applicant carry no weight.

17. These issues led the Tribunal Member to the conclusion that the applicant was not credible in his evidence and ought not to be afforded the benefit of the doubt. He referred to a number of decisions on credibility and the need to apply common sense and life experience. He stated that he had regard to the various COI reports and information given and the previous RAT decisions relied upon, but found that they were not helpful as credibility had not been established. He therefore affirmed the negative recommendation. He did not address state protection or internal relocation and it is common case that his decision was based on a finding of a fundamental lack of credibility.

Delay

18. The Tribunal decision was notified to the applicant by letter dated 12th May 2011 and it was received by the RLS on the following day. The applicant thereafter had 14 days to bring proceedings pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. However, he did not issue proceedings until 16th February 2012, some 9 months after the expiry of the s. 5 time limit. He seeks an extension of time to bring these proceedings.

19. Counsel for the applicant accepted at the hearing that the delays were substantial but he argued that they were not the fault of the applicant himself and he relied in that regard on the judgment of McGuinness J. in *C.S. v. The Minister* [2005] 1 I.R. 343. A number of explanations for the delay are advanced in an affidavit sworn by the applicant's RLS solicitor. First, it took until 22nd June 2011 for the Tribunal to respond to an RLS request to withdraw the decision. Additional time elapsed before a legal aid certificate issued on 8th August 2011. Next, believing the applicant to be a minor, the RLS sought to have a next friend appointed to bring proceedings on his behalf. Their request for HSE involvement was declined by letter dated 15th September 2011. On 19th September 2011 the RLS sought the involvement of the Irish Refugee Council. Following discussions about their exposure to a costs order the Council agreed to act as next friend if the respondents agreed to waive any right to pursue the Council for costs. A request was made of the Chief State Solicitor's Office by letter dated 2nd December 2011, appended to which were draft proceedings. By letter dated 16th December 2011, the respondents declined to give the required undertaking. The Christmas vacation intervened and in January 2012 counsel was briefed to draft motion papers to seek a protective costs order. There was additional delay in January / February 2012 while the RLS addressed concerns about the applicant's mental health. Eventually the motion issued on 12th March 2012 and it ran before Cooke J. on 30th March 2012. He refused to grant the relief sought but gave the case priority and at the next list to fix dates in July 2012 it was given an early hearing date. The applicant has posited that if it were not for the approach taken by Cooke J., it would most likely have taken a number of years for the case to be heard bearing in mind the substantial backlog in the asylum list.

20. In the respondents' submission, there are insufficient reasons to extend time. They take no issue with the delay which occurred while awaiting the legal aid certificate. However, they asked the Court to consider periods of unexplained delay and the inherent weakness of the applicant's case. The Court will consider the merits of the case before deciding on the extension of time.

The Submissions

21. Each of the parties made detailed submissions about the specific credibility findings made by the Tribunal Member, set out at paragraph 16 above. The applicant argues that each finding is deficient by reason of irrationality or unfairness and is inconsistent with the applicant's age and mental health difficulties. Moreover the Tribunal Member failed to comply with his statutory duty under Regulation 5(1) of the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) ("the Protection Regulations") to consider the objective evidence before him and the personal circumstances of the applicant. As to the process to be employed by the Tribunal, the applicant relies on the decision of Cooke J. in *S.B.E. v. The Minister* [2010] IEHC 133. He contends that the Tribunal Member took a cumulative approach and so, if one of the findings is flawed, the cumulative finding must fall.

22. In the respondents' contention the applicant is seeking to parse and dissect the decision and the Court should consider the decision in the round. They rely on the decision of Hedigan J. in *H.O. v. The Tribunal & Anor* [2007] IEHC 299 where it was held that a glaring and manifest flaw must be identified before the Court could intervene. They argue that in considering the decision as a whole, the Court may sever any finding which it finds to be irrational or unreasonable or in breach of fair procedures or statutory duty.

Decision

23. The major point of difference between the parties is the significance of the applicant's age to the assessment of his credibility. It is argued on the applicant's behalf that, as the Tribunal Member stated that he was going to give him the benefit of the controversy surrounding his age, the Tribunal Member must be held to the standards required when assessing the claim of a minor. He should therefore have expected less of the applicant and his credibility assessment ought not to have been as harsh as it was. The respondents point out that the legal position relating to the applicant is that he is an adult. This is bolstered by his own evidence at interview that his troubles reached their climax after he had reached his "adulthood". The Tribunal has no statutory role in the assessment of an applicant's age. There is, in the respondents' contention, no sustainable complaint that the Tribunal should have tailored his findings around the applicant's alleged status as a minor.

24. The respondents have emphasised that the applicant said at his s. 11 interview that he had reached his "adulthood" in Afghanistan and this was the catalyst with which the villagers' bullying and harassment changed to threats to and attempts upon his life. The Court is mindful of cultural differences between the age at which one is considered to have reached one's adulthood in different countries and is not prepared to attribute any weight to this superficial inconsistency. It is noteworthy only insofar as it demonstrates that the applicant considered himself to an adult before coming to Ireland.

25. As a matter of basic principle the relevance of an applicant's age will depend a variety of factors including his date of birth,

maturity, stage of physical and mental development, knowledge of the conditions in his country of origin, vulnerability, dependency on his family, and his personal, family and cultural background. The Court considers that the crucial factor in this case is that, if he was telling the truth, the applicant was almost 16 upon arrival in Ireland and he was 17 by the time of his oral hearing before the Tribunal. He was not an infant or a helpless child but an adolescent, a young man quickly approaching the age of majority. He displayed considerable maturity in the manner in which he explained himself in his questionnaire and at his s. 11 interview and it is clear that he was sufficiently mature as to be capable of expressing his views and engaging with the asylum authorities in a meaningful way. He also demonstrated remarkable resilience in travelling with strangers by foot, sea and road through Iran and Turkey and other countries before making his way to Ireland and to the offices of the Commissioner where he sought protection. He might not have attended school on any regular basis or at all but he was home-schooled for a period of time. He showed an awareness of recent events in Afghanistan which was at least commensurate with his stated age and he demonstrated considerable insight into the asylum systems of Iran and Turkey and complex issues including statelessness. The Court also considers that he has demonstrated considerable independence from his family members in Afghanistan. He says he has made little contact with his family and when he did make contact, it was to obtain documentation in support of his claim. Moreover, he considered himself to be an adult.

26. Against that background the Court is not at all persuaded that the benefit afforded by the Tribunal Member to the applicant by reason of the dispute surrounding his age carried the gravity and import which the applicant seeks to attribute to it. All of the evidence before the Court points to the conclusion that if the applicant was indeed a minor, he had reached sufficient maturity by the time he sought asylum that he could be expected to give an account of his past experiences which is generally cogent and consistent. The Court has reached this conclusion by reference to the applicant's stated personal, family and cultural background.

27. In all cases, whether dealing with adults or minors, protection decision-makers are required to bear in mind that asylum seekers may be afraid to speak freely and to give a full and accurate account of their experiences. Moreover, it is well established that refugee status should not be refused simply because the applicant has made statements which are untrue. Instead, untrue statements should be evaluated in the light of all the circumstances of the case. The Court is satisfied that this principle applies equally to minor or trivial inconsistencies in an applicant's account. It is against this background and bearing in mind that the applicant was a young adult of considerable maturity, that the Court will now go on to assess the reasonableness of the credibility findings made by the Tribunal Member as set out as (i) to (vii) at paragraph 16 above. No submissions were made by either party on finding (iv) and the applicant accepts that finding (xiii) was one which was open to the Tribunal Member, though he argues that it is not a matter that goes to credibility.

Finding (i): Someone in fear of persecution would have fled earlier

28. The first matter with which the applicant takes issue is the finding that if the applicant was genuinely in fear, he would have left Afghanistan sooner than he did. The applicant argues that such a finding might have been fair in relation to a grown man but it is unfair and irrational taking account of his minor status. It is irrational to assume that a boy of 15 who had lost his father and brother and on his own evidence was very close to his mother, would leave home immediately. It was unduly harsh for the Tribunal Member to expect to leave any earlier than he did. The respondents say that if the applicant's account of his experiences is true, it would be most unusual for him to have stayed behind in his uncle's village.

29. The reasonableness of the contested finding must be considered in light of the sequence of the applicant's narrative. He says his father and brothers were killed in 2002 and he moved to a nearby village where he lived for eight years. He suffered bullying and harassment which became more persistent in December / January 2009. He was beaten by villagers and pushed down a rocky mountain. In November / December 2009 letters were sent demanding his uncle to hand him over and in March 2010 when he went away from his uncle's village for a short period, people came to his house with the intention of taking him away and killing him. When asked at his s. 11 interview why, if he had been attacked, he remained in his village until March 2010, he said he stayed indoors all the time and going elsewhere was no solution as they would find him. He said he was quite young but **"now I will be 18 soon and they think I will take revenge for my father and brother."** He said he did not want to leave his mother all on her own and he thought they would leave him in peace.

30. The Court is satisfied that it was reasonable for the Tribunal Member to find that it was not credible that the applicant stayed in his uncle's village for several months after letters were sent from local Commanders requiring him to be handed over. It would indeed seem very unlikely that a person in the applicant's position, in respect of whom threatening letters were being sent, would have remained in a village where he was known to his aggressors. His decision to remain in the village after receiving the threats would seem particularly unusual in light of the fact that he had relatives including two sisters and uncles in Balkh province. It is certainly plausible that he would have wanted to remain with his mother but it strikes the Court as unusual that she would not have accompanied her teenage son to stay even temporarily with relatives in another province away from the source of danger. In the circumstances the Court finds that it was entirely reasonable for the Tribunal Member to have found his prolonged stay to be inconsistent with a fear of persecution.

Finding (ii): He said the Pashtun could not help him as they were not in government

31. The Tribunal Member stated that the applicant was incorrect insofar as he said there were no Pashtuns in government. The applicant argues that while this might be fair in relation to an educated grown man, it was unfair and irrational in relation to a 15-year old boy with no education. It is accepted that he was wrong as a matter of fact. However, it was not rational to expect him to have a detailed grasp of Afghan politics. The respondents contend that it was open to the Tribunal Member to reject the applicant's evidence, which did run counter to generally known facts.

32. The applicant's statement as to the lack of Pashtuns in government was made at the s. 11 interview. He had been asked why he could not relocate internally within Afghanistan. He said all ethnic groups are now living openly and *"there are no pashtoons in the government [sic] the majority are farsi speaking and hazaaras."* When it was put to him that President Karzai is Pashtun as are many others, he said they were not related to him and had no reason to trouble themselves by protecting him. The Court finds that it was open to the Tribunal Member to note a difficulty with the applicant's evidence in this regard. The inaccuracy of the applicant's evidence about the ethnic makeup of the Afghan government was grounded in objective information identified by the Commissioner and put to the applicant. The Court is also mindful not to fall into the trap of substituting its own view on credibility for that of the Tribunal Member who had the benefit of witnessing the applicant give evidence.

Finding (iii): His mother and uncle continued to live safely in their village

33. The third finding challenged by the applicant is the finding that his asserted fear of persecution was not consistent with his account that his mother and uncle remain in the village which he left. At his s. 11 interview the applicant was asked where his mother and uncle were now. He said they remained in the same village but that *"they will not harm a woman. She will not be punished for what her husband or son does. They only harm the men. [...] It's a tradition not to put hands on a woman, but not target a woman as an individual."* The applicant did not, however, provide any explanation as to why the Commanders had not targeted his uncle and the explanation which he gave in relation to his mother was found to be undermined by the attack on his uncle's house while he was

visiting relatives in another province.

34. Counsel for the applicant pointed out that the applicant has at all times stated that he lived with his maternal uncle, who had no blood relationship with the applicant's father. This could explain why the uncle was not targeted. He also explained at each stage that his mother was not a target because it was traditional not to target a woman as an individual. The attack on his mother's home was undertaken to capture and kill the applicant, not his mother and uncle, and so the story was not inconsistent. The respondents note that the applicant said his uncle was threatened with death if he did not hand over the applicant; this is not consistent with the explanation now proffered that he was not targeted because he is not a blood relative of deceased Taliban members. The finding was one which was fully open to him.

35. The Court is satisfied that it was open to the Tribunal Member to take account of the circumstances of the applicant's mother and other family members when assessing his credibility. The Tribunal Member cannot be faulted for considering their current situation. The applicant had an opportunity to explain that his uncle would not be targeted (for example, because he is not a blood relative) but he did not give any such explanation. There is also an inconsistency between his explanation that his mother would not be targeted because she is a woman and his account of how people came and destroyed the house where she was living, in an attempt to find and kill her son. It was therefore reasonable for the Tribunal Member to have marked this as a negative finding against the applicant.

Finding (v): If he was in genuine fear he would have applied for asylum in Iran or Turkey

36. The challenge to the finding made with regard to the possibility of the applicant applying for asylum in Iran or Turkey would appear to the Court to be the applicant's key challenge. The finding challenged was as follows:

"The Tribunal finds the appellant's failure to claim asylum in either Iran or Turkey to be not generally indicative of a genuine fear of persecution. His explanation for that failure to the affect [sic] that it was impossible to claim asylum in either of those countries was not reasonable or credible given that it is not in accordance with reality where the UNHCR operates asylum systems."

37. The applicant contends that this was irrational insofar as it flew in the face of COI furnished to the Tribunal Member and that while the applicant's explanation was consistent with the COI, the Tribunal Member's finding had no evidential basis. Moreover the failure to apply in the first safe country is not of itself indicative, as a matter of law, that there is no well-founded fear of persecution. The fact that he did not apply in Iran or Turkey is not rationally connected to his fear of persecution in Afghanistan. The Tribunal Member failed to comply with his statutory duty under Regulation 5(1) of the Protection Regulations to have regard to the explanations provided by the applicant.

38. The respondents contend that the COI which was before the Tribunal Member confirms that there are UNHCR-operated asylum systems in Turkey and Iran and while there were large number of repatriations from Iran to Afghanistan in 2008 and early 2009, by the time the applicant was passing through Iran in March / April 2010, the number of Afghani refugees who were being returned by Iran had drastically reduced and the difficulties encountered by asylum seekers had largely been rectified. The respondents argue that the portions of the COI relied on by the applicant are out of date and that those parts of the COI which were more up-to-date support the conclusion reached by the Tribunal Member.

39. As a matter of basic principle, the failure of an asylum seeker to apply for asylum in the nearest safe country or in the first safe country to which he flees is not a bar to refugee status *per se* and is not necessarily inconsistent with a genuine fear of persecution. In theory, asylum seekers are entitled to choose their country of asylum. The person may, for example, wish to apply for asylum in a country where his native language is spoken, where his family or close friends have settled, or where there is a community of people from his country of origin or sharing his ethnicity or religion. The person may also wish to distance himself from incursions by authorities of his home state and he may have concerns about the true adequacy of protection (see Hathaway, *The Law of Refugee Status*, at p. 50). The assessment of an applicant's credibility may, however, include an assessment of the reasonableness of any explanation given for passing through safe third countries without applying for asylum there.

40. In this case when asked why he did not apply for asylum in Iran or Turkey the applicant said *"Iran and Turkey do not give asylum, even if you spend 20 years there, you are stateless"*. It was put to him that the UNHCR operate in Iran and he said *"In Iran there is no refugee system and no asylum system, and I know afghans who have lived there for 18, 19 years and the men have been sent back"*. It was put to him that he could have sought asylum in another country instead of continuing on his dangerous journey and he repeated, *"In Turkey and Iran there is no asylum system, if there had been a system there I would definitely have asked"*. He said that the places he stopped at en route to Ireland were jungles or totally deserted places and he queried, *"who would I ask and what language would I speak, there were no people, they were deserted."* He was not allowed to ask the other people who travelled with him.

41. The question for the Court is whether it was open to the Tribunal Member to find the explanation given by the applicant to be unreasonable and inconsistent with objectively known facts. It is necessary to look carefully at the COI consulted which consists of a 2009 Amnesty International Report entitled *"Stranded: Refugees in Turkey denied protection"*; a UN statement dated August 2010; a 2008 Global Report on Turkey; that portion of a US Committee for Refugees and Immigrants *World Refugee Survey* for 2009 which deals with Iran (sourced through Refworld); and a 2007 Human Rights Watch report entitled *"Iran: Halt Mass Deportation of Afghans"*.

42. With respect to Turkey, the Amnesty International (AI) report furnished by the applicant relates primarily to 2007-2008. AI expresses concern that persons in need of protection in Turkey were prevented from accessing their rights due to regulations which do not conform to international standards and which are unfairly and arbitrarily applied. They indicated that that such people are denied an opportunity to apply for asylum and that they face forcible return to countries where they are at risk of persecution. The report makes particular reference to the forcible return of Iraqis and, to a lesser extent, Afghan nationals. It refers to beatings and forcible expulsion of persons caught close to or within 50km of the Iranian border. The UNHCR Global Report for 2008 states with respect to Turkey that in 2008 there was a near doubling of Iraqi applicants and a four-fold increase in the number of Afghan applicants. 85 asylum seekers were refouled in 2008, more than in previous years. All non-EU asylum applicants registered with the UNHCR which provided assistance to the 2,800 Afghan asylum seekers who were designated "persons of concern" in 2008, and had a direct operational role in determining the protection needs of non-EU asylum seekers.

43. With respect to Iran, the USCRI World Refugee Survey says that border security killed 15-20 people crossing from Afghanistan in 2008; that Iran deported over 406,000 Afghans in 2008 and over 720,000 over the previous two years; that there were plans for mass deportation of Afghans living illegally in Iran; that the Iranian authorities arrest and rapidly deport refugees for irregular entry, lack of documentation, and unauthorized movement outside their province of registration; and that Afghan deportees are regularly subject to inhumane treatment and beatings during detention. The report continues:-

"The Government's 2007 registration of Iraqis was open only to those who had arrived before 2005 but UNHCR registers later arrivals and recognizes those from central and southern Iraq as refugees prima facie. The Government does not allow UNHCR to issue refugee certificates or other documents. Longstanding Iraqi refugees in Iran hold refugee identity documents known as "white cards." To those arriving since 2006, Iran issues visas valid for one month and renewable for up to three months. To renew for a longer period, refugees must return to Iraq and re-entering. Authorities levy large fines upon Iraqis violating the terms and/or duration of their visas. The 1963 Regulations read, "A refugee has the right to refer to Iranian Courts to demand justice." Additionally, refugees are exempt from the surety required of foreign nations that as claimants or third parties in civil suits. UNHCR offers attorneys at no cost to registered refugees."

44. The Human Rights Watch report, which is dated 20th June 2007, states that since late April 2007, the Iranian government had forcibly deported back to Afghanistan nearly 100,000 registered and unregistered Afghans living and working in Iran including many refugees. The Iranian authorities were in the process of transferring thousands more to camps near the Afghan border before deporting them.

45. The Court is satisfied that the applicant has established substantial grounds for the contention that the Tribunal Member erred insofar as he found that the applicant's reasons for not seeking asylum in Iran and Turkey were *"not in accordance with reality"*. It is certainly arguable that the Tribunal Member's finding is not supported by the COI consulted and that his conclusion involved a degree of impermissible conjecture or surmise. Instead of supporting the Tribunal Member's finding, the COI which was before the Tribunal Member was consistent with the applicant's evidence with respect to the asylum systems in Iran and Turkey. Leave will be granted on this issue on the grounds set out at paragraph 50 below.

Finding (vi): He told Dr Leonard the local commanders captured him

46. The applicant contends that the rationale underlying the sixth credibility finding is not clear and the reader is left to speculate. Moreover the Tribunal Member irrationally focussed on the narrative given in the medical report instead of focussing on the medical difficulties identified. This was not to treat the appellant as a minor. The respondents suggest that it is clear that the Tribunal Member was referencing a stark discrepancy between the narrative given to the asylum authorities and that given to the doctor. It was entirely rational for the Tribunal Member to note this discrepancy. It was a matter for him to assess what weight was to be attributed to the medical report.

47. The Court is not satisfied that the applicant has established any infirmity in the sixth finding made by the Tribunal Member. The decision is clear. The Court is under no doubt that the Tribunal Member intended to draw attention to a discrepancy between the account given to the Commissioner and the Tribunal, and the account given to the SPIRASI consultant Dr Leonard. The applicant told Dr Leonard that the Commanders wished to capture him and had captured him in the past. This is clearly inconsistent with his account of his past experiences as told to the asylum authorities which involved bullying, harassment, assault, threatening letters and an attack on his home but no capture by Commanders. It was clearly open to the Tribunal Member to note this discrepancy.

Finding (vii): The Commanders' letters were from Kabul, not Parwan

48. With respect to the seventh finding the applicant complains that the Tribunal Member ought to have taken account of the fact that the applicant is from Parwan province which next to the Kabul. He neglected to consider the crucial point that the letters associate the Commanders with the new government, which undermines the previous finding relating to the narrative given in the medical report. The sixth and seventh findings are therefore inconsistent. The respondents argue that the applicant's was a localised story: he feared local area commanders and local people from the village. He never claimed to fear any police from Kabul province. He could not explain why the letters did not come from a local source.

49. The Court is satisfied that there was no infirmity in the finding related to the two letters which purported to come from the Commanders. The applicant said at all times that the Commanders who sent the letters were the same two Commanders who killed his father. The letters were furnished before the oral appeal hearing. No written note of what transpired at the hearing is before the Court but it appears from the Tribunal decision that he was asked why the letters from the Commanders were from Kabul province and he replied that Parwan was the nearest administrative centre and he could not say why they came from Kabul as his uncle posted them. The applicant does not dispute that this is what occurred at the hearing. Thus it is a matter of fact that he could not explain why letters from local Commanders emanated from the Kabul police when he came from a village in Parwan province. It is not relevant that Parwan is close to Kabul province as there is no evidence that the Kabul police have any role in the neighbouring province. This was clearly an issue which merited the Tribunal Member's attention as it had a bearing upon the weight to be attached to the letters.

Conclusion

50. The Court is satisfied that substantial grounds have been established with respect to the credibility finding made by the Tribunal Member on the applicant's failure to apply for asylum in Iran or Turkey. In this context and bearing in mind the particular circumstances of this case and the explanations given for the delay in bringing proceedings, the Court considers that there is good and sufficient reason to grant an extension of time. The applicant's solicitors, in seeking to obtain a next friend to bring proceedings on his behalf, were acting in good faith in the best interests of the applicant, whom they believed to be a minor. The issue of the applicant's minority was bona fide raised. An extension of time will therefore be granted and leave will be granted on the following parts of grounds (b) and (c) of the applicant's statement of grounds:-

(b) The Tribunal provided no reasons as to why it was not reasonable for the Applicant not to apply for asylum in Turkey or Iran and failed to apply any of the country of origin information submitted on this issue which stated that Turkey and Iran did not apply proper standards in considering applications for protection from Afghans. The Tribunal erred in holding that the Applicant gave contradictory evidence on this issue.

(c) The Tribunal made a material error of fact and law in holding that the Applicant's failure to claim asylum in Iran or Turkey was not generally indicative of a genuine fear of persecution. A refugee applicant is entitled to choose his country of application, and country of origin information was submitted which set out the difficulties faced by Afghans who seek protection in Iran and Turkey. The finding by the Tribunal was materially incorrect.