Neutral Citation Number: [2009] IEHC 327

THE HIGH COURT

JUDICIAL REVIEW

2008 2 JR

BETWEEN

M. S.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 15th day of July, 2009

1. The applicant is an Afghan national, who was born on 15th August, 1989. He applied for asylum to the Refugee Applications Commissioner on 5th January, 2005. That application was rejected and an appeal was subsequently lodged to the first named respondent. That appeal was unsuccessful and it is that decision on the part of the first named respondent which is the subject matter of the present application.

2. By notice of motion dated 2nd January, 2008, the applicant seeks leave to apply for an order of *certiorari* quashing the decision of the first named respondent made on 8th November, 2007.

3. The grounds upon which the applicant claims relief are manifold but may be summarised as follows:-

That in reaching the impugned decision, the first named respondent:-

(i) failed to act in accordance with the requirements of natural and constitutional justice;

(ii) had regard to irrelevant considerations and/or failed to have regard to relevant considerations;

(iii) failed to adequately or properly consider the fact that the applicant was a minor and the implications of that fact in assessing his claim;

(iv) failed to adequately consider evidence submitted by the *guardian ad litem*;

(v) relied, in error, upon country of origin information relating to members of the Hizb-I-Islami in assessing the applicant's fear of persecution on return to Afghanistan;

(vi) had regard to irrelevant considerations in assessing the future risk to the applicant of being trafficked on his return to Afghanistan;

(vii) engaged in supposition and conjecture and acted irrationally and unreasonably.

Background

4. The applicant applied for asylum to the Refugee Applications Commissioner on 5th January, 2005. In the course of completing the standard questionnaire the applicant set out the reasons why he left his country of origin. Briefly stated, the applicant alleged that enemies of his father were trying to kill his family. He stated his father was a communist and a member of the Hizb-I-Islam, a communist group then trying to overthrow the government. His family had to move to a different village. There the situation got worse. His father, who had in fact been working for the government, went with them. His father subsequently fled from the new family home due to fears of being found to be a member of the Hizb-I-Islam. American soldiers came to the applicant's new house looking for his father. They took him away and questioned him about his father. He did not answer any questions and the soldiers brought him home. On another occasion a group of political activists led by a local anti-communist commander attended at the applicant's home, searched it for his father and threatened his mother that if her husband did not surrender that she and her children would, as communists, be killed. Subsequently, the family were briefly reunited. A decision was then made that they could no longer live in Afghanistan. The applicant was separated from the rest of his family when exiting Afghanistan. He was put in a car with other strangers and he has not seen his family since.

5. The applicant was interviewed by the Refugee Applications Commissioner on 20th July, 2005. The interview notes record that he gave much the same reasons for leaving Afghanistan as had been given in the questionnaire earlier completed by him. He stated that he was afraid to return because of his father's involvement with the Hizb-I-Islami. He stated that the local commander who had been involved in threatening his mother also knew him. The applicant further stated that he was afraid he would be sold to Arabs or sent to jail if he returned to Afghanistan. His mother had told him that there was a drug problem and also a human trafficking problem and he was afraid of these matters, in the absence of his parents.

Report of Refugee Applications Commissioner.

6. The Refugee Applications Commissioner recommended that the applicant should not be declared a refugee. The s. 13

report was forwarded to the applicant on 10th October, 2005. In that report the Commissioner stated that country of origin documentation relating to ex Hizb-I-Islami members suggested that they were not at significant risk and that the government included amongst its number many of its former members. The Commissioner accordingly concluded that it was not credible that the applicant would be targeted given that he himself had no actual involvement with that opposition group and was not even a member of the party. In this regard it was noted that the applicant in his questionnaire had stated that he was a student and was not a party member.

7. The Commissioner, whilst agreeing that a problem in respect of human trafficking existed in Afghanistan, relied upon the fact that a programme had been set up to in Afghanistan to establish a national action plan to eradicate human trafficking. The Commissioner concluded that this being so and having regard to the fact that the applicant had not been a victim of trafficking when he lived in Afghanistan that he was not in any more danger of being trafficked than any other child if he were to be returned to Afghanistan.

8. An appeal was subsequently lodged against the decision of the Refugee Applications Commissioner. By the time the appeal was lodged, the applicant had been made a Ward of Court. This happened as a result of his attendance at a protest at St. Patrick's Cathedral in Dublin where a significant number of Afghan Nationals demonstrated against being returned to Afghanistan. Having been admitted to wardship, Ms. Freda McKitterick was appointed as the applicant's *guardian ad litem*.

9. For the purposes of his appeal against the decision of the RAT the applicant submitted, in addition to the documentation which had been considered by the Refugee Applications Commissioner and the s. 13 Report:- (a) a detailed letter from Ms. Freda McKitterick and (b) supplemental written legal submissions.

10. Ms. Freda McKitterick is a qualified social worker with many years experience in that role. She has worked with Barnardos since the year 2000. In her letter sent to the first named respondent on the applicant's behalf, she referred (*inter alia*) to the fact that in her opinion the applicant was intelligent, articulate and vulnerable. She asserted that the applicant was distressed by reason of his separation from his family and that he was lonely. She stated that she found the applicant tended to become disproportionately upset regarding his situation and that this was likely to manifest itself at interview. She believed that he was a credible historian and had accepted his account that his family had been targeted because of his father's activities. In addition, she stated that it had been noted in the course of his initial interview that he was nervous and spoke so fast that all of his answers could not be taken down. Finally, she referred to the fact that she had spoken to the journalist Robert Fisk and that he had confirmed to her that, in his opinion, there was widespread trafficking of vulnerable young men in Afghanistan.

11. The additional written submissions filed complained of the fact that irrelevant country of origin documentation had been considered by the Commissioner. The documentation relied upon related to risks to former, as opposed to current members of the Hizb-I-Islami. It was submitted that the opinion of the Refugee Applications Commissioner that the government would have little interest in the applicant if he were to be returned to Afghanistan was pure conjecture and speculation. Further it was submitted that the Commissioner had failed to take into account that the applicant could be orphaned if returned home, thus making it more likely that he would be exposed to trafficking.

Report of Refugee Appeals Tribunal.
12. The hearing before the first named respondent took place on 13th August, 2007. Following the hearing the applicant's appeal was rejected. Section 6 of the decision contains the Tribunal member's analysis of the applicant's claim for refugee status. A summary of the findings of the first named respondent are as follows:-

> 1. The applicant had mentioned for the first time in the course of the appeal that his cousin, who was also a member of the Hizb-I-Islami, had been murdered in 2003. The first named respondent found that the applicant's failure to mention his cousin's death in his initial questionnaire or at his interview with the Refugee Applications Commissioner undermined his credibility.
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> 2. The first named respondent concluded, in relation to the applicant's alleged well founded fear of persecution, that the applicant had no involvement in the Hizb-I-Islami, had no knowledge of the party's activities, was a student and that accordingly that it would be difficult to believe that the applicant would be of any interest to the current government, merely because he was his father's son.
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> 3. The first named respondent found that child trafficking was a worldwide problem, that the government had approved the establishment of a commission to prevent child trafficking and that the applicant, not having been a victim of trafficking while living in Afghanistan, would not be in any more danger than any other child if he were returned to Afghanistan.

13. In coming to the aforementioned conclusions the first named respondent stated at para. 7 of her report that her decision was based upon a consideration by her of:-

> "All relevant documentation in connection with this appeal including the notice of appeal; additional submissions submitted at the appeal hearing; correspondence from Freda McKitterick, *guardian ad litem*; CNN documentation and attached documents relating to Asadabad, Hizb-I-Islami and Abdul Wali; map of Afghanistan; the applicant's asylum questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act."

14. The first named respondent affirmed the recommendation of the Refugee Applications Commissioner.

Applicant's Submissions:
15. Ms. Egan on behalf of the applicant submitted that there was no evidence to show that the matters set out by Ms. McKitterick in her letter to the first named respondent were considered. If the matters contained in her letter were to be discounted, then the first named respondent should have set out why the same were so discounted. She complained that the only reference to Ms. McKitterick's letter was cursory and that the report of the respondent make no reference to Ms. McKitterick's findings regarding the applicant's mental state. She states that the reference in the first named respondent's

report to Ms. McKitterick's letter was nothing more than an empty formula of words.

16. Ms. Egan, whilst conceding that international guidelines were met in this case given that the applicant had had the benefit of a *guardian ad litem* and a legal advisor, nonetheless submitted that this fact mandated the first named respondent to have regard to the input of the guardian. She referred to Ms. McKitterick's letter which contained her opinion as to the applicant's credibility, his symptoms of PTSD, and his vulnerability. Ms Egan submitted that there was no evidence in the decision to suggest that these matters had been taken into account.

17. Ms. Egan submitted that the first named respondent erred in basing her findings upon country of origin documentation relating to the ongoing risk of persecution to past rather than present members of the Hizb-I-Islami. This error, which had been first made by the RAC, had been set out in the written submission to the Tribunal and was also referred to in Ms. McKitterick's letter.

18. The country of origin documentation, Counsel submitted, showed that there was a real risk of danger to ongoing members of the Hizb-I-Islami. Accordingly, the applicant had reasonable grounds to argue that the decision should be impugned on the basis that the Tribunal member had had regard to matters which were immaterial whilst failing to have regard to documentation which was clearly relevant to the claim for refugee status, namely the ongoing persecution of present members of the Hizb-I-Islami.

19. Ms. Egan submitted that the Tribunal's finding as to the applicant's lack of credibility based on the fact that he appeared not to have mentioned his cousin's death in the questionnaire or at interview was arguably not sustainable on the evidence. She asserted that as the applicant was a minor, he should have been afforded more latitude, particularly having regard to Ms. McKitterick's letter which reported that it was noted that the applicant had spoken too quickly at his first interview. His omission to mention his cousin's death was she submitted understandable.

20. Ms. Egan also submitted that in any event the applicant had left Afghanistan due to his father's membership of the Hizb-I-Islami and his fears of persecution were related to those events rather than his cousin's death. Accordingly undue weight had been attached to the omission which she submitted was of minor importance.

21. Counsel submitted that even if this court were to reject all other arguments made on the applicant's behalf that substantial grounds existed to challenge the decision of the Tribunal member regarding the applicants claim to a well founded fear of persecution based upon his risk of being trafficked if returned, as a young male without family support, to Afghanistan. It was submitted that the applicant is a "member of a particular social group" for the purposes of the definition of "refugee" being that group of young men who are without family or community supports. In this regard the applicant relied upon para. 38 of the 2006 UNHCR *Guidelines in relation to victims of trafficking and persons at risk of being trafficked*.

Respondent's submissions

22. In reply, Ms. Emily Farrell B.L. submitted that there was clear evidence that Ms. McKitterick's letter was considered. She relied upon s. 7 of the first named respondent's report, wherein Ms. McKitterick's letter was listed as being one of the matters considered by the Tribunal member when coming to her conclusion. Ms. Farrell also relied upon the letter of the first named respondent dated 28th November, 2007 which referred to consideration having been given to all documents submitted for the purposes of the appeal. The respondent relied upon the decision of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, the decision of Feeney J. in *Bazuzi v Minister for Justice, Equality and Law Reform* [2007] IEHC 3 and that of Dunne J. in *A.W.S. v Refugee Appeals Tribunal & Ors* [2007] IEHC 276.

23. As to the adverse credibility finding made by the Tribunal member, counsel on behalf of the respondent submitted that the role of this Court in relation to a finding of credibility is limited. She relied upon the decision of Peart J. in *Imafu .v .Refugee Appeals Tribunal* [2005] IEHC 416 to assert that it is not for this Court to substitute its view of the applicant on an issue of credibility. She alleged that the onus was on the applicant to displace the findings of the Tribunal member and submitted that the Tribunal was entitled to draw inferences from the applicant's failure to mention his cousin's death. The Tribunal member had not engaged in speculation or conjecture. In this regard, she relied upon the applicant's own affidavit and in particular para. 6 thereof which referred to the fact that his father's fear of persecution "assumed real significance" when his experiences began to mirror those of his cousin. Ms. Farrell stated that it was legitimate for the Tribunal member to draw adverse inferences from his omission to refer to his cousin's death having regard to the fact that he viewed the risk to his father and potentially to himself as being much more significant in the light of his cousin's death.

24. Ms. Farrell submitted that notwithstanding the fact that the Tribunal member came to an adverse credibility finding, she nonetheless went on to consider whether or not the applicant had made out a case that he had a well-founded fear of persecution because of his father's membership with the Hizb-I-Islami. Counsel submitted that the Tribunal member was entitled to rely upon the country of origin documentation which dealt with the risk to past members of the Hizb-I-Islami. She stressed that the Tribunal member was not dealing with the father's fear of persecution which would have warranted a consideration of the country of origin documentation as it pertained to present members. In this case, the Tribunal member was dealing with the fear of the applicant who was a student with no political affiliations. Even if the Tribunal member had wrongfully referred to the applicant's father as a past as opposed to a serving member of the Hizb-I-Islami, it was reasonable for the Tribunal nonetheless to draw inferences from the country of origin documentation to ground its decision that the applicant could not have a well founded fear of persecution. Ms. Farrell submitted that the Tribunal member did not rely upon conjecture and that the country of origin documentation pertaining to the risk to past members of the Hizb-I-Islami was in fact relevant to her findings. Her decision was in this regard, according to Ms. Farrell, was reasonable having regard to the evidence and the inferences that could legitimately be drawn from the same. She relied upon the decision of Peart J. (Unreported, High Court, 5th June, 2003) in *Skender Memishi v. Refugee Appeals Tribunal* as authority for the proposition that the Tribunal member was entitled to take a view which might reasonably follow from the facts concerned.

25. Finally, on behalf of the respondent, it was submitted that a person could not be regarded as a refugee by reason of being at risk of being trafficked. Reliance was placed upon the decision of *A.G. of Canada v. Ward* [1993] 2 S.C.R. 689 to support the submission that a particular social group cannot be defined by the persecution suffered i.e. potential trafficking. Counsel submitted that whilst trafficking could be deemed to be a method of persecution, it could not amount to a Convention ground unless a Convention nexus was established. A well-founded fear of being trafficked of itself could not bring the applicant within the definition of a refugee.

Decision

26. The appropriate standard to be applied by this Court on a leave application is that is which is set down in section 5 of the Illegal Immigrants (Trafficking) Act 2000, namely that the applicant is required to establish "substantial grounds." As Carroll J. held in the case of *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125:-

> "In order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

27. The court concludes that it is not arguable that the decision of the Tribunal should be impugned due to a lack of evidence demonstrating that the views of Ms. McKitterick or the views of Mr. Fisk as referred to in Ms. McKitterick's letter were not considered.

28. The court rejects the applicant's assertion that it should presume that section 7 of the first-named respondent's report is a mere formula of words inserted in standard fashion and should not be viewed as evidence that the contents of the documents therein set forth were considered. This is not a standard paragraph which is common to all decisions of this nature. There is specific reference to Ms. McKitterick's letter in this paragraph. Given that this is so, the court does not accept that it should infer the diametrically opposed inference that it was not so considered. The court believes that there is sound legal reasoning behind the decision of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 wherein he stated:-

> "That a person claiming that a decision-making authority had, contrary to its express statement, ignored representations which it had received needed to produce some evidence, either direct or inferential, of that proposition before he could be said to have an arguable case."

29. Given the direct reference to Ms. McKitterick's report, the applicant has failed to discharge the obligation upon him to produce some evidence that Ms. McKitterick's views were not considered and evaluated. Further, against the applicant's submission is the reference by the Tribunal member to her analysis of the claim for refugee status having regard to "the applicant's age and situation". This reference once again seems to support the respondent's contention that these are matters which would have involved the Tribunal member in considering the content of Ms. McKitterick's report which, of course, included the views of Mr. Fisk.

30. Insofar as the applicant seeks to argue that reasonable grounds exist to impugn the decision of the Tribunal member regarding the applicant's credibility, this Court believes that the applicant has not discharged the requisite onus of proof. It is well-established in this jurisdiction that the assessment by the decision-maker of the credibility of the applicant and his story forms part of the decision making power conferred by the Refugee Act 1996 and must be carried out in accordance with the principles of natural and constitutional justice. There are no grounds to suggest that the decision of the Tribunal member was made in breach of these principles. Goodwin-Gill ("*The Refugee and International Law*", Clarendon Paperbacks, Oxford) at page 349, describes the assessment of credibility in the following terms:-

> "Simply considered, there are just two issues. First, could the applicant's story have happened, or could his/her apprehension have come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent with what is known about the country of origin, then the basis for the right inferences has been laid.
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> Inconsistencies must be assessed as material or immaterial. Material inconsistencies go to the heart of the claim, and concern, for example, the key experiences that are the cause of flight and fear. Being crucial to acceptance of the story, applicants ought in principle to be invited to explain contradictions and clarify confusions."

31. The failure on the part of the applicant to mention the death of his cousin when completing his questionnaire and/or at his subsequent interview was clearly a matter to which the Tribunal member was entitled to attach substantial weight. Such omission could reasonably have been regarded as material in circumstances where his cousin's treatment by the Afghani government and American forces had been a significant factor in his family's decision to leave Afghanistan. The weight to be attached to any evidence is a matter for the Tribunal member. It is not for this Court to substitute its views as to credibility and in this regard the court once again relies upon the decision of Peart J. in *Imafu v. Refugee Appeals Tribunal* [2005] IEHC 416 where he indicated that the Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal member.

32. Insofar as the applicant has sought to make out some generalised type of claim that the applicant's age when taken in conjunction with those matters contained in Ms. McKitterick's report should have driven the Tribunal member to a point where an adverse finding regarding credibility should not have been reached, the Court rejects that assertion. The applicant completed the relevant questionnaire with the assistance of a social worker and did so in his own language. At Q.47, he indicated that he had received legal assistance in completing the same. The guidelines to the questionnaire make it clear that the information contained in that questionnaire forms the basis of the application and advises the applicant to give as much detail as possible. The applicant was assisted by the Refugee Legal Services at the time of his initial interview. He also had his Health Board social worker in attendance with him and was in a position in the course of that interview at Q.23B to advise of his grandfather's involvement with the military and also his own father's involvement with the Islamic party.

33. In circumstances where the full set of submissions filed with the first named respondent made no mention of his cousin's death which was then raised for the first time in the course of the appeal hearing, there was ample evidence from which the Tribunal member was entitled to draw an adverse view of the credibility of the applicant in respect of his alleged well-founded fear of persecution regardless of his age. It is not for this Court to interfere or second guess that finding.

34. The court rejects the submission that the applicant has established substantial grounds to argue that the decision of the first named respondent can be impugned on the basis that the Tribunal member took into account materials which

were irrelevant to her considerations whilst ignoring materials which were relevant. Insofar as the Tribunal member clearly placed emphasis upon country of origin documentation which pertained to the risk of persecution to past members of Hizb-I-Islami, this fact does not afford the applicant any ground to argue that the decision should be impugned. What the Tribunal member was considering was the applicant's allegedly well-founded fear of persecution. He himself was not a member of the Hizb-I-Islami. He was a student. There was no reason, in the view of the Tribunal member, to treat him as if he were a member of the Hizb-I-Islami. He had not been persecuted prior to his departure. Accordingly, it cannot be argued that the Tribunal member failed to have regard to relevant considerations whilst making its decision upon country of origin documentation which was irrelevant to its determination.

35. It was argued on behalf of the Applicant that he was entitled to refugee status as a member of a particular social group, namely young men without family or community supports who were therefore vulnerable to child trafficking. Ms. McKitterick had noted in her report that she had spoken with the journalist Robert Fisk, a specialist in Middle Eastern and Afghani affairs, who had confirmed the widespread trafficking of vulnerable young men and their subsequent sexual abuse. Reliance was placed upon para. 38 of the 2006 UNHCR *Guidelines in relation to victims of trafficking and persons at risk of being trafficked* which states:-

> "Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As such, they may constitute a particular social group. Factors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings; therefore certain social subsets of women may also constitute particular social groups. Men or children or certain social subsets of these groups may also be considered as particular social groups. Examples of social subsets of women or children could, depending on the context, be single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children. The fact of belonging to such a particular social group may be one of the factors contributing to an individual's fear of being subjected to persecution, for example, to sexual exploitation, as a result of being, or fearing being, trafficked."

36. In assessing this aspect of the applicant's claim, the Tribunal member stated:-

> "The applicant generally fears being trafficked in Konar province if he returns to Afghanistan. Child trafficking is a world wide problem. While people trafficking is a problem in Afghanistan the government has approved the establishment of the Commission of the Prevention of Child Trafficking and has pledged to establish a National Action Plan to combat trafficking (Appendix B) and is making significant efforts to comply with the minimum standards for the elimination of trafficking…this year, Afghanistan reported 40-70 arrests of traffickers (US State Department Report on Trafficking in Persons (June 2006)). The Applicant was not a victim of people trafficking while living in Afghanistan and he would not be in any more danger than any other child if he were to return to Afghanistan."

37. It is well established that a particular social group cannot be defined by the persecution feared, but must exist independently of it: *Attorney General of Canada v. Ward* [1993] 103 D.L.R. (4th) 1. The leading case on the issue of the meaning of membership of a social group is the decision of the House of Lords in *R v. Immigration Appeals Tribunal ex parte Shah* and *Islam v. Secretary of State for the Home Department* [1999] 2 A.C. 629, where it was held that women in Pakistan could constitute a particular social group for the purposes of the Refugee Convention. The House of Lords based its finding on the fact that the laws of Pakistan did not offer protection to women who were subject to domestic violence, simply because they were women. Lord Hoffman stated:-

> "In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. The obvious examples, based on the experience of the persecutions in Europe which would have been in the minds of the delegates in 1951, were race, religion, nationality and political opinion. But the inclusion of a "particular social group" recognised that there might be different criteria for discrimination *in pari materiae* with discrimination on the other grounds, which would be equally offensive to principles of human rights…the concept of social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming with the anti-discriminatory objectives of the Convention."

38. This decision was cited with approval in this jurisdiction in the cases of *Rostas v. Refugee Appeals Tribunal* (Unreported, High Court, 31st July 2003) and *Msengi v. Minister for Justice and Another* [2006] IEHC 241.

39. The UNHCR Guidelines recognise that "not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognized as a refugee, all elements of the refugee definition have to be satisfied" [para. 6]. The individual concerned must have a well-founded fear of persecution linked to one or more of the Convention grounds in order to be recognised as a refugee. In relation to the causal link, para. 29 of the UNHCR Guidelines states:-

> "To qualify for refugee status, an individual's well-founded fear of persecution must be related to one or more of the Convention grounds, that is, it must be "for reasons of" race, religion, nationality, membership of a particular social group, or political opinion. It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause. In many jurisdictions, the causal link ("for reasons of") must be explicitly established, while in other States, causation is not treated as a separate question for analysis but is subsumed within the holistic analysis of the refugee definition. In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is likely to be linking the well-founded fear of persecution to a Convention ground. Where the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link."

40. In relation to causation, Lord Hoffman stated the following in *Islam* and *Shah*:-

> "Once one has established the context in which a causal question is being asked, the answer involves the application of common sense notions rather than mechanical rules. I can think of cases in which a "but for" test would be satisfied but common sense would reject the conclusion that the persecution was for reasons of sex. Assume that during a time of civil unrest, women are particularly vulnerable to attack by marauding men, because the attacks are sexually motivated or because they are thought weaker and less able to defend themselves. The government is unable to protect them, not because of any discrimination but simply because its writ does not run in that part of the country. It is unable to protect men either. It may be true to say that the women would not fear attack but for the fact that they were women. But I do not think that they would be regarded as subject to persecution within the meaning of the Convention. The necessary element of discrimination is lacking."

41. It appears from the Tribunal member's decision that she considered that this discriminatory element was lacking in the present case, as she expressly stated that the applicant "would not be in any more danger than any other child if he were to return to Afghanistan". She also considered that State protection was available to the applicant, pointing to efforts by Afghanistan's government to combat child trafficking. The essential question for determination at this stage is whether the applicant has established arguable and substantial grounds. The essence of the case made by the applicant is that there were materials before the Tribunal, namely the evidence of Mr. Fisk, that placed the Tribunal on inquiry as to whether the applicant would be the potential victim of trafficking by reason of his membership of a particular social group, namely young men without family or community support in Afghanistan. There is no express consideration in the decision of this question of whether such a particular social group existed as a matter of law for the purposes of the Refugee Convention, and whether the applicant satisfied the definition of a refugee on that basis. It appears that the Tribunal member regarded the risk to the applicant as an indiscriminate one, and did not assess whether he was at particular risk as he would be without family or community support in Afghanistan. Moreover, she failed to assess whether "children in Afghanistan" were themselves a particular social group at an unacceptably high level of risk for the purposes of the Convention. In the circumstances, I am of the view that for the purposes of this leave application the applicant has crossed the necessary threshold in establishing grounds for seeking leave though I wish to reiterate that the finding of this Court goes no further.

42. Having regard to all of the aforementioned facts the court will grant leave to the applicant to seek the relief set forth at par (i) (ii) and (v) of the notice of motion on the grounds set out at E (vi) of the Statement required to ground the application for judicial review.