

**THE HIGH COURT****JUDICIAL REVIEW****[No. 2009/1084/J.R.]****IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000****BETWEEN****M. H. Z.****APPLICANT****-AND-****THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENTS****JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 27th day of March 2014**

1. This is a 'telescoped' application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal dated 20th September 2009 refusing the applicant a recommendation of refugee status. The applicant was granted temporary residence in the State on the basis of his marriage to an Irish citizen in 2010, but notwithstanding this, he is proceeding with his challenge to the legality of the Tribunal decision.

**Background:**

2. The applicant was born on 15th October 1983 and is a citizen of Afghanistan. He states that he fled his home country on 6th March 2007, arrived in the State on 2nd April 2007 and claimed asylum here on the 10th April 2007. The applicant claims he has a well founded fear of persecution in his home country on the basis of sexual relationship with an unmarried woman who became pregnant as a result. The applicant claims that the woman was the niece of a senior local commander who is part of the ruling regime within Afghanistan. On discovering the relationship, it is alleged that the commander killed his niece and sought to frame the applicant for her murder. The applicant claims an arrest warrant issued in his name and that he was forced to flee Afghanistan in order to avoid being wrongfully prosecuted of a crime he didn't commit.

**Tribunal Decision:**

3. The decision of the Tribunal Member in this case, unlike many others which the court has read, is not based on the adverse credibility of the applicant. On the contrary, the Tribunal states that "Since the applicant has provided a number of documents that purport to corroborate aspects of his claim, in that regard it may be said that his story with regard to the factual background is largely credible as a result." However the key finding of the Tribunal is in the next sentence which states: "However, I am not satisfied that it can be said that his fears, such as they are can be said to be objectively well-founded."

4. The Tribunal Member supports this finding by reference to the fact that no country of origin information supplied by the applicant supports his claim that a person in a position similar to his own would then be framed for murder. It is also found that no country of origin information supports the applicant's contention that even if he was definitively able to prove that he is not guilty of the offence, this would not make any difference to the outcome in his case. In the view of the Tribunal, with the exception of the arrest warrant submitted, there is no independent verifiable evidence to support the applicant's contentions that persons who 'dishonour' females are liable to be framed for their murder or that a person in the position of the applicant (who could prove that he did not commit this crime) would not be able to avail of the legal system in Afghanistan, however rudimentary that system may be. As such, the Tribunal Member finds that whatever subjective fears the applicant may have, his story cannot be considered to be objectively well founded.

5. The Tribunal Member goes on to consider that even if he is in error in respect of the above finding, there is no Convention nexus to the applicant's claim. He states that from the applicant's own evidence, the reason he was targeted was because he had dishonoured the local commander's family however the Tribunal Member finds that this is not indicative of a particular social group with a unifying characteristic of which the applicant is a member. Rather, it is the Tribunal's view that the only way it would be possible to identify such a social group is by reference to the persecution concerned, but as the applicant's actions were individual to him, he is not considered to be a member of a particular social group with an immutable and unifying characteristic the membership of which has given rise to the purported persecution.

6. Finally, with regard to the potential claim of the applicant that he was in fear of persecution from the Taliban, the Tribunal notes that no country of origin information was submitted in support of such claim but that in any case the option of internal relocation to an area of the country which the Taliban did not control, such as Kabul for example, was available. The Tribunal Member cites a UK Home Office Operational Guidance Note of Afghanistan in support of this finding.

7. Counsel for the applicant submits that the Tribunal Member, who accepted the credibility of the applicant's narrative in relation to the circumstances which led to his departure from Afghanistan, failed to have proper regard to the arrest warrant provided by the applicant. The applicant relies on the decision of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 393 in this regard. Counsel also claims that the Tribunal Member has failed to properly consider the country of origin information submitted on behalf of the applicant. A UK Home Office Country Report on Afghanistan dated 2008 in respect of the position of local "warlords and commanders" was particularly relevant in the applicant's case it is contended. In this regard, counsel states that the finding by the Tribunal that the country of origin information did not support the applicant's claim fails to have regard to the totality of the country of origin information which was before it and which, it is claimed, corroborated the applicant's narrative.

8. Counsel for the respondent submits that the Tribunal Member did not fail to have regard to the arrest warrant which was

submitted. The Tribunal's decision states that "...the applicant has provided a number of documents that purport to corroborate aspects of his claim, in that regard it may be said that his story with regard to the factual background is largely credible as a result. However, I am not satisfied that it can be said that his fears such as they are can be said to be objectively well founded." This shows that the arrest warrant was considered and that it led the Tribunal Member to the conclusion that the factual background to the claim was largely credible. However, the respondent asserts that while the Tribunal Member considered the arrest warrant he did not consider it to provide objective evidence that a person framed for a murder that he could prove he did not commit, would not be in a position to avail of the protections of the legal system. I accept these submissions by the respondent. In addition, as regards the country of origin information relating to the power of warlords and local commanders, the respondent states that when such information is read in its entirety it shows that the power is limited in terms of both its force and its scope to relatively small areas such that there is no evidence that a local commander could subvert the legal system. This too is a well made point which I accept and thereby reject the applicant's case with respect to a failure to consider all of the country of origin information.

9. In relation to the finding of the Tribunal Member that the applicant's claim lacks a Convention nexus, it is asserted that the applicant qualified as a member of a particular social group, namely as a person who had violated strict Islamic mores and codes of behaviour by engaging in a sexual relationship outside of marriage which resulted in pregnancy. In finding a lack of a Convention nexus to the claim it is submitted by counsel that the Tribunal has fundamentally misunderstood the test for establishing the particular social group and has conflated the fact of persecution with the reasons for that persecution. In support of his argument, the applicant cites the decision of the House of Lords in *Islam v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another, Ex parte Shah* [1999] 2 A.C. 629 which found in the case of certain women from Pakistan that they belonged to a "particular social group" narrowly defined by the unifying characteristics of gender, of being suspected of adultery and of lacking protection from the state and public authorities. Counsel for applicant also refers to the American case of *Sarhan and Disi v. Holder*, (658 F. 3d 649 - Court of Appeals, 7th Circuit 2011 which found that a woman who would fall victim to an 'honour killing' constituted a member of a social group) in support of the claim that the applicant comes within a particular social group for the purposes of the Convention in this case.

10. The respondent submits that there is no factual basis in any of the information given by the applicant to substantiate his claim that he is a member of a particular social group, that group being persons who violated strict Islamic rules and codes of behaviour by engaging in a sexual relationship outside marriage which resulted in pregnancy. On the contrary, it is stated that there is no evidence in the case that the dispute between the applicant and the local commander, following the revelation of the sexual relationship and pregnancy, was anything other than a personal reprisal based on the fact the commander believed that the applicant had betrayed him. As such, the respondent notes that nowhere in his interview with the Refugee Applications Commissioner does the applicant mention that he has violated strict Islamic codes. Rather, when asked about why the commander's family's pride was at stake, he didn't mention religion but pointed to the fact that the commander's niece had been promised in marriage to another man. The respondent submits that the applicant in this case is not being persecuted because he is a member of the social group that violates strict Islamic codes but rather is being personally and specifically targeted by the local commander because he made his niece pregnant and thwarted the plans to marry her to another man.

11. The respondent notes that the Tribunal Member reviewed the relevant case law in the area in reaching his conclusion on this issue including the cases of *Re Costa* (191 & N211 (BIA 1985)) and *Islam and Shah* [1999] 2 A.C. 629. Counsel also directs the court to the English Court of Appeal decision in *Secretary of State for the Home Department v. Skenderaj* [2002] EWCA Civ 567 in support of the principle that a blood feud or personal dispute between families is not sufficient to establish that a person fleeing persecution on that account is a member of a social group. The respondent submits that the findings in the ex tempore decision of Edwards J. in *M.S. v. Refugee Appeals Tribunal* [2009] IEHC 462 also support the contention that the applicant in this case is not a member of a particular social group within the meaning of the Convention.

12. It is difficult to fault the decision of the Tribunal that the applicant's subjective fears are not objectively well founded. The applicant is adamant that he is innocent of the murder and as noted by the Tribunal Member, nothing he has advanced established why he could not persuade the authorities in Afghanistan of his innocence and I can find no legal error in this conclusion. I am also of the view that the Tribunal Member came to a lawful conclusion on the question of 'membership of a social group' and therefore correctly decided that the applicant had not established a convention nexus in relation to his feared persecution. The Tribunal Member took considerable care in setting out the legal principles which govern this issue and in my view no error can be detected in the statement or application of these rules.

13. I accept that the applicant failed to make out membership of a social group either factually or legally. The woman who was the unfortunate victim was, of course, a member of a social group as this term is understood. She was the tragic victim of an honour killing. However, the targeting of the applicant by the local commander and the attempt to frame him for this killing does not indicate the existence of a group whose members suffer because of an innate shared characteristic. It is important to recall that 'social group' in this context cannot be defined by the persecution feared. The group must be capable of identification absent the feared harm. The social group contended for on behalf of the applicant has nothing to do with any innate characteristics shared by the applicant with others. It may well be that men who have sex outside of marriage in Afghanistan are persecuted. Whether such men are thereby part of a social group for the purposes of the Convention is not a matter for determination in this case where the clear facts are that the applicant says he is being framed for a murder he did not commit. He did not claim asylum on the basis of a fear of persecution for having non marital sex. He claims persecution because he is charged with a crime he says he did not commit at the behest of a powerful person and a fear that his defence will not succeed. The applicant has failed to establish membership of a social group and the Tribunal's decision on this aspect of the case is lawful.

14. In all the circumstances I decline to grant leave to seek judicial review.