

THE HIGH COURT**JUDICIAL REVIEW****Between:****Record No. 2009/139 J.R.****K. N. Q. [IRAQ]****APPLICANT****-AND-****THE CHAIRPERSON OF THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND
MICHELLE O'GORMAN SITTING AS THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 14th day of March 2013.**

1. In this case the applicant seeks an order of certiorari quashing the decision of the of the Refugee Appeals Tribunal dated the 18th December, 2008 affirming the recommendation of the Refugee Applications Commissioner dated the 22nd October, 2007 that the applicant should not be granted refugee status.. With the consent of both parties, the application for leave was treated as the application for judicial review by way of a single telescoped hearing.

Background

2. The applicant is a national of Iraq who arrived in Ireland on the 13th May, 2007. He applied for refugee status on the 21st May, 2007 claiming that he would be persecuted by reason of his imputed political opinion and/or membership of a particular social group if returned to Iraq. He presented to the Office of the Refugee Applications Commissioner (ORAC) as a 17-year old unaccompanied minor and he submitted an Iraqi national identity card in support of his age and identity. He was quite ill at the time and requested medical assistance.¹ The Commissioner questioned the validity of his identity card and that document was therefore deemed insufficient evidence of his age. An age assessment was carried out on the 16th May, 2007 by two named persons whose qualifications to make such assessments was not stated. They found that the applicant was not a minor. A social worker attached to the Health Service Executive (HSE) sought, on the applicant's behalf, a reassessment of this decision regarding his status as a minor and expressed concerns relating to the validity of the finding that he was over 18 years. Such reassessment was refused unless the applicant could produce further documentation to support his claimed age. He was unable to procure further documentation. The Court has serious misgivings as to the fairness of the procedure or the competence of the assessors who conducted this age assessment, which will be further discussed later in this judgment.

3. The applicant's claim involves the following asserted facts: he is an Iraqi national of Kurdish ethnicity born on the 11th April, 1990. His father was a high-ranking member of the military in the Ba'ath party in Kirkuk. Following the fall of Saddam Hussein's regime in 2003 his father's position as a former Ba'athist was not secure and he came under threat. He and the family received multiple death threats. The applicant did not go to school since 2003 and the family lived within an enclosed house at an identified address. In October, 2006 he opened the gate to their compound in response to a signal from his father who was driving his car with his uncle. However, terrorists were waiting for the gate to open and a shooting and grenade attack ensued, during which the applicant's father and uncle were shot dead and the applicant was injured. The applicant was rendered unconscious through shrapnel injury to his head and legs and woke in hospital where he found that his foot was injured and he was deaf. He and his remaining family members received no assistance once it was discovered that his father was in the Ba'ath Party. He continues to suffer severe hearing loss as a result of being close to the grenade explosions. His family moved him to the home of one of his father's Arab friends where he remained for six months without any medical treatment and in fear of going outside. His mother and sisters remained in the family home in mourning. As a member of a well-known Ba'ath party family, terrorist groups sought to enlist the applicant to attack the American military in Iraq. Having received threatening letters he fled Iraq on or about the 22nd April, 2007 travelling first into Syria and then onwards to Turkey. He was then hidden in a container truck until he arrived into Ireland. He was in pain and very ill for the journey and was unable to walk. He had left behind or lost his bag containing clothes, medicines and documents relating to his father's position when he was travelling from Syria to Turkey.

4. The Commissioner rejected the applicant's credibility as did the respondent Tribunal on appeal. The applicant instituted proceedings some 26 days out of time. At the hearing of the application for judicial review the Court exercised its jurisdiction to extend the time due to the extreme difficulties experienced by the applicant.

The Impugned Decision

5. In his s. 13 report the Commissioner observed that the applicant had not submitted any police report, medical evidence,² threatening letters or a death certificate relating to his father, nor any documents to corroborate his claim that his father was a member of the Ba'ath party. The applicant's Notice of Appeal to the Tribunal raised the issue of the inadequacy of the age assessment conducted and submitted that his s. 11 interview with ORAC was unfair and oppressive in that although he was deaf and a minor he had no assistance, advice or representation at the interview as would occur if he were treated as a minor. It was submitted that it would therefore be unfair to make a negative recommendation to the Minister in relation to his claim for refugee status on the basis of findings made by the authorised officer conducting the s. 11 interview. Country of origin information (COI) was provided to the Tribunal Member outlining the high incidence of revenge killings on former Ba'ath party members in Iraq and deliberate attacks on Iraqi civilians by insurgent groups. The COI named Kirkuk as being a city in "the triangle of death" and stated that the Iraqi authorities could do little to stop these activities. The COI further stated that the security situation and human rights abuses have worsened in southern and central Iraq and especially in the Mosel/Kirkuk area and that the UNHCR recommended favourable consideration of asylum seekers from this area in its report of December 2006.

6. The impugned Tribunal decision recounts the presentation and cross-examination of the applicant's claim at the oral hearing. The

cross-examination indicates a highly adversarial style with questions focussed on the details of the attack on his father's car, the likely injuries his father would have suffered if the car had exploded, the insignia on his late father's uniform, the identity of the attackers, the threats his father had received, the threats he had received and why terrorists would be interested in him once they had killed his father. The applicant was questioned regarding the sale of a family property to fund his travel, why both houses were not sold and why the family did not go to Iran, whether he could speak Arabic and whether his family could have sought refuge with his father's Arab friend who harboured the applicant after the attack on his father. He was also questioned about his travel, the loss of his bag containing documents and why he did not seek asylum in Turkey.

7. The Tribunal Member stated that she would approach the appeal on the basis of the UNHCR *Guidelines on the treatment of refugee applicants who are minors at interview*. She quoted from those Guidelines in relation to the liberal application of the benefit of the doubt and referred to the UN Convention on the Rights of the Child and to the *Statement of Good Practice of the Separated Children in Europe Programme*. The Tribunal Member then went on to quote from the Refugee Act 1996 and from the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006) with regard to the burden of proof, credibility and assessment of facts and circumstances and the standard of proof as if the applicant were being treated as an adult, which he undoubtedly was at this stage and without further regard to the earlier passages quoted.

8. Notwithstanding references to the treatment of children at interview, the Tribunal's analysis of the claim involved frequent comparisons between what the applicant said in his asylum questionnaire, what he said at his s. 11 interview (when he claimed to be a minor but was treated as an adult) and what he said at his oral appeal hearing. Adverse comments were made relating to the applicant's identification of the terrorists who threatened the applicant and his father as being Al Qaeda. The applicant explained that this information came recently from his mother who was then living in Iran and the Tribunal Member noted this but found that "*at no point prior to the appeal did the Applicant state that he and his father were being targeted by groups such as Al Qaeda (sic) who wanted them to fight against the Americans*". Ultimately she concluded thus:

"...in the circumstances of all that had happened to him and his family...it is not credible, even taking the applicant's age at the time of these stated events into account, that he would not have known until up to two months ago that he and his family were being targeted by terrorists who wanted his father to fight the Americans and now wanted him to fight against the Americans. This change in emphasis in relation to the Applicant's claim seriously undermines the credibility of his account. "

9. The Tribunal Member then made a number of credibility findings arising from the s. 11 interview and she affirmed the Commissioner's negative recommendation. She found that it was not credible that after his father's death at the family home, the applicant's mother and siblings would have remained in that house for some months. She also found an inconsistency in the applicant's descriptions of his father's work. During the s. II interview the applicant had stated that his father was involved in security and that he was a leader but during the appeal hearing he stated that his father was involved in training and supervising. The Tribunal Member found that it is not unreasonable to expect that the applicant would have known the nature of his father's work and that he would be able to recount the details of this work consistently.

10. The Tribunal Member questioned why the applicant, a Kurd, did not seek asylum in Turkey "*where millions of Kurds live where there is nothing to suggest that there is systematic persecution of Kurds*". She rejected his explanation which was his belief that people cannot seek asylum in Turkey and that Kurds are persecuted there. She found it incredible that a person as sick and as young as the applicant claimed he was would have chosen to travel in a truck for thirteen or fourteen days rather than seek help as soon as practicable after leaving Iraq.

11. While the Tribunal Member accepted that the applicant has an ear injury, she found it difficult to believe that this injury arose in the manner asserted considering the credibility issues that arise from his story. Relying on the decision of the Court of Appeal in *S v. Secretary of State for the Home Department* [2006] EWCA Civ 1153, the Tribunal Member attached little evidential value either to the medical reports regarding the applicant's ear injuries or to the further documentary evidence produced, namely a school report from Kirkuk and the father's death certificate. These were described as documents *which could not be authenticated*. She noted that relevant sections of the death certificate were incomplete and that when the foregoing was considered the death the applicant's claim.

The Applicant's Submissions

12. The applicant challenges the legality of the Tribunal decision on a number of grounds:

(i) The decision maker has not actually considered his core claim;

(ii) Having accepted that he was only 17 when he was interviewed, the Tribunal Member gave inadequate consideration to the complaint made that his interview was conducted without adequate safeguards for his age and she went on to make findings on credibility and inconsistency based on statements made by him when he was a minor, and failed to correctly apply the benefit of the doubt in assessing the appeal;

(iii) The Tribunal's decision was made seven months after the date of the oral hearing and there was a further delay of almost two weeks in notifying the applicant of the decision. The applicant alleges that this amounts to a breach of the right to have one's appeal determined within a reasonable time;

(iv) The death certificate submitted was dismissed as its veracity could not be authenticated without any explanation as to why or whether any steps were taken to attempt authentication. Further, the applicant was not made aware of any doubts harboured by the Tribunal Member on the authenticity of the death certificate nor was he given any opportunity to address these issues;

(v) Five previous positive decisions relating to applicants from Iraq were submitted in support of his claim but were also not expressly considered and there was merely a general statement that they had been considered;

(vi) The Tribunal Member failed to consider a significant aspect of his claim, namely that the lack of medical treatment in Iraq for his hearing loss would amount to persecution;

(vii) The finding that there is no persecution of Kurds in Turkey was completely without foundation, as no source for this finding was furnished in breach of s. 16(8) of the Refugee Act 1996 and the principle of *audi alteram partem*. Section 16(8) states as follows:

"The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) and the High Commissioner whenever so requested by him or her with copies of any reports, observations, or representations in writing or any other document, furnished to the Tribunal by the Commissioner copies of which have not been previously furnished to the applicant or, as the case may be, the High Commissioner pursuant to section 11(6) and an indication in to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section".

(viii) There was a nine month delay in delivering the decision which was so excessive as to warrant an order quashing the decision.

The Respondents' submissions

13. The respondents argue that there is no evidence beyond assertion to suggest that the Tribunal Member failed to carry out an objective assessment of the applicant's claim. In their submission, the applicant has failed to identify what exactly the Tribunal Member failed to consider, as is required pursuant to *G.K. v. The Minister for Justice, Equality and Law Reform* [2002] 1 ILRM 81. It is not necessary for the Tribunal to specifically analyse each and every document, provided that sufficient reasons are given to the applicant to explain the rejection of his/her claim. At the conclusion of the decision, the Tribunal Member stated that all COI on file had been considered. In that context, the findings made are rational and cogent. Quite simply, a series of inconsistencies, including the change of emphasis in his claim relating to the terrorist organisations seeking to recruit him, was laid out and was found to undermine his credibility.

14. The respondents further argue that the Tribunal Member gave adequate consideration to the possibility that the applicant was a minor at the time of the account given to ORAC. The applicant is not entitled to maintain the manner in which ORAC assessed his age as a ground of review at this stage.

15. The respondents dispute the applicant's claim that there was a failure to put certain matters to him. Specific issues were put to him, for example the fact that there were doubts about the authenticity of the death certificate. The Tribunal Member wrote to the applicant in relation to the purported death certificate thus providing him with an opportunity to remove the Tribunal's doubts about the document. The Tribunal Member also arranged for the death certificate to be translated a second time. In circumstances where some of the delay was caused by the efforts taken by the Tribunal Member to obtain a better translation of the applicant's father's death certificate, the delay in furnishing the decision was not excessive. Further, no prejudice has been identified or demonstrated.

16. The Respondents accept that there may have been a technical breach of s. 16(8) of the Act of 1996 but they argue that such a breach is not fatal to the decision in this case.

17. Finally, the respondents submit that the applicant's submission in relation to the adequacy of health care in Iraq has no real prospect of success in light of the case law relating to that area. Therefore even if it is accepted that the Tribunal Member failed to examine that point, it is also clear that had she considered it, she would have dismissed it.

Decision

18. Having examined the claim made by the applicant, the Court is persuaded by the argument that the core claim was inadequately addressed in the appeal decision. When one looks at his asserted fear of persecution in Iraq, it is apparent that credibility findings were made on segments of the applicant's narrative but not on the substance of the claim.

19. The Court has arrived at this view having regard to the particular facts of this claim. It must be recalled that the applicant arrived in the State as a sick and injured young asylum seeker in May 2007. His recent ear, foot and head injuries were there to be confirmed and he complained of severe headache. He has consistently recounted a story which could be true, in the background of the truly horrific internecine conflict in post Saddam Hussein Iraq which is outlined in COL. The function of the protection decision makers was therefore to determine, by questioning and probing and examining the oral and written evidence, whether this particular applicant's narrative could on balance be true. The correct method of assessing facts and circumstances in accordance with Regulations 5(1) and (2) of the *European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) was outlined in the Tribunal Member's decision. That method includes, at Regulation 5 (1) (c), an assessment of the individual position and personal circumstances of the applicant. It seems to the Court that the relevant questions which should have been decided would therefore at a minimum include:

- a. Is he from Iraq?
- b. Is he from Kirkuk?
- c. Is he a Kurd?
- d. Was his father a Ba'athist figure of authority?
- e. Was his father murdered/killed because of his Ba'athist sympathies?
- f. Was the applicant also injured?
- g. If returned to Iraq, would the applicant still be at risk because of his father's position?
- h. If so, could he reasonably be expected to relocate internally?

20. The applicant claimed to fear persecution for two interconnected reasons. He claimed that being the son of a local Ba'athist military commander of Kurdish ethnicity who had been threatened, targeted and ultimately killed by terrorists, he (the applicant) would be without State protection if he were also targeted because of his father's history. It is undoubtedly true that the applicant stated for the first time at his appeal hearing that he had recently learned from his mother that those who had threatened and killed his father and were threatening him included Al Qaeda. However, this really does not change the nature of his claim. The key factor is that he consistently claimed to fear persecution as a member of the family of a formerly high ranking Ba'ath Party member.

21. In support of his claim the applicant produced an ID card and later a school report containing a photograph and bio-details from his 2002/2003 school records, together with an original death certificate for his father dated the 15th October, 2006 certifying his

death from gunshot wounds to the head and chest on the 5th October, 2006 by the doctor who conducted the post mortem examination. If those documents are accepted at face value, they establish the applicant's age, identity and place of residence in Kirkuk. The death certificate indicates a date and cause of death, name of deceased and date of birth which are consistent with the information provided by the applicant in his questionnaire and at his s.11 interview. Similarly, the school examination report furnished to the Tribunal Member accords with information provided by the applicant when he first sought asylum and it has the potential to confirm that he left school on 20th July, 2003.

22. It does not appear to be in dispute that the applicant is who he says he is and that he comes from Kirkuk and is a Kurd. While these findings were never actually spelled out, they can be inferred from the finding of the Tribunal Member that she expected him to know more about his father's duties as a commander and to be consistent in his description of those functions and her further finding that as a Kurd, he could and should have sought asylum in Turkey if he was genuinely fleeing persecution in Iraq. While the Tribunal Member originally paid little heed to the school certificate and death certificate, dismissing them as being of little evidential value as their authenticity could not be verified, the later part of her decision appears (after the death certificate was translated a second time) to leave open the possibility that she ultimately accepted their contents notwithstanding negative comments, but found that the certificate was not compelling enough to overturn the credibility findings. Her decision is also open to the interpretation that because of the blanks in the death certificate and because the death was stated to have occurred at home and in the hospital, she rejected its otherwise consistent contents.

23. While the Court may have come to quite different views relating to the blanks (described as incomplete sections), this case is not one which fell on the weight to be attached to the contents of documents or suspicions relating to the authenticity of those documents. Rather, the decision is centred on credibility findings set against the documents and the Tribunal Member ultimately failed to actually accept or reject the well-foundedness of the applicant's fear of persecution because of his father's past.

24. It appears to the court that the applicant's identity, ethnicity and age were accepted by the Tribunal Member. It follows that the applicant was 17 years old when his initial s. 11 interview was conducted; 16 when his father was killed and approaching 13 when Saddam Hussein was overthrown and when he ceased going to school. In circumstances where the Tribunal Member quoted best practice attaching to the treatment of minors at interview, it is puzzling that she then ignored those guidelines in the knowledge that the applicant was an unaccompanied minor whose interview was conducted without the usual safeguards for children and made credibility findings based on a comparison between his evidence at interview and his evidence at appeal. While she referred to the need for a liberal application of the benefit of the doubt to the claims of minors, there is no evidence of any such application in this case.

25. In the applicant's particular circumstances, the relevance of his knowledge or recollection of his father's duties as a military commander is not compelling and could not be of any great importance to his claim if it were accepted that his father was a member of the Ba'ath Party. Similarly, it is difficult to see how, if the applicant and his father were targeted because of the terrorists, later identified as possibly Al Qaeda, the identification of those terrorists and their motive for seeking to harm the applicant or his father could amount to a different claim and negate the validity of his overall claim.

26. COI demonstrates that the nature of the conflict in Iraq has changed on a regular basis. Initially directed against former Ba'ath Party supporters, the conflict evolved to encompass threats against the family members of former Ba'ath party supporters. It subsequently also came to be directed against the army of occupation and is now characterised by internal inter-religious attacks with the involvement of Al Qaeda and other jihadist groups and nationalities. The interviews conducted with the applicant and the forms which he filled out are clear in their account of threatening letters being sent to his father before he was killed and to the applicant after his father and uncle's deaths. Until the hearing, the applicant never identified the source of the threats but knew that they were directed towards his father because his past career was well known in Kirkuk. His mother's opinion or even knowledge of the motives of the terrorists, which became known to him only at the appeal stage, does not neutralise his fear of persecution as the son of a high ranking Ba'ath party member. This aspect of his claim is amply supported by the COI furnished to the Tribunal Member which confirms that Ba'ath party members and their families are attacked with impunity by Iraqis in a country where law and order have broken down.

27. As previously mentioned, no material difference was identified between what the applicant said at each stage which could be said to be of such substance as would warrant the rejection of the core claim. According to his narrative the applicant was an Iraqi boy of barely seventeen years old from the troubled city of Kirkuk who was injured in the successful assassination of his father some seven or eight months before he arrived in Ireland. He produced documentary evidence of his connection to a man with the same address as the applicant and with a date of birth that had been provided by the applicant and who was indeed killed on the requisite day from gunshot wounds. In these circumstances it seems to the Court that the claim to be investigated was not whether his mother and sisters stayed in the family home after the assassination, whether Al Qaeda were involved in the threats, whether he should have sought asylum in Turkey or whether he knew enough about his father's duties in the military. Instead the Tribunal Member ought to have considered whether he would be at risk of persecution because of his connections if returned to Iraq.

28. The failure of the Tribunal Member to actually deal with the claim rather than concentrating on perceived inconsistencies leading to negative credibility findings is best described as unsettling. No understanding of the war in Iraq is evident from the impugned decision. The Tribunal Member's findings on Kurds seeking asylum in Turkey ignored the explanations offered by the applicant for not applying for asylum there and no reasons were given for her decision to disregard his seemingly reasonable explanation. The Court is also disturbed by the treatment of medical documents furnished to the Tribunal which state beyond dispute that the applicant has hearing loss and vertigo arising from blast damage. In the circumstances, the Court has very strong reservations regarding the fairness of the appeal hearing. The applicant's hearing loss was dismissed with the following cursory sentence: *"I have had regard to the medical documentation on file and the Applicant's account of how he received the injury. While the applicant has an ear injury, considering the credibility issues that arise with the Applicant's stated account, it is difficult to believe that the Applicant's injury arose in the manner stated in the Applicant's claim."* It must be recalled that the negative credibility findings related to (i) the identification of Al Qaeda as the terrorists who threatened his father so that he would fight against the Americans rather than so that they could seek revenge against former Ba'athists; (ii) his perceived lack of knowledge and lack of consistency with regard to his father's functions and duties; (iii) the fact that his mother and siblings stayed on in the family home after the assassinations and (iv) his failure to apply for asylum in Turkey.

29. The Tribunal Member also paid scant notice to the death certificate furnished by the applicant. When viewed in the context of the earlier negative credibility findings, the Court is bound to ask itself why such a potentially corroborative document was rejected and is further bound to review the reasonableness of the Tribunal Member's reasons for not seeking to authenticate the document. It cannot have been beyond the power of the Commissioner to investigate the provenance and authenticity of the document which is stamped in several places, contains the signature of the pathologist who certified the cause of death and left blank the entries for any previous treated illnesses, possibly because he had not previously been treated for existing medical conditions. The strong

impression given by the dismissal of the document is of a mind closed to even the possibility that what the applicant was asserting might possibly be true. Even if the death certificate had been authenticated, there is the distinct suspicion that following the tone of the previous findings the Tribunal Member may have attached little weight to the certificate as it did not establish Ba'ath Party membership.

30. The Court is satisfied that the impugned decision ought to be quashed. This is not because of the treatment of and weight attached to potentially relevant and corroborative documents but because the decision is essentially based on peripheral findings rather than an assessment of the well-foundedness of the applicant's asserted fear of meeting the same fate as his father because of his father's membership of the ousted Ba'ath party. There is no mention in the impugned decision of the terrible war in Iraq and no consideration of the COI furnished by the applicant. While it is certainly true that it is not necessary for a Tribunal Member to recite and analyse each and every document furnished to him, most cases call for some reference to the situation in an applicant's country of origin. In cases such as the present where the asserted Iraqi nationality of the applicant is accepted, something more than a statement to the effect that the decision maker has considered all COI on file is required.

31. A claim for asylum must be approached with an open mind and a decision maker must not set out to find reasons to reject or minimise every aspect of the claim. Unfortunately, the Court is satisfied that such principles were not applied in assessing the applicant's claim in this case especially when there was no question of internal relocation or state protection to avoid persecution. There should have been a careful identification and consideration of the core claim prior to such a decision being reached. Ultimately, there was no substantive consideration of the applicant's claim.

32. For the sake of completeness the Court finds that the arguments relating to delay and the lack of medical treatment in Iraq are not persuasive on a stand-alone basis although these aspects of the case are further indicative of a rather closed mind to every aspect of the applicant's claim. The delay complained of was contributed to by correspondence relating to the translation of the death certificate furnished by the applicant. In any event, the delay was not such that the applicant was greatly prejudiced.

33. It is highly regrettable that the applicant was treated as an adult at the ORAC stage and that unreasonable demands for additional documentation were made before a review of his age assessment would be considered. Nonetheless the Commissioner is not a party to these proceedings which relate to the decision making processes of the Refugee Appeals Tribunal and not to those of ORAC. It is important to stress therefore, that while the Court has serious concerns relating to the age assessment process and the reasons advanced for finding the applicant to be an adult, the challenge before the Court is to the validity of the RAT decision and as a matter of basic principle the Court cannot quash the Commissioner's age assessment decision at this stage.

Conclusion

34. The Court will quash the decision of the respondent Tribunal and direct that a fresh appeal be conducted before a different decision maker and that the fresh decision maker should be made aware of the reasons for the quashing of the decision.

¹·He was taken to the Royal Victoria Eye and Ear Hospital where he was prescribed anti-biotics and other medication for his ear condition. The ASY1 form records that he suffers from pain and deafness owing to perforation of his eardrums following an explosion, his left foot was injured and the back of his head, and he suffers from headaches. The applicant has also been seen by a doctor at his accommodation and referred for further treatment. He had a CT scan of his brain.

²·The Court notes that the applicant had in fact furnished a CT scan and reports and prescriptions from the Eye and Ear Hospital.