Neutral Citation: [2014] IEHC 123

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009/1198 JR

F.O.

Applicant

-and-

THE REFUGEE APPEALS TRIBUNAL (PAUL MCGARRY) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 31st January 2014.

Introduction

1. In this case the applicant seeks, principally, an order of *certiorari* quashing the decision of the first named respondent affirming the decision of the Refugee Applications Commissioner recommending that the applicant should not be declared a refugee. It is contended that the decision in question contains material errors of fact; relies upon a flawed assessment of the applicant's credibility; reaches unreasonable conclusions and fails to engage in a forward looking assessment of risk of persecution.

Background

2. The applicant initially presented to the Office of the Refugee Applications Commissioner on the 27th November, 2007 and the form setting out his claim for asylum was lodged on the following day. In it, he stated that he was a national of Afghanistan and that he had travelled from there to Ireland via Iran, Kazakhstan and Russia. He had departed from Afghanistan approximately two months earlier and arrived in Ireland on the 26th November, 2011. His travel was arranged by an agent whom his uncle had paid in US dollars.

3. According to the form

> *"Applicant stated that his father and himself were members of Hazb e Islami/Taliban and they wanted him to be a suicide bomber and because of this he left Afghanistan."*

4. On the 5th December, 2007 the applicant completed a questionnaire for the purpose of the claim.

5. In answer to the question *"Why did you leave your country of origin?"* the applicant asserted that his father had been a member of Hizb-e-Islami [the Islamic Party] and had worked for the Taliban government. He said that he himself had graduated from school in 2003 and had spent two years attempting unsuccessfully to gain admission to university. A friend of his father then persuaded his father to send him to an Islamic madrasa in Pakistan. This friend took him to the madrasa in Peshawar, where he stayed for about five months.

6. The applicant went on to describe being subjected to a mixture of brainwashing, encouragement and threats with regard to the desirability of carrying out suicide attacks against the foreign forces occupying Afghanistan and its government. Eventually he agreed to participate in one such attack and was sent to Kabul. However, he says, he did not want to hurt innocent people and after one night there he left the house in which he was staying and went to his family. Soon after security officials came to his parents' house looking for him and arrested his father.

7. In answer to the question "What do you fear may happen to you ... if you return to your country of origin?" the applicant said

> *"If I return to Afghanistan, security officials of the government will put me in prison and punish me. Because I was brought to Kabul for a suicide attack and the government is fully aware of this. They came to our house to arrest me and they arrested my father. And I still do not know the whereabouts of my father. The other point is that the group of Taliban is also in my pursuit and my life is at risk."*

8. In the section dealing with the applicant's travel details, he stated that his uncle had made arrangements for him with an agent. He said that he had travelled, on a false Hungarian passport, through Iran, Turkey and Greece. He had spent one week in Iran, about three and a half weeks in Turkey and one year and fifteen days in Greece. He did not apply for refugee status in any of these countries.

9. The applicant enclosed with the questionnaire what were said to be his national identity card, his madrasa identity card and his father's Hezb e Islami identity card.

10. On the 23rd June, 2008 the applicant attended for interview with the Refugee Applications Commissioner.

11. The applicant was asked why he had not claimed asylum in Greece if he was in fear of his life. He said that he had been arrested by the police and was told that he was not accepted and that he had to leave the country. He referred to being given an "exit paper". He said he did not have enough information about Greece to know whether a claim would be accepted or not.

12. The interviewer again asked why the applicant had not said to the Greek police that he wanted asylum. He replied "*I did not know about asylum. He said go to Athens...He said it is better for you he just gave us a ticket*." He also said that the police gave him an address in Athens. The interviewer commented, twice, that this appeared to mean that he had been given a ticket to Athens and an address to go to in order to claim asylum. The applicant said that when he got to Athens other Afghanis told him "*they will give you nothing no food or anything*" and he threw away the address and the ticket.

13. In relation to his time in Pakistan, the applicant said that when he failed to get into university his father decided that he should go to an Islamic school in Pakistan. The school, he said, was not just a school but encouraged students to become suicide bombers because of the American and British occupation of Afghanistan. He believed that the teachers were correct in saying that God would forgive such actions. One teacher in particular, named Noorullah, told him that he would have to do it, and that his father would be proud of him because he had been in the Taliban. However, the applicant was clear that his father did not know that the school

trained suicide bombers. He had always told him not to take part in hurting people. Not every student was recruited, only those with strong religious feelings.

14. The applicant said that he was in contact with his father perhaps five times over the five months, using the office phone in the school. He told him that what was being taught was "not good" but his father simply took it that he was being lazy.

15. At one point the interviewer inquired where the applicant had learned English. The applicant replied that he had studied English in school and in English language centres in Afghanistan. He went on to say *"When I was jive months in Pakistan we studied English on computers to a high level."* The interviewer asked why his father would send him to an English school if he was in the Taliban and he answered that his father had been a big officer in the government, had been to university and had a Master's degree. Asked why a school training him to be a suicide bomber would teach English "to a high level", he said that it was part of the curriculum that the school had to teach English.

16. The applicant said that when he left the house he had been taken to in Kabul he went to an uncle's house. That uncle then took him to his father, who was reluctant to believe him but eventually accepted what he was told. He stayed one day with his father and then one night with an uncle. That night his father was arrested. The applicant said that he did not know who informed the police but maybe it was the person from whom he had escaped. He was not sure of this. He and his family still did not know the whereabouts of his father.

17. The applicant said that he had left Greece on the 25th November, 2007 and flown to Belfast Airport. He travelled to Dublin the same day and went to the office of the Refugee Commissioner on the following day. The agent travelled with him as far as Belfast, took his passport and ticket and put him in a taxi to Dublin. Asked by the interviewer why he did not claim asylum in Belfast "*as it is part of England*," he said that the agent told him it was all Ireland and he was to go to the capital.

18. The applicant then mentioned that he had transited through London for two hours. Asked why he had not claimed asylum there he said

> *"I heard that If you claim asylum in England they will send you back and if you get stopped in the airport they will know that you came from Greece."*

19. The interviewer then said

> *"So the reason that you are claiming asylum in Ireland is because it is easier to get asylum here is that correct?"*

20. The applicant's response was

> *"Yes, because I believe the agent he said that it is easier in Ireland than in other countries."*

21. He was also asked why, in his first interview, he had claimed to have left Afghanistan two months before he arrived in Ireland. He replied

> *"Because I am afraid that if I say that I was in Greece they will send me back, the agent said that I should not talk to anyone and if I say that I came from Greece that will send you back."*

22. The interviewer asked where the applicant got his father's Hizb e Islami card and why he was carrying it, to which the response was that his uncle had given it to him and that the agent said that it would be good to have it, to show that his father was in that organisation. When asked "*How do I know that this is your father's ID?",* he said "*I have the same name as my father's name the same as my ID card."*

23. Towards the end of the interview, it was put to the applicant that there were "*a number of discrepancies in the documents*" that he had presented and he was asked if he could comment. He replied "*I don't know about that*". He had no objection to his documents being sent to the Garda Technical Bureau for verification. No specific discrepancy is recorded as having been put to him.

24. The Commissioner's report on the application, made under s.13(1) of the Refugee Act, 1996 as amended, recommended that he should not be declared a refugee. It is necessary to refer to the report in some detail, as certain of the findings were endorsed by the respondent.

25. In paragraphs 3.2.1 to 3.2.5 the report sets out the following findings adverse to the applicant:

• He had the opportunity to claim asylum in Turkey and his failure to do so was not consistent with the actions of a genuine refugee.

• He had the opportunity to claim asylum in Greece, having been given an address and a ticket by the Greek police for that purpose, and his actions in throwing these away were inconsistent with having fled his homeland to seek international protection.

• He had the opportunity to claim asylum in London and Belfast but chose to come to Ireland in the belief that it was easier to get asylum here, which made it clear that his intention was not to apply in the first safe country but in a country where it would be easier to get refugee status. The officer adopted the following passage from Hathaway, *Law of Refugee Status* (1991):

> *"The applicant's failure to seek asylum in any other country than Canada, although he passed through several intervening countries is not consistent with fleeing from one's pursuers."*

26. The report continues with the following adverse findings:

• It was not plausible that the applicant's father, who was in the Taliban, would not know that the madrasa was used to train suicide bombers.

• It was not plausible that the applicant could not tell his father that he had been asked to become a suicide bomber on any of the five occasions upon which he had telephone contact with him.

• It was not plausible that the applicant had English lessons in the madrasa.

• It was not plausible that the person from whose house in Kabul the applicant escaped would inform the police of his activities.

• The name on the Hizb e Islami card was not the same as that of the applicant.

27. This decision was appealed to the first named respondent and an oral hearing was held on the 21st May, 2009. It is not necessary to set out all the grounds of appeal but they included a complaint as to the use of the quotation from Hathaway, considered further below.

28. At the hearing the applicant gave further evidence as to his stay in the madrasa. He said that before he went there, neither he nor his family knew that it involved more than religious studies. However, while there he also studied English and computers. The encouragement in relation to suicide attacks began when he had been there for three or four months, when the teachers had observed who were the more religious students. The applicant said that he had believed what he was told about American atrocities.

29. The applicant said that he was told not to tell his parents about these things over the telephone, and the only phone to which he had access was in the school office.

30. He said that he left the house in Kabul because he did not want to go ahead with the plan. He said that killing foreigners was not right. He went to his uncle and together they went to his father. At first his father did not believe him, then he said that his life would be in danger and people "*would come for him*." His father's view was that the government would be able to identify attackers coming into the city. He also said that there would be danger from the Taliban because they might believe that he would disclose their activities.

31. The applicant gave evidence that he feared the Taliban and the people from the madrasa because he had prepared for an attack and did not carry it out and because they might think that he would disclose information. He also feared being imprisoned for preparing the attack. He did not consider that he would be safe, in Kabul or elsewhere.

32. On the arrest of his father, the applicant said that it might have been because of himself, that the authorities might have known that he had entered the city and might have believed that his father, as a member of Hizb e Islami, had encouraged him to carry out a suicide attack. His family still had no news as to what had happened to his father. The applicant said that he thought that the interviewer must have misunderstood him in relation to the possibility that the people from whom he fled would have informed on him.

33. An explanation was given in relation to the translation of the Hizb e Islami card. In his affidavit the applicant avers that this explanation was accepted by the Presenting Officer and by the first named respondent.

34. In relation to his travels, the applicant said that his uncle had made arrangements with an agent. They went to Iran for one week, then Turkey for three. In Turkey he stayed in the hotel all of the time, on the instructions of the agent. They then went to Greece, where he said he remained for almost a year while the agent tried to get him out. The agent would not let him apply for asylum in Greece because he said that the applicant's uncle would not pay him. He told him that if he was caught by the police he would be returned to Afghanistan.

35. The contact with the Greek police was discussed. The applicant said that the police did not tell him to claim asylum there.

36. The applicant said that he did not seek asylum in London because the agent told him not to, as the English were "very strict" and might force him back.

37. Submissions were made on behalf of the applicant to the effect that he had a well-founded fear of persecution from both the government and the groups associated with the madrasa - the former because it would be considered that he was associated with a terrorist organisation, the latter because he would be considered a turncoat.

38. On the 29th August, 2009 the first named respondent affirmed the Commissioner's decision.

Decision of the first named respondent

39. The decision of the tribunal member (hereafter "the respondent") summarises the basis for the applicant's case and the submissions made on his behalf. It is not necessary to set out the summary in full but two factual matters need to be mentioned. In referring to the core aspects of the claim the respondent said

> *"He fears that the Taliban will kill him because they will think that he has informed on the applicant [sic] to the government authorities. He says he fears that the government will imprison him because he has run away from the country."*

40. Dealing with the applicant's sojourn in Greece and his contact with the police there the respondent said

> *"The applicant says that when he was detained by police in Greece, they told him to go to an address in Athens. The applicant previously indicated at interview that this address was a place that he could claim asylum. The applicant says that the police did not tell him to claim asylum."*

41. The respondent agreed with the Commissioner on the specific findings as to credibility set out in paragraphs 3.2.1. to 3.2.5 of the report (summarised above). The applicant, it was said, had provided conflicting accounts "*throughout the asylum process, in particular in relation to his travel and as to his motivation for travelling to Ireland*". The respondent further stated that "*in addition*" the applicant had initially claimed to have come through Kazakhstan and Russia and observed that

> *"It is always difficult, in circumstances where an applicant accepts that he has given incorrect information, to know where the truth begins with regard to any aspect of an applicant's claim. In my view it is incumbent upon an applicant to provide a consistent account of all matters relating to his claim."*

42. The respondent noted that the Commissioner had pointed out discrepancies relating to the applicant's stay in Greece. However, he described as "*more worrying*" the indication by the applicant that he claimed asylum in Ireland rather than England because it was easier to get asylum in Ireland, saying:

> *"In my view, this attempt by the applicant to cherry pick the country in which he should claim asylum is precisely the type of mischief to which section 11B(b) of the Refugee Act is directed. I agree with the conclusion drawn by the*

Immigration Appeal Board of Canada, in the case of Asamoah, (referred to at page 48 of Hathaway, Law of Refugee Status and identified by the commissioner in the Section 13 Report) as follows:

'The applicant's failure to seek asylum in any country other than Canada although he passed through several intervening countries...is not consistent with an intention to flee from one's pursuers and therefore the concurrent need to seek haven wherever one can. Surely it is reasonable to expect one to seek help at the first convenient venue.'

The applicant now says that he travelled through Iran, Turkey and then spent, on his own evidence, one year in Greece. The applicant then transited through London and Belfast before coming to Ireland. I find that the applicant's answers with regard to his failure to claim asylum in these places are not reasonable having regard to his assertion that he was in flight for his life arising from what occurred to him and his family in Afghanistan."

43. The respondent went on

"I also agree with the conclusion drawn by the Commissioner to the effect that it is incredible that if the applicant's father had been involved with the Taliban (and worked in the Finance ministry) he would know that the school that the applicant was attending was liable to be training him to be a suicide bomber; neither is it plausible that the applicant would not tell his father on the 5 occasions that he spoke to him on the telephone during his time away at school."

44. On the issue of credibility, the respondent's finding was that

"For any of these reasons, I conclude that the applicant is not a credible person and I could not therefore afford him the benefit of the doubt."

45. The decision continues as follows:

"Even if the applicant presented as a credible person, I do not think that he would come within the category of person contemplated in Section 2 of the 1996 Act. In this context, the applicant's fear appears to be related to the allegation that he was trained to become a suicide bomber, and then changed his mind. No country of origin information has been provided to the Tribunal that supports the contention that the applicant would be in difficulty if he simply refused to participate in such activities having been requested or trained to do so. In fact, all of the country information submitted on behalf of the applicant refers to a generalised fear arising from the poor security situation in Afghanistan at the present time. The documentation does not corroborate or support the implicit submission made by the applicant to the effect a person in the applicant's specific position will be liable to be in difficulties if returned to Afghanistan at the present time.

Even if I am wrong in this conclusion, it does not seem to me that what the applicant fears could amount to persecution in the context of his story. If the applicant was genuinely a person that had been trained to participate in suicide bombings, then it is quite possible that the legitimate authorities would want to talk to him about those who had been involved in training him, his colleagues and comrades, and the plans that he had been instructed to carry out. In my view, this would be a legitimate and realistic concern on the part of authorities, if they became aware that plans for suicide bombings were being put in place. In those circumstances, I cannot see that what the applicant is in fear of could amount to persecution, having regard to his own evidence about his activities prior to his return to Kabul and change of heart."

Submissions

A. Alleged material errors of fact

46. According to the applicant there are two alleged material errors of fact in the respondent's decision. Firstly, the respondent is said to have erred in recording that the applicant's fear in relation to the government of Afghanistan arose from the fact that he had "run away from the country". The applicant had stated in his questionnaire, in interview and in the appeal hearing that he feared being arrested, imprisoned and ill-treated because the government forces would know of his connections with Hizb e Islami and because of his involvement in a planned attack. They had come to arrest him before he left the country and had arrested his father instead. He still did not know what had happened to his father.

47. It is argued that the applicant's support for Hizb e Islami was a core part of his claim, and it is pointed out in this regard that there is no finding in the decision in relation to the membership card.

48. It is accepted that the decision, when read in full, does deal with the applicant's case in respect of the government but it is submitted that the inclusion of the sentence complained of is "disturbing".

49. The second alleged error relates to the contact the applicant had in Greece with the Greek police. The respondent stated in his decision that the applicant had indicated at interview that the police had given him an address in Athens at which he could claim asylum, whereas in fact this was an assumption on the part of the interviewer. The significance of this error is said to lie in the way that it feeds into the findings as to the applicant's credibility.

50. On behalf of the respondent Ms Stack SC submits that the statement that the applicant had "indicated" at interview that the address in Athens was a place at which he could claim asylum was a reasonable and rational reading of the interview notes quoted above. Further, it was in the respondent's summary of the evidence and not in his findings.

B. Travel and the general assessment of the applicant's credibility

51. This issue concerns the application of s. 11B(b) of the Refugee Act, 1996 as inserted by s.7(t) of the Immigration Act, 2003. Section 11B sets out a list of matters to which the Commissioner or Tribunal, as the case may be, is to have regard when assessing the credibility of an applicant. Section 11B(b) refers to

"whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence."

52. Mr. McGrath submits that it was inappropriate to apply this provision in the light of certain decisions of the European Court of Justice (*N.S. v Secretary of State for the Home Department- Cases C-411/10 and C-493/10*) and the European Court of Human Rights (*M.S.S v Belgium and Greece, 30696/09*) relating to treatment of asylum seekers in Greece.

53. In M.S.S. the applicant was an Afghan national who had left Kabul early in 2008 and travelled to Belgium via Iran, Turkey, Greece and France. While in Greece he had been arrested and detained for a week. He was then issued with an order to leave the country. He did not apply for asylum there.

54. The Belgian authorities and relevant courts determined that Greece was the Member State having responsibility in the matter and it was decided to transfer the applicant back there. An application to the European Court of Human Rights for a suspension of the transfer was unsuccessful, but the court informed the Greek government that this decision was based on its confidence that Greece would honour its obligations under the Convention and comply with EU legislation on asylum. The applicant was sent to Greece on the 15th June, 2009. Within three weeks of his arrival in Greece the Court had been given sufficient grounds for concern to apply Rule 39 of the Rules of Court and inform the Greek government that the applicant should not be deported pending the outcome of the proceedings.

55. It appears that from that date up to the date of the Court judgment on the 21st January, 2011 the applicant was provided with no assistance as regards accommodation or subsistence. He had been briefly detained on two occasions, in what he alleged to be appalling conditions. He claimed to have been mistreated while in detention. He also claimed that he had nearly been deported to Turkey twice.

56. In its judgment in the substantive case the Court listed a large number of reports published since 2006 by national, international and non-governmental organisations deploring the conditions of reception of asylum seekers in Greece. There was a systematic practice of detention in poor conditions with a real risk of ill-treatment. Where asylum seekers were not detained, they were sometimes issued with an order to leave the country within a few days. It is noted in paragraph 167 of the judgment that where asylum seekers were detained in areas of the country other than Athens, there was a consistent practice of "*issuing them with an order to leave the country and sending them to a large city like Athens or Patras*." They were given no information about the possibilities of accommodation and many slept in the streets or in illegally occupied public places. There were major obstacles to getting permission to work and to accessing healthcare.

57. The Court also found that there were significant issues in relation to the asylum procedure itself. There was a lack of information about the possibility of making an application, the procedures to be followed and the time-limits applicable, while the time-limits were as a matter of practicality too short. The police were described as using "tricks" to discourage applicants from following the procedure, such as telling them that they could not apply without an address.

58. The processing of applications was criticised on a number of fronts. There was insufficient provision for interpreters and interviews were often held in a language the asylum seeker did not understand. There was no legal aid. Interviews were superficial. Decisions were made by police officers with inadequate training, were not adequately reasoned and were disproportionately negative. Applicants were not informed of the right to appeal.

59. On the 17thJuly, 2009 UNHCR had announced that it would no longer participate in the asylum procedure in Greece.

60. The Court noted at paragraph 192 that the risk of *refoulement* was a constant concern and that it had been established that several Afghan nationals had been expelled to Turkey and thence to Afghanistan without their applications for asylum being considered.

61. In its conclusions on the Article 3 issue, the Court noted that the applicant's allegations of brutality while he was in detention were not supported by medical evidence but found that they were consistent with numerous accounts collected from witnesses by international organisations. There was similar support for his allegations as to living conditions in detention. It found that those conditions amounted to degrading treatment contrary to Article 3. It found a further violation of Article 3 in the fact that, for a prolonged period, the applicant had been left in a state of extreme poverty, living on the streets without any means of satisfying the most basic of needs.

62. On the complaint relating to the shortcomings in the asylum procedure, the Court considered that Article 13 was applicable because of the high-risk situation pertaining in Afghanistan. While the relevant Greek legislation was designed to protect asylum seekers from removal back to countries from which they had fled without examination of their cases, it had been revealed for a number of years that the legislation was not being applied in practice. There was no effective remedy to prevent arbitrary removal back to the country of origin. The applicant had, therefore, been at risk of expulsion to Afghanistan without any serious examination of his case and without access to a remedy. The Court found that the risk of this happening, combined with the deficiencies in the asylum procedure outlined above, amounted to a breach of Article 13 in conjunction with Article 3.

63. With regard to the complaint against Belgium, the Court attached importance to a letter from UNHCR to the Belgian Minister in charge of immigration in April 2009 which contained an "unequivocal" plea for the suspension of transfers to Greece. The Court found that at the time of the applicant's expulsion from Belgium, the authorities there knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. It found a violation of Article 3 of the Convention on the part of Belgium on the basis that it had exposed the applicant to the risks linked to the deficiencies in the Greek asylum procedures and to detention and living conditions in breach of that Article.

64. In *N.S. v Secretary of State for the Home Department*, the Court of Justice ruled on Article 267 TFEU references for preliminary rulings in two cases, one from the United Kingdom and one from this State.

65. N.S., who was the appellant in the main proceedings in the English case, was an Afghan national who had come to the United Kingdom after travelling through several countries including Greece. Although he had been arrested in Greece, and detained for two months, he had not claimed asylum there. The UK Secretary of State proposed, pursuant to Regulation 343/2003 (hereafter "the regulation"), to remove him to Greece for the purpose of having his claim determined there. That Regulation, which replaced the Dublin Convention, is the legal basis for much of the EU legislation relating to the Common European Asylum System and prescribes the method for determining which Member State is to take responsibility for an asylum application.

66. In the judicial review proceedings relating to the decision of the Secretary of State, the applicant contended that his fundamental rights would be at risk in the Greek asylum system by reason of its serious deficiencies and the inadequate conditions for asylum seekers. He also maintained that he would be at risk of *refoulement*.

67. The Court of Appeal referred a number of questions concerning the interrelationship of the duty of a Member State to observe fundamental rights with the provisions of Regulation 343/2003 and related directives, the Charter and Article 6 TEU.

68. The Irish proceedings, dealt with under the reference C-493/10, involved five appellants, unconnected with each other, who had travelled variously from Afghanistan, Iran and Algeria. Each had come to this State via Greece, had been arrested in that country but had not applied for asylum there. In these cases, it was not claimed that there was a risk of *refoulement* or ill-treatment but it was maintained that the procedures and conditions for asylum seekers in Greece were inadequate and that therefore Ireland should exercise its power under Article 3(2) of the Regulation to accept responsibility for examining and determining their claims. The High Court referred two questions to the Court of Justice, asking whether (1) the transferring Member State was obliged to assess the compliance of the receiving Member State with the Charter and relevant Directives and (2) whether, if the answer was yes, and if the receiving State was found not to be in compliance, the transferring State was obliged to accept responsibility for examining the application.

69. In its ruling on these issues, the Court of Justice held that it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the European Convention on Human Rights. However, it observed that

> *"It is not inconceivable that the system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights."*

70. The Court said that it would not be compatible with the aims of the regulation were "the slightest infringement" of the Directives to be sufficient to prevent a transfer. It then went on to say

> *"By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision."*

71. The Court noted that in 2010 Greece was the point of entry into the European Union for almost 90% of the illegal immigrants into the Union,

> *"resulting in a disproportionate burden being borne by it and the inability to cope with the situation in practice."*

72. The findings of the European Court of Human Rights in the case of M.S.S. were pointed to as demonstrating that there existed in Greece, at the relevant time,

> *"a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers."*

73. It was also noted that in reaching its findings in that case the Court of Human Rights had taken account of the "regular and unanimous" reports of international and non-governmental organisations, the UNHCR correspondence with the Belgian authorities and the Commission reports on the evaluation of the Dublin Convention system. The Court of Justice therefore rejected the submissions made to it by a number of Governments to the effect that Member States did not have available the instruments necessary to assess compliance with fundamental rights by the Member State responsible under the Regulation.

74. In its conclusions the Court held that

> *"Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."*

75. It followed that there could be no "conclusive" presumption that an asylum seeker's fundamental rights would be observed in the Member State primarily responsible for his or her application. The Court also noted that, similarly, there could be no conclusive presumption that mere ratification of conventions by a country, be it a Member State or a third country, meant that the country in question observed those conventions.

76. In the instant case it is argued on behalf of the applicant that, given the findings in these two judgments, he must be considered to have given a reasonable explanation for not having claimed asylum in the countries, including Greece, through which he transited. His evidence that the Greek police told him to leave the country should be seen as plausible. It is submitted that, equally, his explanation for not making an application in the United Kingdom is also reasonable having regard to that State's policy in relation to the Regulation at the time.

77. In those circumstances it is contended that s.11B(b) of the Act was applied incorrectly and that the respondent did not engage with the reasons given by the applicant for not applying for asylum in the countries he passed through. There was no reference to, still less an assessment of the explanation given by the applicant. It is submitted that this situation was compounded by the error of fact in the respondent's assumption that the Greek police had told him how to claim asylum.

78. The applicant takes issue with the reliance of the respondent on the passage from Hathaway quoted by both the Commissioner and the respondent.

79. In referring to this aspect I should note that Professor Hathaway is one of the world's foremost experts in the area of refugee law.

80. Put in context, the passage quoted is part of a longer section, starting at p. 48, which reads as follows:

> *"In Canada, there has been an attempt indirectly to incorporate a direct flight rule by impugning the credibility of claimants who do not claim refugee status in other countries of passage or residence. Persons who have spent substantial time in one or more countries, who have enjoyed short term status in an intermediate state, and even those who have merely transited through another country have frequently been viewed with mistrust because of their failure*

to claim refugee status before arriving in Canada. As noted in the case of Ghanaian Anthony Appiah Asamoah,

> *'...[t]he applicant's failure to seek asylum in any other country than Canada, although he passed through several intervening countries...is not consistent with an intention to flee from one's pursuers and therefore the concurrent imperative to seek haven wherever one can. Surely it is reasonable to expect one to seek help at the first convenient venue.'*

By characterising the issue as one of credibility, it is possible simultaneously to refuse the claims of persons arriving indirectly while maintaining a formal commitment to the impropriety of a direct flight rule:

> *'...[I]fthe applicant had experienced a well-founded fear, he had at least two opportunities of expressing and establishing it...It is hard to believe that a person in the grip of an uncontrollable fear...does not make any effort to eradicate this fear when the opportunity arises. I use the expression "hard to believe" because I know that there is nothing in the Act that makes it compulsory for a person to apply for refugee status at the first port he reaches.'*

Fortunately, the Federal Court of Appeal has intervened to constrain this implied direct flight rule."

81. The author goes on to summarise the position of that Court as follows:

> *"[A] claimant's credibility cannot be discounted if there is a reasonable explanation for failure to claim refugee status during passage through or sojourn in other countries which adhere to the Convention."*

82. Amongst the matters listed as having been accepted by the Court as providing a reasonable explanation is "concern regarding the true adequacy of protection".

83. The applicant also relies upon the decisions of O'Keeffe J. and MacEochaidh J. in *A.M.K (A Minor) (Afghanistan)* [2012] IEHC 479 and *F.T. v Refugee Appeal Tribunal* [2013] IEHC 167 respectively.

84. In *A.M.K.*, O'Keeffe J. said at paragraph 39 of the judgment:

> *"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 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."*

85. In F.T., MacEochaidh J. referred to this passage and to the terms of s.11B(b) in holding that the law does not require an applicant to provide an explanation why asylum was not claimed in the first safe country encountered. Rather, the section is applicable where an applicant claims that Ireland was the first safe country entered since leaving the country of origin. While it is "perfectly permissible" for the decision maker to have regard to the failure of an applicant to seek refuge in a safe country en route to Ireland, s.11B(b) should only be relied upon in connection with a credibility finding where its strict terms are met.

86. On behalf of the respondent Ms. Stack SC says that it is implicit in the applicant's argument that it would not have been safe for him to apply in Greece but that this does not explain why he lied in the s.8 interview (when he said that he had come through Russia and Kazakhstan). She further points out that the respondent's decision was made in August 2009, at a time when the policy of both the Irish and United Kingdom authorities in relation to the implementation of the regulation to asylum seekers who had transited through Greece had been upheld by the courts (respectively, in *Mirza v. Refugee Applications Commissioner & Ors* (unreported, Clark J, 21st October, 2009) and *K.R.S. v United Kingdom*, 32733/08). The view at that time was that if a breach of rights occurred in Greece, the remedy was to litigate the issue in (or against) Greece.

87. Ms. Stack further submits that the findings of the Court of Human Rights were primarily in relation a problem with ensuring the rights of applicants and that there was no finding of an issue in respect of *refoulement*. To the same effect it is argued that the finding of the Court of Justice were primarily in respect of living conditions.

88. On the facts of the instant case, it is submitted that this was not a situation where the respondent imposed a "one-flight" test. The respondent was entitled to use the passage quoted from Hathaway as an appropriate test for s.11B(b). In reality the applicant did not answer the questions as to why he did not claim asylum in Greece, or give any evidence as to why he thought that the United Kingdom would not be safe. His answers were, it is said, always interspersed with references to what the agent said and had nothing to do with the Regulation or the European judgments.

C. Unreasonable conclusions reached bv the respondent

89. The applicant's arguments under this heading relate to the findings that, firstly, his father must have known that the school he sent him to would be training students to be suicide bombers and, secondly, that it was not credible that he could not tell his father about it on the telephone.

90. On the first issue it is submitted that the respondent's finding was unreasonable in the sense set out in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and that he had failed to have adequate regard to the information furnished in relation to madrasas in Pakistan. There are 12,000 such establishments, most of which appear to provide a conventional enough education. Only some are thought to be associated with extremist ideology. It is contended that schools which indoctrinate students in the fashion alleged are unlikely to broadcast their activities.

91. It is argued that it is equally unreasonable to find that the applicant could have used the land-line in the school office to discuss such matters.

92. On behalf of the respondent it is said that the findings are reasonable. The applicant's father was in the Taliban and it was

implausible that he would not have known about the school's activities. The applicant had not said that he was not alone in the office and in any event anyone present could be presumed to have known of and approved of such activities.

D. Assessment of risk of persecution for the Convention reason of political opinion

93. The applicant submits that the factual assertions accepted by the respondent included the applicant's identity and background, his attendance at the madrasa and his support for Hezb e Islami. Similarly, it was accepted that his father had held a position with the Taliban government and was a member of Hizb e Islami and of the Taliban. No issue was taken in the appeal hearing or decision with the documents submitted by the applicant. In these circumstances, it is argued that the respondent failed to assess properly the evidence given by the applicant as to his fears. Reference is also made to the country of origin information submitted to the respondent demonstrating that abuses, unlawful killings, disappearances and unlawful detention are carried out by both government forces and Hizb e Islami and other insurgent groups. The respondent's view that there was no specific information tending to show a risk to the applicant is characterised as conjecture, and inappropriate given the volatile nature of the conflict in Afghanistan.

94. Reliance is placed upon following passage from the judgment of Peart J. in *Da Silviera v. Refugee Appeals Tribunal* [2004] IEHC 436:

> *"The task of the tribunal is not simply to be satisfied that there is a well founded fear of persecution arising from the past, but also that, owing to such well founded fear for a Convention reason [the applicant] is outside the country of nationality, and is unable owing to such fear to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about past persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."*

95. The respondent submits that the applicant has failed to point to any specific information relating to the situation in Afghanistan that would render unreasonable the assessment that there was no evidence of persecution of persons in his position.

96. It is submitted that, as far as the actions of the Afghan authorities are concerned, a legitimate interest in investigating or prosecuting bombers does not amount to persecution.

97. Counsel submitted that the primary finding of the respondent was that he did not believe the applicant. She says that the credibility findings were valid and therefore sufficient to defend the entire decision even if the respondent had not gone on to make the further findings that he did.

Conclusions

98. I agree that the primary finding in the case was in relation to the applicant's credibility. The difficulty that arises in this instance is the weight given, in making the assessment of credibility, to the applicant's travels after leaving Afghanistan and before coming to this State. The application of the *Asamoah* test and the invocation of s.11B(b) in that context are of crucial importance.

99. The real issue here is the fact that the applicant did not claim asylum in Greece or the United Kingdom- there being no real suggestion that he should have done so in Iran or Turkey. The question then is how this fact relates to his credibility.

100. In my view the respondent erred in law in approving the *Asamoah* test. This has not been good law in Canada since the 1980s, as the longer extract from Hathaway shows. It was not supported by that learned author. It is not the correct test in this jurisdiction either, and in this regard I respectfully adopt the reasoning in the judgment of O'Keeffe J. in A.M.K.

101. It is also clear, having regard to the decision of MacEochaidh J. in *F.T*. that the mandatory terms of s.11B(b) are applicable only to cases where the applicant claims that Ireland is the first safe country he or she has entered. In other cases, the fact that an applicant has transited through a safe country is something that the decision-maker may have regard to. The issue then is whether the applicant has given a reasonable explanation for not making an application in the country or countries passed through.

102. In this case the assumption made by both the commissioner and the respondent was that the Greek police had directed the applicant to the appropriate office for making an asylum application. There is in fact no evidence to ground this assumption. The applicant denied it and in fact said that the police had told him to leave the country and given him an "exit paper". He also said that he had been told by other Afghanis there that if he applied he would be given "nothing, no food or anything."

103. The respondent did not analyse the credibility of these statements. As a matter of objective fact, having regard to what was established in both the European Court of Human Rights and the Court of Justice, the allegations are consistent with the reported practices of the Greek police and the findings of the two Courts in relation to the living conditions of asylum seekers. In my view, deficiencies in a country's asylum process which give rise to a real risk of violation of the applicant's rights in a transfer context may also constitute reasonable grounds for not making an application in that country.

104. It is the case that the judgments of the Court of Human Rights and the Court of justice post-dated the decision of the respondent in this matter. However, it is clear from those judgments that the problems with the Greek asylum system had been widely reported upon and were well known for quite some time and that, to paraphrase the Court of Justice, other Member States could not have been unaware of them.

105. I note also that the announcement by UNHCR that it would no longer participate in the Greek asylum procedure was made some weeks before the respondent's decision. The letter written by UNHCR to the Belgian authorities asking them to suspend transfers to Greece was written in the month prior to the appeal hearing. I have no evidence as to whether or not a similar letter was sent to the Irish authorities, and there is no suggestion that the respondent was personally aware of any such material. However I think that it is not unfair to impute to the State authorities knowledge of the fact that there was at the relevant time a "systemic deficiency" in the asylum process in Greece and that there was no guarantee that an applicant's case would be seriously examined there.

106. The applicant said that he did not claim asylum in the United Kingdom when he transited through on the basis that he had been told that, if he did, he would be returned to Greece. It is indisputable that at the time of the applicant's arrival here, the United Kingdom followed the policy of the Regulation in relation to transferring applicants back to Greece - that was the issue in *N.S.* He also gave the fear of being returned to Greece as his reason for lying about his travels in his original application here. At the time, that was also the policy of the Irish government although it was not in fact applied to this applicant when the truth emerged.

107. In my view the respondent erred in not considering whether or not the applicant had given a reasonable explanation for making his first application here. Instead, he made it clear that the credibility of the applicant was seriously undermined by the failure to make an application elsewhere. While not applying a "direct flight" rule as such, he did so indirectly by making it a credibility issue without proper regard to the explanation given by the applicant.

108. It is true that the respondent then went on to make credibility findings in respect of a number of other matters. However, these findings were made in a context where the applicant's credibility had already, on a flawed basis, been found wanting. In the circumstances it is not possible for the Court to find that the same decision would ultimately have been reached in the absence of the errors identified here.

109. I therefore propose to grant an order quashing the decision and remitting the matter for reconsideration.