

THE HIGH COURT

JUDICIAL REVIEW

[2011 Rec. No. 1004 JR]

BETWEEN

I. S.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL (ACTING AS PAUL CHIRSTOPHER), THE MINISTER FOR JUSTICE AND LAW REFORM,
IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 12th day of November 2015

1. This is a telescoped application in which the applicant seeks an order granting leave to apply for judicial review by way of *certiorari* to quash the decision reached by the first named respondent.

Background

2. The applicant states that he is an Afghan citizen and was born in Afghanistan and from Kunar province. He is a member of the Pashtun group within Afghanistan and is a Muslim. His first language is Pashto. He never attended school but trained to be a mechanic in his youth, starting at 14 or 15 years of age. He later owned his own shop and was self-employed there as a mechanic for four years between 2007 and 2010. He is a married man with no children.

3. The basis of the applicant's claim for asylum is said to arise in the following circumstances. He states that one day he was taken by people, who he came to realise were the Taliban, who brought him to a remote undisclosed location. The Taliban did not want to harm him physically but required him to repair motor vehicles in the Taliban's possession. The claimed circumstances of how he was taken and what was required of him by the Taliban were described by the applicant in the following terms:-

"I was working in my shop, they came into my shop and said our car has broken down. I went with them. After a long journey, I asked them where we were going, where is your car. When I started resistance, they caught me and blindfolded me and took me away... They said they wouldn't tell me anything but I to repair all these vehicles. I repaired for them some of the vehicles. One person was fixing bombs in the vehicles. They told me I have to help this man. I said I couldn't do this for you, they were forcing me, threatening they would do this and that to my family... I was kept there for 6 months, one day an oil tanker came into that area. I hid in that fuel tanker and I escaped from them. I came to Jalalabad then... In Jalalabad I met with the friends from whom I was buying the spare parts for the cars. They contacted with my uncle. They said these people were now looking for me... He [uncle] said they [government] got information from the neighbour's shops that the Taliban came and I [applicant] am working with the Taliban. The Taliban was also looking for me because I [applicant] escaped from them and my uncle told me that the neighbour shop people told the government people that I went with those people willingly so they presumed I am working with the Taliban... My uncle said it was not good for me to live there because my life was at risk... He [uncle] spoke to the agent and arranged something for me. He spoke to the agent and he told me I have to follow this agent, he will bring you to a safe place. Then I was following the agent. Then I left the country."

4. The applicant departed Afghanistan on 7th January, 2011. His uncle paid the agent \$7,500-\$9,000 for his services. There were several agents involved in arranging the applicant's path from Afghanistan to Ireland. The applicant claimed to be unaware of any of the countries that he travelled through to get to Ireland as he travelled by night. Other people travelled with the applicant, and he did not know their names and addresses. The applicant's modes of transport are mentioned as being "motor-vehicle, lorry, by foot and ship". He arrived in this state on 14th March, 2011 and sought asylum.

5. The applicant bases his claim for asylum upon the belief that his "...life is at risk from the Taliban and as well as the Government of Afghanistan". He did not report his capture by the Taliban to the authorities in Afghanistan. The reason as to why he did not do so is proffered as being "I did not notify the Government of Afghanistan because I was working with the Taliban as a mechanic; I used to help them with placing bombs in motor-vehicles. And the Government of Afghanistan had found out about it." He stated that he did not move from one area of Afghanistan to another to avoid his persecution. He claims that he did not do so "... because on the one hand my life was at risk from the Government of Afghanistan and on the other hand my life was at risk from the Taliban. Therefore, I did not change my place of residence and I left my country." He claims that if he was to be returned to Afghanistan, "then the Government of Afghanistan will arrest me accusing me [of] being a Talib and they will sentence me to death. And on the other hand the Taliban are also after me to kill me."

Procedural history

6. The applicant's asylum application commenced on 14th March 2011 and he underwent a s.8 interview on that date. He completed a questionnaire on 23rd March 2011. His s. 11 interview was conducted on 27th April, 2011.

In the s. 13 report compiled on the applicant's claim for asylum, it is stated that:-

"The applicant's claim may be considered to constitute a severe violation of basic human rights and therefore may be considered as being of a persecutory nature and as such could satisfy the persecution element of the refugee definition."

7. Under the 'well-founded fear' heading of the s. 13 report it is stated:-

"A report from the Refugee Documentation Centre ("Are there any reports specifically about Taliban activity and insurgency against government in the District of Marawara or generally throughout the Province of Kunar for 2009, 2010 and so far into 2011?" Appendix A) indicates that there is a significant level of Taliban activity in Kunar province. If the applicant's claim were to be accepted, he may have a well founded fear of persecution from the Taliban in his home district. However, this is without prejudice to the findings in paragraph 3.3.2. below."

8. The report assessed the applicant's reluctance in contacting the Afghan authorities in the following terms: *"It is considered that it is reasonable for the authorities to want to question the applicant about his kidnapping and time with the Taliban and it is also considered that he has not provided sufficient evidence to indicate that he would be treated unfairly by the authorities if he co-operated with their investigation. The applicant has not established a well founded fear of persecution in relation to this aspect of this claim."*

9. Under the heading 'State Protection' the s. 13 report determined *"while the applicant claims to fear the authorities, it is considered that he had not provided sufficient evidence to indicate that he would be treated unfairly by the authorities if he co-operated with their investigation."*

10. Regarding the applicant's fear of the Taliban, it was acknowledged that there was a significant level of Taliban activity in Kunar province and found that while country of origin information indicated that *"the Afghan and International forces are targeting the Taliban there, it is considered that state protection may not be available in this province."*

11. The s. 13 report went on to determine that *"the applicant could internally relocate and seek protection from the authorities in Kabul, which is under the control of the Afghan and International Security Forces" and "moderately secure"* As a *"33 year old married male self employed for 4 years prior to his problems in Afghanistan, it was concluded that "it would not be unduly harsh for the applicant to relocate internally to an area such as Kabul"*

12. In all the circumstances, the Commissioner concluded that the applicant had not established a well founded fear of persecution.

13. The applicant appealed to the Refugee Appeals Tribunal on 6th July, 2011 and the oral hearing took place on 20th September, 2011. Its decision dated 23rd September, 2011 issued on 28 September 2011.

The Tribunal's decision

14. The s. 6 analysis of the appellant's claim determined that *"The Tribunal was not generally satisfied as to the objective credibility of the particular claim for asylum advanced by this appellant."* In essence, the applicant's claimed fear of state persecution was rejected on the basis that *"former Taliban... members did not have difficulties with the government. This would apply mutatis mutandis to persons who never had an association with these groups in the first place"*

15. The Tribunal Member also found that the applicant could relocate within Afghanistan *"to escape any alleged problems he might have with the Taliban"*. As the applicant's claim of state persecution was not well-founded, that element of his claim was found not to be an impediment to internal relocation. The Tribunal's individual findings are considered more substantively elsewhere in the judgment.

The challenge to the decision

16. The grounds of challenge include the following:-

- a. the first named respondent erred in law and breached natural and constitutional justice requirements in proceeding with the applicant's hearing when certain documentation upon which the applicant was relying was not translated;
- b. the first named respondent erred in fact and in law and breached natural and constitutional justice requirements in failing to set out in the decision the contents of the documents that had been orally translated by the interpreter at the hearing, with regard to the threatening letters that he has received from the Taliban and from the police in his country of origin;
- c. the first named respondent erred in law and breached natural and constitutional justice requirements in failing to give the applicant and his legal representatives a time period subsequent to the hearing to submit the translated documents to him before he made his decision and in making his decision within three days of the hearing and in forwarding it to the applicant within eight days of the hearing;
- d. the first named respondent erred in fact and in law in making no finding in relation to the applicant's nationality and identity, more particularly having regard to the fact that the refugee applications commissioner had accepted that he was a national of Afghanistan and that additionally he had produced the original of the applicant's Afghanistan citizenship card;
- e. the first named respondent erred in fact and in law and breached natural and constitutional justice requirements in failing to give any reason in his decision of why, in relation to the documents that the applicant had produced in support of his claim that he *"affords them little weight and finds accordingly, that they do not advance his claim in any material respect"*, more particularly as he took no issue with the applicant, or his legal representative, with regard to their authenticity at the hearing and that the applicant had provided the original of the envelopes that were couriered to the applicant from his native country;
- f. the first named respondent erred in law and breached natural and constitutional justice requirements in making no assessment of the risk of persecution that the applicant faced from the Taliban, more particularly as the Commissioner had accepted at para. 3.3 of his s. 13 report that, based on the country of origin information, that (a) *"there is a significant level of Taliban activity in Kunar province* and (b) that the applicant *"may have a well founded fear of persecution from the Taliban in his home district"*;
- g. the first named respondent erred in fact and in law in failing to differentiate the time period when the applicant was first kidnapped by the Taliban and the subsequent six month period during which time the neighbouring shop keepers falsely informed the authorities that the applicant had gone willingly with the Taliban and was fixing bombs for them, in arriving at his conclusion that he would not be at risk from the state on the basis of this false belief;

h. the first named respondent erred in fact and in law in failing to show where the credibility issue lay in respect of the applicant being unable or unwilling to contact the police in relation to what had happened, without differentiating the time period before and after the false report made by the neighbouring shopkeepers of the applicant having gone off with the Taliban and fixing bombs for them;

i. the first named respondent erred in law and breached natural and constitutional justice requirements in stating that the applicant could internally relocate to Kabul, having regard to the fact that the state were agents of his persecution and in also in failing to consider the country of origin information in respect of the large number of incidents, including murders, that the Taliban were involved in all over Afghanistan and in failing to have regard for the provisions of Article 8 of Council Directive 2004/83/EC on 'Internal relocation';

j. the first named respondent erred in law and breached natural and constitutional justice requirements in failing to carry out a rational analysis of all the Country of Origin information, more particularly having regard to the fact that the Commissioner's own Country of Origin information had found that the applicant was at risk of persecution in his home district, that state protection would not be available to him, allied to the country of Origin information in relation to intense activity of the Taliban in his district and all over Afghanistan.

The submissions advanced on behalf of the applicant

17. Ultimately, in the course of oral submissions, counsel for the applicant did not maintain the challenge set out in the statement of grounds and in the written submissions that the Tribunal Member erred procedurally in failing to await the receipt of the written translation of certain documents which had been submitted by the applicant prior to the hearing and acknowledged that the said documents were in fact orally translated in the course of the oral hearing at the request of the applicant's counsel. Written translations of the documents (completed after the Tribunal's decision had issued) were before the court.

18. In the course of his submissions however, counsel argued that the Tribunal Member erred in failing to give any reason in the decision as to why he afforded "little weight" to the documents which the applicant had furnished. The documents comprised what was said to be:

- The original of the applicant's national identity card with photograph;
- the original of his business cards;
- the originals of invoices for spare parts in connection with his business;
- the original of a letter received by him from the Military Commission of "The Islamic Emirate of Afghanistan, Kunar Province and which stated that the applicant "who used to work with the puppet government for a long time and who is accused of giving intelligence information of the Mujahideen of the Islamic Emirate, should be sentenced to death";
- the original of a notice issued by the Sub-Directorate Office, Security Headquarters of Kunar Province, Ministry of Interior, Islamic Republic of Afghanistan in relation to the closing of the applicant's workshop and prohibiting any person reopening it or working in it;
- the original of a communication from the Sub-Directorate Office, Security Headquarters of Kunar Province, Ministry of Interior, Islamic Republic of Afghanistan stating that the applicant "should be handed over to the law" and that "every person who has any information about him should inform the intelligence agencies. "

19. In outlining how the Tribunal Member should have approached the documentation which the applicant submitted, counsel relied on the *dictum* of Eagar J. in *F.U. (Afghanistan) v. Refugee Appeals Tribunal* [2015] IEHC 78.

20. Furthermore, the manner of the Tribunal Member's assessment of the documents breached the requirements of Regulation 5 of the 2006 Regulations and the principles of natural justice. In the latter regard, counsel referred to *Gallagher v. the Revenue Commissioners (No. 2)* [1995] 1 IR 55 where O'Flaherty J. stated at pg. 82:-

"Megarry J. put well the rationale for taking pains to get the matter right when charges are levied against any person when he said in John v. Rees [1970] Ch. 345 at 402:—

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

21. Counsel also argued that it was not cogent reasoning for the Tribunal Member to conclude that it was not plausible or objectively credible for other people in the neighbourhood to have told the police that the applicant had gone willingly with the Taliban when the applicant had told the Tribunal that he himself had no inkling that the people who sought his assistance were members of the Taliban until he arrived at their mountain hideout. Counsel submitted that this finding did not countenance that the applicant's neighbours may have suspected that the people who came to the applicant's garage were Taliban members and had then informed the police of this and that the applicant had gone with them willingly.

22. The Tribunal Member erred in finding that the applicant's subjective apprehensions as to persecution by the authorities was not borne out by country of origin information and was thus not objectively well-founded. In this regard, counsel referred to the documents which the applicant had submitted to the Tribunal, one of which suggested that the authorities were looking for the applicant. Moreover, the Tribunal found an "apparent contradiction" in the applicant's evidence which was not put to the applicant, as it should have been, before an adverse finding was made on the basis of such apparent contradiction. In this regard, counsel

referred to the *dictum* of Kelly J. in *Camara v. the Minister for Justice* (Unreported Judgment High Court 26th July 2000) who, in the context of the assessment of a protection applicant's credibility, quoted Goodwin-Gill "The Refugee and International Law", as follows:

"Inconsistencies must be assessed as material or immaterial. Material inconsistencies go to the heart of the claim, and concern, for example, the key experiences that are the cause of flight and fear. Being crucial to acceptance of the story, applicants ought in principle to be invited to explain contradictions and clarify confusions."

23. In coming to the conclusion that the applicant's fear of the Afghan authorities was not objectively well founded, the Tribunal Member failed to have proper regard to the country of origin information which was before him. Furthermore, the decision-maker failed to have proper regard to the applicant's fear of reprisals by the Taliban by finding that he could relocate within Afghanistan, "to Kabul for example". Counsel submitted that the said finding was made without any proper assessment of either the risk to the applicant in relocating to Kabul or the reasonableness of such a move in the context of the applicant's personal circumstances. Counsel argued that the findings on relocation did not conform to the UNHCR Guidelines on relocation or the principles set out in *K.D. (Nigeria) v. RAT* [2013] IEHC 481 or *E.I. v. Minister for Justice* [2014] IEHC 27. Moreover, the finding was arrived at by means of selective reliance on country of origin information.

24. The finding that the applicant had not provided a reasonable explanation for his failure to apply for asylum at an earlier stage of his travels through the EU *en route* to Ireland was flawed on the basis that (i) the Tribunal Member did not set out which explanation proffered by the applicant was considered not reasonable, and (ii) there was no requirement in law that a protection applicant had to seek asylum at the first available opportunity.

25. The treatment of the country of origin information by the decision-maker was problematic and was such that it rendered the decision procedurally flawed. The Tribunal Member erred in law and breached the principles of natural and constitutional justice in failing to properly assess the country of origin information vis-à-vis the applicant's claimed fear of persecution by state authorities and in relation to the issue of internal relocation as a solution for his fear of reprisal by the Taliban. In particular, in concluding that internal relocation was an option for the applicant, the Tribunal Member ignored country information which suggested a contrary viewpoint. In support of the submission that the Tribunal Member erred, counsel relied on the dictum of Edwards J. in *D.V.T.S. v. Min. for Justice* [2007] IEHC 305 and on the dictum of Barr J. in *Lin v. RAT & Ors.* [2014] IEHC 608.

The submissions advanced on behalf of the respondents

26. On behalf of the respondents, it was submitted that there was sufficient country of origin information from which the Tribunal Member could conclude that the applicant's fear of the state authorities and police was not objectively well-founded and that his fear of reprisals or retaliation from the Taliban could be overcome by means of relocating internally within Afghanistan. In relation to the latter, while the country of origin information documented volatility in Kunar, the applicant's home region, because of the authorities' engagement with Taliban forces, the Freedom of the World Report documented that Kabul was moderately secure by the end of 2010. Insofar as the applicant relied on the Amnesty International report in support of his claim that Kabul was unsafe, that report did not indicate that generally Kabul was unsafe for someone like the applicant, as he had not shown that he would be particularly targeted. The Taliban attacks in Kabul, as documented by the Amnesty International Report, were on specific locations such as government buildings, international convoys, the Indian Embassy and a UN guesthouse. Moreover, some of the reports relied on by the applicant related to such matters as abuse of women, an issue which is not relevant to his circumstances. The UNDP "Police Perception Survey – 2010", also furnished by the applicant, showed the perception of the Afghan National Police (ANP) as "broadly positive overall".

27. Insofar as the applicant cited the 2009 UK Border Agency Report as noting the "increasing frequency of indiscriminate attacks on civilians and the lack of national protection available...", counsel submitted that that reference in the report was made in the context of specific groups of people such as those Afghans perceived as critical of factions or individuals exercising control over an area, government officials, ethnic minorities in certain areas, converts from Islam to other faiths, women with specific profiles, children, victims of serious trauma, individuals at risk or victims of harmful traditional practices, homosexuals, Afghans associated with international organisations and security forces, landowners and Afghans associated with the Peoples Democratic Party of Afghanistan. The applicant did not fall into any of these categories.

28. Counsel submitted the Tribunal Member's decision in the case of the applicant was not one which related to his personal credibility. This was a case where the decision-maker looked at the applicant's story and duly assessed his claim that the state authorities would persecute him and that was rejected by the decision-maker as not objectively proved given the content of country of origin information. In the applicant's case, country of origin information showed that lowly ranked people in the Taliban were able to avail of a government amnesty and that being the case, it could not be said that the applicant would have cause to fear the authorities given his claim that his work for the Taliban consisted solely of repairing cars, and then only under duress.

29. The Tribunal Member assessed the applicant's claim in the context of Afghan history, in particular, the decision maker looked at the situation of the treatment of Taliban active supporters from 2004. Insofar as the applicant claimed to have worked for the Taliban under duress, it was open to him to apprise the authorities of this in order to counter any contrary impression that the state authorities might have from what the applicant feared his neighbours might have told them. Thus, given the country of origin information, the decision-maker was within jurisdiction in finding that the applicant's fear of the authorities in Afghanistan was not objectively well-founded. Insofar as the second limb of the applicant's fear was concerned, the Tribunal Member found that internal relocation to Kabul was an option for the applicant so that he would be removed from any fear of reprisal from the Taliban. The proposed area of relocation, Kabul, was perceived as being in the control of the Afghan army and the perception from country of origin information was that Kabul was a safe area to which the applicant could relocate. It was not the test in asylum law for the applicant to have an absolute guarantee of protection from the state. The test is whether it would be effective protection. The Tribunal Member had also addressed the applicant's personal circumstances in the context of the consideration of internal relocation. The applicant was a garage owner who had a successful business and who had been assisted by his uncle/father-in-law in starting up his business and in deed in coming to Ireland, as was found by the Tribunal Member. There was sufficient evidence to hold that the applicant had the resources to relocate to Kabul. Thus, the decision-maker properly concluded that relocation to Kabul would be reasonable and not unduly harsh. In all the circumstances there was compliance with the principles set out in *K.D. (Nigeria) v. RAT* [2013] IEHC 481 and *E.I. v. RAT* [2014] IEHC 27.

30. With regard to the documentation which the applicant had submitted to the Tribunal, the Tribunal had accepted his evidence that he was a mechanic. Therefore, the business card, photograph and invoices did not advance this aspect of his claim any further than that already accepted.

31. The letter from "the Islamic Emirate of Afghanistan" addressed to the applicant did not materially advance his claim as made at the hearing and throughout the asylum process which was that he was "an escapee from the Taliban" and in danger for that reason.

32. The letters from the Afghan Ministry of Interior merely stated that the applicant's shop had been sealed and no-one had the right to start working in the place or reopen it and that the applicant "should be handed over to the law". However, the Tribunal did not accept that the state authorities would be interested in the applicant for the reasons set out in the decision. Even if the applicant's feared that his neighbours might have apprised the authorities of his willingness to work with the Taliban, the country of origin information was to the effect that former active and actual members of the Taliban did not have difficulties with the government. Thus, it could not be said that a person who claimed to have worked for the Taliban only under duress would be persecuted by the state authorities. Counsel submitted that it was for the Tribunal to decide what weight, if any, should be accorded to a particular piece of evidence. Insofar as the applicant's counsel sought to rely on *F.U. (Afghanistan) v. Min. for Justice*, that case was distinguishable from the applicant's circumstances because in the former case, the claim had been rejected on the basis of a lack of credibility in the subjective claim.

The applicant's response to the respondents' submissions

33. It was contended on behalf of the applicant's counsel that the analysis carried out by the respondents' counsel with regard to the country of origin information was the analysis which fell to be carried out by the Tribunal Member, but which was not done.

34. Furthermore, it was not the case that the persons who may be at risk in Afghanistan were limited to the categories suggested by counsel for the respondent. Insofar as the 2009 UK Border Agency Report referred to such risk categories, it was also clear from para. 32.01 of the report that categories who may be at risk of persecution also included "former Taliban members" Counsel re-emphasised the significance of the finding made by the 2009 UK Border Agency Report to the effect that "internal flight or relocation alternative for those fleeing persecution or generalised violence is generally not available", information not adverted to by the decision-maker in this case contrary to the principles set out in *DVTS v. Min. for Justice* [2007] IEHC 305.

Consideration

35. The Tribunal's first finding was set out in the following terms:

"The appellant stated that the authorities were looking for him because the people in the businesses next to his had told the authorities that he had gone willingly with the Taliban and that "they got wrong information from the neighbour shop keepers that I am fixing bombs for the Taliban and I am willingly working for them (Q. 67 of the s. 11 interview)." The Tribunal does not accept this as a plausible scenario in circumstances where the appellant himself told the Tribunal in his oral evidence that he himself had no inkling that the men who had approached him in his shop were members of or associated with the Taliban until he arrived at their mountain hideout and was then told by them who they were. Accordingly, the appellant's contention that he would be at risk from the state on the basis of a (false) belief that he was associated with the Taliban is not found by the Tribunal to be objectively credible."

36. I am satisfied that there is merit in the argument advanced by counsel for the applicant that the Tribunal Member's conclusion was not cogent. The applicant's evidence was not inconsistent with a scenario whereby his neighbours could well have informed the police that the individuals with whom the applicant willingly departed in order, as the applicant believed, to repair a motor vehicle that had broken down, were connected to the Taliban. Furthermore, this finding cannot be viewed in isolation from the finding made by the Tribunal Member in relation to the documentation which the applicant furnished to the Tribunal.

37. The Tribunal Member stated:-

"Whilst the Tribunal does not make any explicit finding in relation to the purported identity and other personalised documents presented by the appellant, it affords them little weight and finds, accordingly, that they do not advance his claim in any material aspect."

38. Two of the documents, dated 1st April, 2011 and 1st July, 2011 respectively, are said by the applicant to be edicts from the Afghan Ministry of Interior's Sub-Directorate Office requesting that the applicant "should be handed over to the law" and that "every person who has information about [the applicant] should inform the intelligence services" and announcing "to seal the workshop of [the applicant]". Thus, the premise of these letters suggests an objective basis for the applicant's fear that the Afghan authorities believed he was associated with the Taliban and that he was being sought by the authorities in this regard. While the weight to be attributed to any piece of evidence is entirely a matter for the decision-maker, the difficulty with the Tribunal Member's finding is that no reason is proffered as to why he afforded the documents "little weight" or why he concluded that the documents did not advance the applicant's claim "in any material respect". In my view, the documents in question were material to the claims made by the applicant. This is particularly so given that the applicant's reliance on the documents said to emanate from the Ministry of the Interior, and the Tribunal Member's finding that there was no objective basis for the applicant's claimed fear of the authorities. If the documents were to be rejected as of "little weight", the reasons (whatever they might be) for the rejection should have been set out in the decision. In failing to do so, the Tribunal Member erred in law. Reg.5 of the European Communities (Eligibility for Protection) Regulations, 2006 require that a decision-maker take account, *inter alia*, of:-

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed amount to persecution or serious harm"

39. Moreover, as stated by Eager J. in *F.U. (Afghanistan) v. Refugee Appeals Tribunal* [2015] IEHC 78.

"30. In my judgment of S.F v. The Refugee Appeals Tribunal and the Minister for Justice Equality and Law Reform, delivered by me on the 4th February 2015 I outlined the statutory framework of the decision making role of the Refugee Appeals Tribunal and also the function of the High Court in judicial review. I adopted the ten principles outlined by Cooke J. in I.R. v. The Minister for Justice Equality and Law Reform and the Refugee Appeals Tribunal [2009] IEHC 353. In applying these principles to the case in question I find as follows:

.....

3) Having regard to the documents which were submitted it is not sufficient in my view for the first named Respondent to adjudicate until she had considered all the documents and stated the reasons as to why she did not accept these documents as assisting credibility. Cooke J. states that:-

"Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of the 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."

They are not so stated in this case.

40. The Tribunal Member found further reason to reject the applicant's claimed fear of persecution by the Afghan authorities as not objectively well-founded by reference to country of origin information. He found as follows:-

"The Tribunal has also come to the conclusion that the appellant's subjective apprehensions as to persecution by the government are not borne out in country of origin information (which was specifically put to the appellant and his legal advisors during the course of the oral appeal hearing) and are, accordingly, not objectively well-founded."

41. Counsel for the applicant submitted that the Tribunal Member's conclusion in this regard was unlawfully arrived at because there was selective reliance on country of origin information in circumstances where the said information contained conflicting views as to how the authorities dealt with former members of the Taliban.

In the context of the applicant's fear of persecution from the state authorities, the 2009 UK OGN concluded as follows:-

"Case owners should base their decisions on the circumstances of the individual claimant and the balance of the current country information. This points to former members of the Taliban not having any difficulty with the current administration so long as it is clear that they are no longer associated with Taliban. It is therefore unlikely that such applicants will have a well-founded fear of persecution by the state and a grant of asylum or Humanitarian Protection will not generally be appropriate. Claims from current members of the Taliban should be referred to a Senior Caseworker."

Case owners should note that the Taliban have been responsible for serious human rights abuses. If it is accepted that the applicant was an active operational member or combatant for the Taliban and has been involved in such actions, case owners should consider whether one of the Exclusion clauses is applicable. Case owners should refer such cases to a Senior Caseworker in the first instance."

42. The 2009 UK Border Agency Report dealt with the position of "Former Taliban Members" by noting that a Danish 2004 fact finding mission to Kabul found that:

"low profiled, or ordinary Taliban members generally do not face problems when integrating in the local community... The source was of the opinion that many ordinary people choose [sic] to join the Taliban just in order to get a job and therefore not necessarily guilty of human rights abuses. The source found that at the present time there is very little persecution going on of the Taliban supporters. They have adapted to the society and have no problems solely because they are former members of the Taliban...."

The Danish report further noted

"...The questions as to whether a former member will have problems in Afghanistan today depends on whether the person concerned has a solid network, and is in a position to persuade that he has changed side [sic] to the people in power. An international NGO mentioned that people who formerly worked for the Taliban can have problems in Afghanistan today, but that the extent of the problems depends on how highly placed the person was...."

[N]ational law enforcement officials around the country have been welcoming the former Taliban officials and fighters home if they promise to eschew violence and support the government".

43. In concluding that the applicant's fear of persecution by the Afghan authorities was not objectively well-founded, the Tribunal Member relied on the aforementioned 2009 UK Border Agency Report (referred to in the decision as a UK Home Office Report) and the 2009 UK OGN Report and concluded that "former Taliban or hexb-e-islami members do not have difficulties with the government. This would apply mutatis mutandis to persons who never had an association with these groups in the first place."

44. It seems to me that the country of origin information on which the Tribunal Member relied to find the applicant's fear of the Afghan authorities objectively not well-founded is more nuanced than the decision-maker's conclusion would lead one to believe. The approach advocated in the 2009 UK OGN was that "case owners" should base their decisions "on the circumstances of the individual claimant and the balance of the current country information".

45. On their face, the letters said by the applicant to emanate from the Afghan Ministry of the Interior comprised part of the applicant's circumstances. While the applicant claim is that he was a mechanic forcibly taken by the Taliban to work for them, the tenor of one of the letters said to have issued from the Ministry of the Interior appears to suggest that the authorities believed that the applicant's association with the Taliban merited his being "handed over to the law". The 2009 UK OGN premised its view that "current country information" pointed to "former members of the Taliban not having difficulty with the current administration so long as it is clear that they are no longer associated with Taliban." However, if the applicant was perceived to have an association with the Taliban, then that issue was required to be weighed by the decision-maker in the round (including country information) in the context of assessing whether his fear of the Afghan authorities was objectively well-founded. In the absence of any reasons for as to why the letters, which on their face showed that the authorities believed that the applicant was associated with the Taliban, were discounted, the TM's reliance on the 2009 UK OGN, in particular, was not indicative of a balanced consideration of whether the applicant's fear of the authorities was objectively well founded. I am thus persuaded that the decision-maker's finding that the applicant's fear of persecution by the authorities was not objectively well-founded cannot stand for the reasons set out herein.

46. The Tribunal went on to find an "apparent contradiction" between the applicant's evidence as to the reason why he had not reported his abduction to the police, namely his fear of being killed by the Taliban and perceived weaknesses in the police's ability to protect him, and the applicant's contention earlier in the asylum process that he did not go to the police because he feared persecution from them. While I note the argument advanced by counsel, it is not apparent to the court the extent to which this finding led to a rejection of the applicant's claimed fear of persecution by the authorities. The applicant's fear of persecution by the authorities as someone associated with the Taliban was rejected by the decision-maker on the basis of an erroneous reliance on available country of origin information in circumstances where a rejection of part of the applicant's claimed personal circumstances was not rationalised, an issue which this court has addressed, as outlined above

47. The Tribunal Member addressed the applicant's claimed fear of persecution by the Taliban in the following terms:-

".. the appellant could relocate within Afghanistan, to Kabul for example, to escape any alleged problems he might have with the Taliban. Given the degree of concern demonstrated by the appellant's family in sending him to Ireland and the financial resources displayed by them in being able to pay \$9,000.00 (a vast sum in the context of the average Afghan income) to facilitate his travel to Ireland, it would be expected that the appellant and his relatives would have the resources to enable the appellant to escape the threat of the Taliban and such internal relocation would be reasonable and not unduly harsh in the circumstances. One of his explanations for filing to do so, viz, that he didn't know about other areas, is also unreasonable in light of his eventual solution by coming to Ireland. His other explanation for failing to relocate internally is also unreasonable in light of his inability to particularise or specify how the Taliban purportedly have reporters everywhere or how those reporters would know or be motivated to find out the appellant's previous alleged interest to the Taliban and in light of his evidence to the Tribunal that he had never been to Kabul. Country of origin information appended to the s. 13 report supported this finding... and the appellant and his legal representatives were aware of this finding and the basis upon which it had been made. Moreover, the appellant has given evidence that his uncle and his wife remain safely living in their home. Despite displaying resources in trafficking the appellant to such a far flung location as Ireland, his and his uncle's failure to move themselves out of Afghanistan, even to Pakistan, for example, which would not require large resources, is not indicative of a sufficient threat to the life and safety of them, not only in Kabul but even in their own home province. Accordingly, the Tribunal finds that it would not be unreasonable or unduly harsh for the appellant to relocate to Kabul, as an example."

48. The country of origin information appended to the s. 13 report clearly demonstrated that Kunar Province, from whence the applicant hailed, was particularly unsafe and prone to Taliban insurgency. (Afghanistan NGO Safety Office October 2010). This was accepted by the Commissioner who found that state protection would not be available to the applicant in Kunar province, and effectively also by the Tribunal Member. A 2011 Freedom in the World Report noted that Kabul was "moderately secure" and that the efforts of the Karzai administration "to win over Taliban fighters and negotiate with elements of the Taliban leadership yielded few tangible results" during 2010. The same report referred to, *inter alia*, NGOs being "impeded by the worsening security situation and increasingly restrictive bureaucratic rules", a judicial system which "operates haphazardly" with "judges and lawyers ... often subject to threat from local leaders or armed groups", some provinces where "government ministers as well as warlords... sanction widespread abuses by the police, military, local defence militias, and intelligence forces under their command, including arbitrary arrest and detention, torture, extortion, and extra-judicial killings...". Moreover, while the report noted that the Afghan security forces continued to grow in 2010, "the army and especially the police have been plagued by inadequate training, illiteracy, corruption, involvement in drug trafficking and high levels of desertion. The Intelligence Service, the National Directorate of Security, lacks transparency and stands accused of serious human rights violations..."

49. Country of origin information which was submitted with the applicant's appeal to the Tribunal included an Amnesty International report dated 28th May, 2010 which stated, *inter alia*, as follows:

"Afghan people continue to suffer widespread human rights violations and violations of international humanitarian law more than seven years after the USA and its allies ousted the Taliban. Access to healthcare, education and humanitarian aid deteriorated, particularly in the south and southeast of the country, due to escalating armed conflict between Afghan and international forces and the Taliban and other armed groups. Conflict-related violations increased in northern and western Afghanistan, areas previously considered relatively safe."

50. The same report documented that:

"The Taliban and other anti-government groups stepped up attacks against civilians, including attacks on schools and health clinics, across the country. Allegations of electoral fraud during the 2009 Presidential elections reflected wider concerns about poor governance and endemic corruption within the government. Afghans faced lawlessness associated with a burgeoning illegal narcotics trade, a weak and inept justice system and a systematic lack of respect for the rule of law. Impunity persisted, with the government failing to investigate top government officials widely believed to be involved in human rights violations as well as illegal activities. ..."

and

"Civilian casualties caused by the Taliban and other insurgent groups increased. Between January and September, armed groups carried out more than 7,400 attacks across the country, according to the Afghanistan NGO Safety Office. The UN registered more than 2,400 civilian casualties, some two-thirds of whom were killed by the Taliban."

Violence peaked in August during the election period, with many of the attacks indiscriminate or targeted at civilians. Used as polling stations, schools and clinics were vulnerable to attack. According to the UN, at least 16 schools and one clinic were attacked by the Taliban and insurgent groups on election day."

51. The report also documented a Taliban suicide bomb attack on three Afghan government buildings in Kabul in February 2010, and that on 17th September, 2010, a suicide car bomb on an International Security Assistance Force convoy in Kabul killed 18 people, including 10 civilians. The Taliban claimed responsibility for the attack. The Report also documented that on 8th October, 2010 a Taliban suicide car bomb outside the Indian Embassy in Kabul resulted in the killing of 13 civilians and 2 police officers. On 28th October, 2010, Taliban fighters stormed a UN Guest House in Kabul, killing 5 foreign UN employees and 1 Afghan civilian and 2 Afghan security personnel.

52. The Amnesty International Report also made reference to "internally displaced people", stating that

"UNHCR, the UN Refugee Agency, estimated that 297,000 Afghans were displaced from their homes, with more than 60,000 in 2009 alone. The majority of the displaced had fled the ongoing fighting in the south, east and south-eastern areas. Thousands were also displaced by drought conditions, flash floods and food shortages in central and northern areas."

Thousands of displaced people were living in makeshift camps in Kabul and Herat with inadequate shelter and very little access to food, drinking water, health care services and education."

A total of 368,786 refugees returned to Afghanistan from Iran and Pakistan during the year, according to UNHCR. Some returnees were displaced from their places of origin because of scarce economic opportunities and limited access to

land, housing, drinking and irrigation water, health care and education. In several instances, the returnees' land and property were occupied by local militias allied with the government."

Thousands of displaced Pakistanis, who fled military operations in the north-western parts of Pakistan – the Federally Administered Tribal Areas and Swat valley – were sheltering in Kunar, Khost and Paktika provinces in eastern Afghanistan"

53. The applicant also submitted a 2009 Human Rights Watch Report with his appeal submissions which referred, inter alia, to the United Nations reporting that:

"approximately 2,021 civilians were killed by coalition, government, and insurgent forces in the first 10 months of 2009, an increase on 1,838 killed during the same period in 2008. Of these, 69 percent were attributed to "anti government elements," and 23 percent to international-led military forces."

54. The report stated that:-

"Civilian casualties caused by the Taliban and other insurgent groups continued to rise."

55. While the Tribunal Member sourced and made reference in the s.6 analysis to a 2009 UK Home Office report and a 2009 UK OGN in support of his finding that the applicant's fear of persecution by state authorities was not objectively well-founded, he did not specifically refer to these reports in the context of his finding that internal relocation would be an option for the applicant to escape reprisal from the Taliban, and he relied, in relation to one aspect of the finding, on the country information referred to in the s. 13 report

56. It has to be said that the 2009 UK Border Agency Report and the 2009 UK OGN contain conflicting views as to the merits of internal relocation within Afghanistan as an alternative to refugee status. Portions of the reports suggest that internal relocation within Afghanistan is not a viable option

57. Under the heading "Internal flight or relocation" the 2009 UK Home Office report documented as follows:

"UNHCR's Eligibility Guidelines for Assessing the International Protection needs of Afghan asylum seekers, December 2007 stated that: 'In the context of Afghanistan, UNHCR considers that an internal flight or relocation alternative for those fleeing persecution or generalized violence is generally not available. Local commanders and armed groups are often able to extend their influence beyond local areas due to links to more powerful actors, including at the central level. Due to limited capacity and on-going conflict, State authorities are largely unable to provide effective protection from non-State actors. Extended family and community structures within Afghan society are the predominant means for obtaining protection and economic survival, including access to accommodation. Thus, it is very unlikely that Afghans will be able to lead a relatively normal life without undue hardship upon relocation to an area to which they have no effective links, including in urban areas of the country'."

58. Other parts of the UK Home Office report, under the heading "UNHCR Guidelines on return to Afghanistan", noted that

"Given the open conflict in Afghanistan, increasing frequency of indiscriminate attacks on civilians and the lack of national protection available, there will be cases in which the granting of international protection is warranted even in the absence of a specific link to the criteria enumerated in the 1951 Convention... In this context, it should be noted that access to conflict-affected regions is severely curtailed for United Nations' staff, affecting monitoring, project implementation and protection activities."

59. In relation to Kabul, the 2009 UK OGN stated, *inter alia*, :-

"Sufficiency of protection. A judicial and legal system with limited function exists in Afghanistan. In Kabul the police authorities are generally willing to enforce the law, although their ability to do so is limited by inadequate resources and dependent to some extent on the loyalties of individual officers. ISAF [International Security Assistance Force] works alongside the Afghan Security Forces to maintain security in and around Kabul and as a result the general security environment there is much better than in other areas."

and

"It may be that an applicant is able to establish a well-founded fear of treatment by non-state actors that might amount to persecution. Within Kabul, sufficient protection against such treatment will be available in most cases, but each claim must be decided on its merits... Applicants from outside Kabul can reasonably relocate to Kabul unless there is evidence that their would be persecutors would be likely to pursue them there and there is evidence that they would fall into the small category of applicants who would not be able to rely on sufficient protection in Kabul. In the latter case, a grant of asylum may be appropriate."

60. Under the heading "Fear of warlords", the 2009 UK OGN, expressed the following viewpoint:-

"Internal relocation. The law provides for freedom of movement within Afghanistan, but certain laws limit citizens' movement and the Government limits citizens' movement due to security interests. Local customs and traditions may also make it very difficult for women to travel without a male escort. This makes it practical for men and women with a male support network who have a well-founded but localised fear of persecution in one area of Afghanistan to relocate to other areas of the country where they would not be at risk. Therefore, applicants who encounter problems with a minor warlord who has influence in their local area can relocate to another part of the country, and it is reasonable to expect them to do so. However, there may some applicants who encounter problems with warlords whose influence reaches beyond the local area and for them internal relocation may not be an option. Factors to take into account in deciding whether internal relocation is available to an individual applicant will include whether they, or their would-be persecutors, have influential connections in the current administration."

61. The foregoing information does not appear to have been weighed by the Tribunal Member in the context of the internal relocation finding, yet some of the information had the potential to support the applicant's claim and would appear contrary to the views formed by both by the RAC and the Tribunal Member that the applicant could relate to "Kabul for example". Moreover, the decision-maker dismissed the applicant's fears about relocating within Afghanistan on the ground, inter alia, that he could not substantiate his belief

that the Taliban "have reporters everywhere", yet some of the country of origin information suggests that "[l]ocal commanders and armed groups are often able to extend their influence beyond local areas due to links to more powerful actors, including at the central level."

62. Where there is conflicting country of origin information, the decision-maker is obliged to consider it and weigh it as appropriate and set out why certain information is preferred over other information. However, this exercise was not carried out by the Tribunal Member, contrary to the dictum of Edwards J. in *DTVS v. RAT* [2007] IEHC 305 where he states:-

"The second named respondent asserts in his ruling that he had regard to all of the relevant facts. However, the country of origin information before him contained conflicting information. He gives no indication as to how, or on what basis, he resolved the conflicts in the information before him. Moreover, he gives no indication as to the basis on which he elected to prefer the apparently anecdotal accounts of certain interviewees quoted in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission report on Cameroon 2004. While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis. The difficulty in the present case is that the second named respondent firstly, does not allude to the fact that the information is conflicting and secondly, does not give any indication as to why he was inclined to prefer the information contained in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission Report 2004 to that contained in the reports submitted by or on behalf of the applicant.

In conclusion, and for the reasons outlined, I am disposed to grant the applicant the relief sought by him in para. 4 (a) of his amended statement of grounds."

63. I adopt the approach advocated by Edwards J. in relation to the present case.

64. Furthermore, the shared burden of proof as referred to in principle 10 of *KD (Nigeria)* requires a protection decision-maker "to conduct a careful inquiry into a safe relocation area, having regard to up-to-date objective evidence about the area." Such objective evidence must necessarily include conflicting country of origin information where such exists so that the decision-maker is in a position to conduct the necessary careful inquiry in a balanced manner.

65. Moreover, if country of origin information potentially probative of a core issue in the applicant's case is to be rejected, there is an obligation on a decision-maker to set out why it was being rejected. That was not done in the present case

66. For all of the foregoing reasons, I am satisfied that the challenge that there was not a fair or proper analysis of country of origin information in the context of the finding on internal relocation insofar as assessment of risk is concerned has been made out.

67. Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006 provides:-

(1) As part of the assessment of protection needs, a protection decision maker may determine that a protection applicant is not in need of protection if the applicant can reasonably be expected to stay in a part of his or her country of origin where there is no well-founded fear of being persecuted or real risk of suffering serious harm.

(2) In examining whether a part of the country of origin accords with paragraph (1), the protection decision-maker shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

68. Principle 5 of the principles set out in *K.D. (Nigeria)* states:-

"Where there is a well-founded fear of persecution and a general area has been identified as an alternative to refugee status then the protection decision-maker must pose two questions: (i) is there a risk of persecution / serious harm in the proposed area of relocation? If not, (ii) would it be reasonable to expect the applicant to stay in that place?"

69. Principle 6 sets out the following:-

Absence of Risk: Where the persecution feared is of a general or public character such as a religious or tribal conflict or oppression by a political regime which controls a particular region or city, it will be necessary to consult appropriate up-to-date COI to determine whether the risk of persecution / harm is genuinely absent from the proposed area of relocation. In such cases the decision maker must engage in a detailed and careful enquiry as to the general circumstances prevailing on the ground in the proposed area, in accordance with Regulation 7(2).

70. I am satisfied as far as the assessment of risk was concerned, that it was unreasonable for the Tribunal Member to conclude that the applicant could avoid the claimed risk of harm from the Taliban by moving to Kabul, in the absence of any balanced assessment of country of origin information which was before the decision-maker and which contained conflicting viewpoints on the issue of internal relocation within Afghanistan.

71. I turn now to the consideration of the applicant's personal circumstances, in the context of the reasonableness of the internal relocation finding. I am satisfied that the assessment made by the Tribunal Member about his personal circumstances was not unreasonable having regard to the evidence and information given by the applicant, as recorded in the decision. However, this is not sufficient to sustain the internal relocation finding in light of the Tribunal Member's failings vis-à-vis the assessment of risk, as set out above

72. The Tribunal also reached a determination in relation to the applicant's failure to seek asylum in an EU country before he reached Ireland. It held:-

"The appellant's travel to this state would have been circuitous and involved transit through another EU state given that he hid in a container lorry which drove here on a car ferry. He did not provide a reasonable explanation for his failure to apply at an earlier stage for asylum."

73. I agree with the applicant's counsel that there is no requirement on a protection applicant to seek asylum in the manner

suggested by the Tribunal Member. Furthermore, I agree that the finding lacks clarity. The view expressed by the decision-maker suggests that the applicant did not give a reasonable explanation as to why he did not seek asylum in "another EU state", yet there is nothing on the face of the decision to assist the court as to what was put to the applicant in this regard or what his explanation was, which was deemed unreasonable. Nor does this appear to have been addressed in the s. 11 interview or the s. 13 report. In any event, this finding, of itself, could not sustain a decision rejecting the claim for refugee status, given the peripheral nature of the finding to the core claim.

74. Finally, I wish to address the Tribunal Member's statement to the effect "that the above issues on credibility lead to the conclusion that the appellant is not credible in his evidence" I agree with counsel for the applicant that this statement is difficult to comprehend in circumstances where a reading of the decision overall does not suggest that the substance of the applicant's claim was disbelieved, although, for the reasons set out by this court, the Tribunal Member erroneously concluded that the applicant's fear of persecution by the Afghan authorities was not objectively credible and erroneously concluded that he could relocate to Kabul to escape the Taliban.

75. The tone of the above quoted statement appears to suggest that the applicant's personal credibility was in issue. However, it is not apparent to the court what aspects of the applicant's claim were found not to be subjectively credible. If all or aspects of the applicant's story was disbelieved, the interests of fairness required that the matter be addressed clearly and rationally. Equally, the court is somewhat at a loss to understand why the Tribunal Member saw fit to invoke the principle enunciated in *Folarin v. Minister for Justice* [unreported, High Court, Peart J., 2nd May, 2008] that "[o]nce such a fundamental lack of credibility is found, the Tribunal is not obliged to refer to country of origin information to see whether her story could be true". In my view, there were no adverse personal credibility findings on the face of the record which would merit the approach set out in *Folarin*. Indeed, counsel for the respondents argued in the course of her submissions that the decision was not about the applicant's personal credibility and the applicant's counsel opined likewise while questioning why the Tribunal Member invoked *Folarin* at all. It is not helpful to a court exercising its judicial review function to have to try and comprehend why the decision-maker saw fit to invoke the principle in *Folarin*, absent any clear findings on the face of the record or indeed patent from the decision with regard to the applicant's personal credibility.

Summary

76. For the reasons set out in this judgment, the court is satisfied that substantial grounds have been made out to warrant the granting of leave and this being a telescoped hearing, the court will quash the decision of the first named respondent and remit the matter to the Refugee Appeals Tribunal for a *de novo* hearing before a different Tribunal Member.