Neutral Citation: [2015] IEHC 787

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 918 J.R.]

BETWEEN

G.M.D. (AFGHANISTAN)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND THE

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 11th day of December, 2015

1. This is telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal dated 14th October, 2013, in respect of the applicant, and communicated to him by letter dated 21st October, 2013, remitting the appeal of the applicant for de novo consideration.

2. The proceedings herein were issued on 5th December, 2013, thereby outside the statutory 14-day time limit for bringing judicial reviews of this nature. The applicant explained the delay at para. 20 of the grounding affidavit sworn on 5th December, 2013, and exhibited at p. 18 of the booklet of pleadings furnished to the court. The respondents did not object to the extension of time. In light of the foregoing and in the circumstances, I am satisfied that there are good and sufficient reasons to extend time and I so do.

Background

3. The applicant is a national of Afghanistan born on 26th April, 1989. The following is the applicant's account of the events that gave rise to him claiming international protection in Ireland.

4. The applicant's father was a member of the Taliban and the applicant was initially unwilling to join. Taliban members threatened the applicant until he and his brother agreed to join their ranks in 2009. He worked as a bodyguard for a commander, transported roadside bombs for senior commanders and brought villagers before commanders if they had disobeyed the Taliban's codes.

5. The applicant's brother was killed in an air strike by international forces and he informed his superiors that he did not wish to continue being part of the organisation. The applicant was severely beaten as punishment for this transgression and he remained a member. The applicant was, one night, on guard duty, when he escaped and fled. The applicant paid US$12,000 to an agent, travelled through Iran and Turkey, staying for three and two months respectively, and then travelled through Europe in a container. The applicant arrived in Ireland on 24th July, 2011. The applicant fears that the government, local villagers, Hezb-e-Islami and the Taliban are pursuing him and he will be killed by one of these groups if returned to Afghanistan.

6. The applicant applied for asylum on 25th August, 2011.The applicant attended eight s.11 interviews at the RAC on the following dates:

1. 24th August, 2011;

2. 29th August, 2011;

3. 29th September, 2011;

4. 18th October, 2011;

5. 27th January, 2012;

6. 14th February, 2012;

7. 6th September, 2012; and the

8. 30th October, 2012.

Communication issues arose between the interpreter and the applicant during the first and fourth interviews, which were attributable to the regional variance in the Pashto dialects. The RAC did not rely on either of these interviews in its decision. The applicant submitted the following documents in support of his claim:

1. An Afghan identity document (a tazkira);

2. A letter from the Afghan security forces instructing that the applicant should be arrested;

3. A USB memory stick containing two videos and nine photographs, all purporting to show the applicant with other Taliban members carrying weapons;

4. A courier envelope;

5. A letter from Welcome Immigrant Centre dated 7th November, 2012; and

6. An online article referencing the death of a local commander.

7. The RAC issued a report pursuant to s.13 of the Refugee Act, 1996 (as amended) on 23rd April, 2013. The RAC was satisfied that the applicant was from Afghanistan, the videos and pictures were seen as compelling evidence that the applicant was a member of the Taliban, and it was decided that the applicant would be at risk of serious harm from the Taliban if he were to be returned to Afghanistan. The applicant's testimony was deemed to be credible and the risk faced by him was seen to be country-wide. The RAC stated that the applicant was unlikely to have recourse to state protection as this could cause him further difficulties with the Taliban, nor would it be sufficient to protect the applicant from the group. At pg. 224 of the booklet, under the heading 'nexus to section 2 grounds', the authorised officer states:

> "It is accepted that the applicant's claim may fall under section 2 grounds of political opinion and religion. The applicant's alleged desertion from the Taliban could lead the Taliban to perceive the applicant as a political opponent. Indeed, due to the Taliban's view that they are fighting a jihad or holy war, the groups may perceive the applicant's desertion in a religious way."

8. The authorised officer, over the next eight pages, analysed the exclusion clause. The exclusion clause derives from article 1F of the 1951 Refugee Convention, which states:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

9. The Refugee Act, 1996 (as amended) provides for the exclusion clause in s.2(c), allowing that a person who would otherwise be recognised as a refugee in accordance with s.2, may be excluded in circumstances where:

> "There are serious grounds for considering that he or she—
>
> (i) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
>
> (ii) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
>
> (iii) has been guilty of acts contrary to the purposes and principles of the United Nations."

10. In the final section, at pgs. 230-231, the authorised officer states as follows:

> "In summary, the ORAC makes the following findings:
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> • The applicant presents as a mature and intelligent individual who knows the difference between right and wrong.
>
> • It is ORAC's position that the applicant must have been aware of the brutal methods used by the Taliban. The ORAC finds that the applicant was aware of such brutal methods from within a few months of joining the Taliban.
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> • It is ORAC's position that the applicant arrested villagers, and he did so armed with the knowledge that he could be actively contributing to the execution of a civilian. This contribution by the applicant can be described as aiding and abetting.
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> • The applicant transported explosives to be used as roadside bombs. Roadside bombs have contributed greatly to civilian deaths in Afghanistan. It is ORAC's position that the applicant must have known such devices are indiscriminate and could potentially kill civilians. The applicant's contribution can be described as aiding and abetting.
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> • It is ORAC's position that due to the nature of the applicant's job, he was in a position to desert from the Taliban in order to avoid participation in violent acts. It is ORAC's position that this opportunity was available to the applicant long before he took it. It is ORAC's position that the applicant's failure to remove himself from his involvement serves to augment his complicity and individual responsibility.
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> Having given this issue full consideration, it is concluded that, in accordance with Section 2(c)(i) of the Refugee Act 1996 (as amended), the applicant should be excluded from being a refugee as there are serious grounds for considering he has committed a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."

11. The applicant appealed the negative recommendation to the RAT by way of form one, notice of appeal dated 13th June, 2013. An oral hearing was held on 14th August, 2013. A note of the hearing, taken by the applicant's legal representatives, was included with the booklet of pleadings, exhibited at pg. 244.

The impugned decision

12. The decision dated 14th October, 2013, affirmed the negative recommendation of the RAC not to declare the applicant a refugee. The decision, exhibited from p.257 of the booklet of pleadings, provides a summary of the applicant's claim and sets out the applicable law, in the usual manner. Beginning at pg. 264, the analysis of the claim is undertaken. The tribunal member found inconsistencies with the story presented by the applicant, namely:

> (i) the claim that he was forced to join the Taliban;

(ii) the claim that he was not aware of the alleged crimes villagers had committed when arresting them; and

(iii) the story of his escape from the organisation.

13. The tribunal member stated as follows at para. 4 of pg. 8 of the decision:

> "He has shown himself to be adept in moulding his evidence to suit the exigencies based on the direction the examination of his story is taking at any particular juncture and well acquainted with what could be called 'template' asylum claims or histories and the pitfalls associated with each. I, for one, am convinced that he is adept at moulding his evidence and claim to suit those immediate exigencies. The obvious global result however is that the more the story is probed and examined, it will be shown to be fabricated or cobbled together from such 'templates' by the emergence of serious gaps and contradictions in the overall testimony, which is exactly what has occurred in this case."

14. The following paragraph continues:

> "Indeed, I am not satisfied that he had any material connection to the Taliban as alleged. In this respect, I must disagree with the Commissioner's assessment. Many contradictions and implausibilities in the appellant's evidence during his s.11 interviews were cited by the Commissioner as evidence that the appellant's involvement with the Taliban was much greater than he had then contended. I take the contrary view. I am more of the view that those same contradictions and implausibilities in the appellant's s.11 testimony, which had been correctly identified by the Commissioner, tends to the opposite conclusion, i.e. that his involvement with the Taliban was much lower than he alleged, to the point of being almost non-existent."

15. The tribunal member did not accept that his stated fear of the Hezb-e-Islami is well-founded based upon country of origin information. On pg. 9, the tribunal member states as follows:

> "The authenticity of the documents purporting to be a taskera [Afghan identification] is not material to any matter that the Tribunal must determine, given that, for the purposes, it is being accepted that he may be from Afghanistan. The provenance of the document purporting to be a 'letter from the Afghan security forces local commander instructing that the appellant be arrested' was not established to any degree of satisfaction by the appellant when it was gone through with him in some detail at the appeal hearing. I am satisfied that it is a mock-up. Furthermore, the appellant had also travelled through Iran, Turkey and several other European countries, including of logical necessity, France before arriving in this State. Neither did he apply for asylum in any of those states. Accordingly, whether it be proffered by the appellant himself or his lawyers on his behalf, the reasons proffered for failing to apply for asylum in Iran, Turkey, or France are not credible, plausible or reasonable and evince, to this Tribunal at least, an intention to avoid the full and proper determination of any asylum claim which could have been made earlier in a safe country after leaving Afghanistan. His movements across Europe and his explanations therefore evince a capacity for evasiveness and deception and do not evince a genuine well-founded fear of persecution."

16. The tribunal member continues by making a finding on the feasibility of internal relocation where he begins, '[l]est the Tribunal be wrong in relation to the assessment of the credibility of the claim', stating that relocating to an urban area such as Kabul would be feasible for the applicant. The tribunal member then finds that the commissioner was incorrect in applying the 1F exclusion clause, and concludes by affirming the negative recommendation of the RAC that the applicant should not be declared a refugee.

The applicant's submissions

17. Counsel for the applicant Ms. Sunniva McDonagh, S.C., appearing with Mr. John Noonan, B.L., submitted that the note of the RAT oral hearing, transcribed by the applicant's solicitor's legal executive, has not been contested and therefore, it is a fair record of same. The applicant argued that the main contention with the decision is the manner in which it was conducted, in that the decision-maker had decided that the applicant was attempting to fit into the template of refugee. The applicant argued that the alleged inconsistencies that the decision-maker found in the s.11 interview notes and the oral hearing are not inconsistent when looked at appropriately; and, notwithstanding the foregoing, it is not open to the tribunal member to trawl through the s.11 interview notes to find inconsistencies where the RAC had found the applicant to be credible.

18. The applicant submitted that the assessment of credibility was not conducted in the manner prescribed by regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006), nor has the tribunal member fulfilled his obligation to assess facts and circumstances, as set out by *I.R. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 353, particularly paras. 3-6 and 10. The applicant argued that the credibility findings are set out in general terms and the decision-maker has failed in his obligation to provide clear reasons as to why the applicant was not believed. The applicant relied on the decision of Cooke J. in *T.M.A.A. v. Refugee Appeals Tribunal & anor*. [2009] IEHC 23, where Cooke J. held that an applicant is entitled to a clear and reasoned decision and the High Court requires this to properly exercise its judicial review function.

19. The applicant submitted that most of the credibility findings made against the applicant are not de novo and are made in reference to the memoranda of the s.11 interviews. The applicant argued that instead of considering the appeal afresh, the tribunal member conducted a sort of judicial review of that which was decided by the RAC. The applicant pointed out that the s.11 memoranda are not full transcripts of those interviews and it is fundamentally unfair for the tribunal member to parse those reports where the interviewer had found the applicant to be generally credible.

20. The applicant argued that there was no evidence before the tribunal member that the applicant had created a story to fit into a template nor were any examples provided so that the applicant could understand why such a finding be made against him. The applicant contended that the tribunal member's use of the phrase 'will be shown to be fabricated' suggests that the tribunal member did not assess the case with an open mind but instead had predetermined that the applicant's evidence could not possibly be correct, must have been fabricated or based on a template and that any answers that were consistent and believable, were not in fact true, but were merely evidence of how good he was at fabricating evidence. This, the applicant argued, is all the clearer given that the tribunal member uses highly emotive language, such as suggesting that the applicant abducted villagers with "apparent gusto" or the statement "I do not need to over labour how implausible is his contention" that the commanders put the applicant on unsupervised night duty, without stating why it was implausible.

21. The applicant argued that the tribunal member's view of the videos and photographs submitted by the applicant was entirely based upon speculation, namely, it was a truism that weapons are easily available to all Afghan households and therefore, those in the video were not Taliban members but "the appellant and some of his acquaintances… lolling around, brandishing guns", and "only served to fit into the applicant's template story". The applicant submitted that the tribunal member formed a gut feeling in relation to

the case and was determined to find fault with it.

22. The applicant argued that the tribunal member's findings of inconsistencies with evidence were based on misreading the memoranda of the s.11 interview or incorrect assertions of what happened at the oral hearing. The applicant, in submissions, argued that issues arose with three parts of the applicant's story, where, according to the tribunal member, inconsistencies arose.

23. The tribunal member gave an example that "the appellant initially stated that when arresting, or abducting villager for the Taliban, he was not aware what kind of crimes they were alleged to have committed. However, he later stated that he knew that their alleged crimes were minor". The applicant submitted that this was an incorrect analysis of what the applicant had said. The applicant argued that his evidence was that he was not told the reasons for the arrests, but that sometimes he would know the people involved and that their crimes were not serious; on other occasions, he would later find out the reasons for the arrest. The applicant submitted that the tribunal member was entitled to agree or disagree with inferences drawn from facts established before the RAC and is entitled to assess such evidence before the tribunal, comparing and contrasting both if necessary. However, the applicant argued the tribunal member was not entitled to revisit the memoranda and find completely different facts, while not referring to the evidence before him. This, the applicant argued, is a failure to conduct a hearing de novo.

24. The tribunal member found inconsistencies in the applicant's evidence regarding his knowledge of the intended use of the roadside bombs he was responsible for transporting. The applicant submitted that this is a complete misrepresentation of the facts and the evidence provided by the applicant.

25. The tribunal member found the applicant's story of escape 'implausible', where he had previously informed his superiors that he wished to leave the ranks. The applicant submitted that the tribunal member's assessment missed an essential feature of the applicant's story: the commanders had beaten him and they maintained their control over the applicant by threat of violence and not constant supervision. This, the applicant maintained, amounted to the tribunal member not taking the applicant's reasons into account. The applicant relied upon the decision of *C.A. v. Minister for Justice and Equality & anor.* [2012] IEHC 564, where MacEochaidh J. doubted the rationality of a finding that the applicant's story of escape was not believable.

26. The applicant concluded that the decision was reached based upon incorrect facts and/or a misreading of the s.11 memoranda and the decision should be quashed as irrational as per the test for irrationality in *Rawson v. Minister for Defence* [2012] IESC 26.

The respondent's submissions

27. Counsel for the respondents, Ms. Kilda Mooney, B.L., submitted, it was accepted by the tribunal that the applicant is from Afghanistan. As regards the applicant's membership of the Taliban, the respondents argued that the tribunal member did not accept his claim of having been 'press-ganged' into joining the Taliban and, at p.7 of its decision, a number of examples are given of occasions where the applicant claims to have been allowed home on 'shore leave' during which he made no attempt to leave or escape from the Taliban, and where the applicant was left alone and did not attempt to flee.

28. The respondents submitted that the tribunal member draws attention to numerous contradictions in the applicant's testimony between his s.11 interviews and his oral evidence to the RAT, and also the contradictions within his s.11 testimony itself. The respondents argued that the tribunal member reached a decision about the core elements of the claim and rejected the applicant's account of his Taliban membership and past persecution arising from same and provided clear reasons for this assessment of credibility in conformity with the caselaw. The respondents relied upon *Imafu v. Minister for Justice, Equality and Law Reform & ors*. [2005] IEHC 416; I.R. (supra).; *F.E.A. v. Refugee Appeals Tribunal & ors*. [2013] IEHC 106 and *R.O. v. Minister for Justice and Equality & anor*. [2012] IEHC 57.

29. The respondents argued that there was no need for the tribunal member to perform the forward-looking test where the applicant's story was disbelieved. The respondents submitted that whilst past persecution is a good indication of a risk of future persecution, it is clear from the decision of Cooke J. in *M.A.M.A. v. Refugee Appeals Tribunal & ors.* [2011] 2 I.R. 729 that if there is a total rejection by the decision-maker of core evidence upon which an applicant seeks asylum, no obligation to carry out an analysis of the applicant's future risk of persecution can be said to arise. The respondent argued that it is clear from reading the decision as a whole, that the tribunal member did not accept the applicant's core claim concerning both his involvement with the Taliban and the manner in which he was alleged to have been forced to join. The respondents submitted that it was not necessary for the decision-maker to have considered a forward-looking persecution, as the basis for this persecution was deemed to be an untruth, as per a decision of this court in *B.U. (Nigeria) v Minster for Justice and Law Reform & ors*. [2015] IEHC 431.

30. The respondents submitted, notwithstanding the foregoing, the decision does deal with future persecution and internal relocation on an alternative basis and expressly categorises this consideration as an 'even if' finding as referred to by Clark J. in the case of *K.D. [Nigeria] v. Refugee Appeals Tribunal & anor.* [2013] IEHC 481.

31. The respondents argued that the particular phrase relied upon by the applicant to demonstrate that the tribunal had pre-determined the evidence 'it will be shown' is taken entirely out of context. The respondents submitted that the tribunal member formed a very strong view of the applicant, and his evidence, and used strong language in describing it in the decision; however, that in itself, does not demonstrate the tribunal member had pre-determined the issue and when one reads the decision as a whole it is clear that the tribunal member's view was based on the evidence given by the applicant both at the hearing and previously, at the s.11 interviews. The respondents argued that the decision clearly post-dated the oral hearing and the tribunal member's assessment of the evidence and therefore, logically, cannot constitute evidence of a pre-determination of the issues.

32. The respondents submitted that the tribunal member is statutorily obliged to take the s.11 interview and s.13 report into account in coming to his decision. The respondents contended that the decision-maker attributed levels of probative value to parts of the evidence before him. The respondents argued that it was a matter for the tribunal member to decide upon the probative value of the videos and photographs submitted, and not a matter to be adjudicated upon in judicial review. The respondents relied on *Kikumbi & anor. v. Refugee Applications Commissioner & anor.* [2007] IEHC 11 and *N.S.M. [Zimbabwe] v. Minister for Justice, Equality and Law Reform & anor*. [2015] IEHC 440

33. The respondents argued that the decision is reasoned, rational and based upon all of the evidence before the decision-maker at the time he made his decision. The respondents submitted that the reasoning behind the decision is cogent and discernible and it is clear from the decision as a whole that the tribunal member carried out his own fair and independent assessment of all the evidence.

Decision

34. I accept the respondent's categorisation of this case as being an unusual one. The applicant applied for asylum in this jurisdiction on 25th August, 2011. The applicant attended no less than eight s. 11 interviews at the offices of the RAC. Communication issues

arose between the interpreter and the applicant during the first and fourth interviews which were attributed to the regional variance in the Pashto dialects. The RAC did not rely on either of these interviews in its decision. While the RAC accepted that the applicant's claim was plausible, it nevertheless went on to consider the nature of his behaviour and whether an exclusion clause could or should apply. The commissioner concluded that the exclusion clause should be applied to the applicant's claim for refugee status.

35. The applicant appealed to the RAT and the Tribunal Member held against the applicant but on a different basis to which the commissioner had held against the applicant. The respondent submitted, and I accept, that the Tribunal Member's decision in this case, largely turns on the credibility findings made by the Tribunal Member. The applicant takes issue with the Tribunal Member's conclusions. The applicant contends that the Tribunal Member effectively engaged in a review of the commissioner's finding while the respondents contend that the applicant is inviting this court to substitute its own view of the plausibility of the applicant's account for that of the Tribunal Member.

36. An appeal to the Refugee Appeals Tribunal is a de novo hearing. The nature of that appeal and de novo hearing was set out by Charleton J. in *M.A.R.A. (Nigeria) (infant) v. Minister for Justice and Equality & Ors.* [2014] IESC 71 where, at para. 12 thereof, Charleton J. stated as follows:

> "… Here, however, the function of the Refugee Appeals Tribunal is to examine afresh such aspects of the decision of the Refugee Applications Commissioner as are appealed. Initiation of an appeal, under subsection 3, is by a notice in writing. This must specify the grounds of appeal. An applicant may require an oral hearing of that appeal. Under subsection 10, there should be an oral hearing unless that has been barred under section 13(5) or section 13(8). For the purposes of the appeal, whatever information has been brought to the attention of the Refugee Applications Commissioner, or that has come to his or her notice during the investigation of the application for refugee status, should be furnished on the appeal. Subsection 16 makes it clear that, in deciding an appeal, regard is to be had to evidence, to representations, to documents, and to argument. Full disclosure of any reports, observations, or representations is required to be made to the appellant under subsection 8. Powers exist to require the attendance of witnesses, to make directions for the purposes of the appeal and for the production of documents: these are explicitly set out in subsection 11. Such powers, which are as ample, or close to as ample, as those of a court demonstrate unequivocally the duty of the Refugee Appeals Tribunal to fully scrutinise an appeal. On appeal, therefore, the issue is not simply whether any error was made at first instance. The person appealing has the right to attend and present their case in person or through a legal representative, or other individual of their choosing, under subsection 11(c).
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> 13. The duty of the tribunal on appeal, under subsection 16A, is either to affirm the recommendation that refugee status should be refused or the tribunal may make a positive recommendation where it is "satisfied, having considered the matters referred to in subsection (16), that the applicant is a refugee." Hence, on appeal, there is a complete opportunity to present on behalf of the applicant in aid of this enquiry as to refugee status any new facts or arguments; to reargue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full. The result of the appeal may be the affirmation of the Refugee Applications Commissioner in whole or in part or it may be that for a particular reason argued on appeal the applicant will be found to have established sufficient for a recommendation that the Minister grant him or her refugee status.
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> 14. It is clear from all of this that the form of appeal explicitly set out in the Act of 1996 is not merely a review as to whether any error had been previously made: rather, it is a full and thorough enquiry into the relevant documents and observations as previously furnished to the Refugee Applications Commissioner and the hearing of oral evidence and the reception of documentary evidence and submissions in respect of every point on which an appeal has been lodged. It is also apparent that the duty of the Refugee Appeals Tribunal is to make such rulings or finding of fact as are appropriate.
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> 15. It has been submitted before this Court, on behalf of the applicant/appellant, that on appeal to the Refugee Applications Commissioner issues might be elided or left without decision. The example given in argument was that an appeal might be decided solely on the basis that a substantial territory remained within the country from which the applicant for refugee status had supposedly fled where no persecution of persons of the alleged attributes of the applicant would take place without, on that appeal, deciding whether the applicant had a well founded fear of persecution or was not credible in the account which they are given. Under the Act of 1996, the decision of the Refugee Applications Commissioner is entirely subject to legal and factual review by the Refugee Appeals Tribunal. The purpose of the notice of appeal is to set out the points of fact or law that are important to the applicant and in respect of which he or she disputes the earlier decision. The appeal overturns the record of what has been decided; save and in so far as on appeal it is affirmed. It is only to the extent of that affirmation, if any, on appeal, that the earlier decision stands. In its nature, that appeal is to be regarded as an equivalent change in the record as where a person appeals a criminal conviction in the District Court to the Circuit Court...there has been a hearing at first instance that did not accept that a recommendation be made to the Minister that an applicant should have refugee status and on appeal this will have been affirmed by the tribunal under subsection 16A. In so far as it may be thought necessary by the Refugee Appeals Tribunal, in some cases, to resolve appeals as to the essential point only, or to conclude that a particular issue decides the appeal, while leaving unresolved some other question raised in the notice of appeal, this does not result in any disadvantage to an applicant. Some relevant findings of fact or of law may not be disputed on the appeal. Such findings remain undisturbed notwithstanding the appeal as, under the legislation, there must be a particularisation as to what grounds of the decision of the Refugee Applications Commissioner are disputed. Once the notice of appeal initiates a dispute as to any finding of the Refugee Applications Commissioner, by that appeal such finding is neutralised unless it is affirmed by the Refugee Appeals Tribunal. It would be contrary to the principle of constitutional construction of the legislation, considered in its entirety, for the Minister to be required or entitled to have regard to any aspect of a finding that had been overturned on appeal. A similar consideration applies to any aspect of the original decision which is the subject of an appeal and which is not upheld by that process. Where the Refugee Appeals Tribunal does not consider it necessary to resolve the appeal on any such ground, but decides the appeal either positively in favour of the applicant or negatively against him or her on another ground, so much of the earlier decision as is appealed against is rendered merely historical. There is therefore no remaining or "hovering" disadvantage once an appeal is taken.
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> 16. In essence, an appeal within this process is an active rehearing. That is precisely what happened here…"

37. The Tribunal Member is not only entitled, but is mandated, to have regard to, inter alia, the s. 11 interviews, the Notice of Appeal, s. 13 report and any other evidence produced by the applicant. In my view the Tribunal Member was entitled to have regard to the inconsistencies in the applicant's evidence which were elucidated during the course of the s.11 interviews and further to have regard to the manner in which the applicant dealt with the said inconsistencies when they were put to him during the course of the appeal hearing.

38. It is not for this court to substitute its view in respect of the applicant's evidence, or indeed to even form a view in respect of same during the course of these judicial review proceedings. As has often been stated, the function of this court, on judicial review, is to determine whether the Tribunal Member adhered to fair procedures and the rules of natural and constitutional justice.

39. I cannot accept that the Tribunal Member in this instance, embarked upon making a determination on this matter based upon a gut feeling or instinct. While the language of the Tribunal Member may at times have been forceful, it seems to me that he was the person best placed to assess the applicant and the applicant's credibility and whether or not the story which he presented stood up. One of the complaints made by the applicant, in this judicial review, is that the Tribunal Member's use of the grammatical future form "will" show that the decision maker had prejudged the matter and was setting out to prove that the applicant was not a refugee. However I have no difficulty in accepting the respondent's submission that this argument would mean that a decision maker was writing in a stream of consciousness style. Obviously the decision maker has made his conclusions before writing the text of the decision and the use of the "will" in that sense was merely a stylistic writing choice, commonly used in academic writings.

40. The Tribunal Member had the benefit of hearing the applicant during the course of the oral hearing on appeal and also from observing the applicant and the manner in which he responded to the questions posed at the appeal hearing. It seems to me that it is clear from reading the decision as a whole, that the Tribunal Member did not accept the applicant's core claim concerning both his involvement with the Taliban, and the manner in which he was alleged to have been forced to join. I am further satisfied that having reached an adverse credibility finding, in respect of the applicant's core claim, that the Tribunal Member was not obliged to apply a forward-looking test of risk of persecution as the basis for this persecution was deemed to be untruthful. Notwithstanding this, however, the Tribunal Member did proceed to apply the forward-looking test in relation to the risk of future persecution based on an "even if" basis, as was referred to by Clark J. in *K.D. v. RAT* [2013] IEHC 481. The Tribunal Member concluded, on this basis, that even if he was wrong in relation to the assessment of credibility, that the applicant could, in any event, avail of internal relocation in Kabul. The Tribunal Member noted that the possibility of relocating in Kabul was put to the applicant and he failed to provide any compelling, or plausible, explanation for why he could not avail of internal relocation. I can find no basis upon which to interfere with this finding and I cannot accede to an argument that the Tribunal acted unfairly, or irrationally, in relation to determining this aspect of the applicant's case.

41. I am satisfied that the findings made by the Tribunal were rational and reasoned findings based on the evidence before the Tribunal Member and were findings the Tribunal was entitled to reach, having heard all of the applicant's evidence and considered the matters which the Tribunal Member was obliged to have regard to, as set out in s. 16 of the Refugee Act, 1996. The findings in respect of credibility, future persecution and internal relocation, in my view, conform to the requirements of the established case-law. The reasoning behind the decision is cogent and discernable. It is clear from the decision as a whole that the Tribunal carried out its own fair and independent assessment of all the evidence and arrived at a decision which was adverse to the applicant.

42. In my view it seems that the applicant's case is founded upon an attempt to ask this court to evaluate the findings and determinations made by the Tribunal Member and to substitute the view of this court for that of the Tribunal Member. That is not the function of a court in determining a judicial review application and I reject that approach.

43. For the reasons set out above, I will therefore refuse leave.