

**THE HIGH COURT
JUDICIAL REVIEW**

[Record No. 2005/15JR]

**IN THE MATTER OF THE REFUGEE ACT, 1996 AND
THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000 AND
THE IMMIGRATION ACT, 1999**

BETWEEN**JIAN XIAO****APPLICANT****AND**

**REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER MICHELLE O'GORMAN) AND MINISTER FOR EQUALITY JUSTICE
AND LAW REFORM**

RESPONDENTS**Judgment of Ms. Justice Dunne delivered on the 2nd day of June, 2005**

1. The applicant in these proceedings seeks a declaration that a decision of 7th December, 2004 of the first named respondent and the recommendation of the Tribunal Member of 29th November, 2004 are ultra vires and without efficacy and were reached in infringement of the applicant's right to constitutional and natural justice and fair procedures. The applicant also seeks an injunction restraining the second named respondent from taking any steps to affirm the decision to deny the applicant refugee status and/or to make a proposal to deport the applicant. Further an order is sought directing that the applicant's claim for refugee status be reheard and finally an order of certiorari is sought quashing the decision of the first named respondent of 7th December, 2004 and the recommendation of the Tribunal Member of 29th November, 2004 refusing the applicant a declaration of refugee status.
2. The grounding affidavit of the applicant herein was sworn on 10th January, 2005. In the grounding affidavit the applicant sets out details in relation to his background and he sets out the circumstances in which he applied for a declaration of refugee status together with an account of the proceedings in the Office of the Refugee Applications Commissioner (hereinafter referred to as "ORAC") and the Refugee Appeals Tribunal. The applicant states that he is a national of China. He arrived in the State in 1995 having previously been in the United Kingdom where he had also applied for asylum. He left China in May of 1993 owing to his fear of persecution for political reasons. He applied for a declaration of refugee status in this State on 17th August, 2004 and completed the usual questionnaire on 18th August, 2004. During the time he has been in Ireland he has worked at various jobs in the restaurant trade without a work permit save for a period between 15th July, 2002 to 14th July, 2003 when a work permit was obtained for him by his then employers.
3. He stated that his reason for a fear of persecution is that a cousin of his attended the June 4th democracy movement protest in Tianamen Square, Beijing and was killed. He became involved in supporting the democracy movement and he did this by printing leaflets and documentation about the events that occurred and making them available. His wife was subjected to harassment and detention and other family members were placed under surveillance because of his activities. One of his colleagues in the democracy movement had been executed and another had been sentenced to thirteen years imprisonment and he fears that if returned he would be subjected at a minimum to ten years imprisonment. These matters are expanded upon in a statement prepared by the applicant which was before ORAC and in the interview which took place between the applicant and the authorised officer of ORAC together with the questionnaire completed by the applicant in the course of his application for refugee status.
4. One of the more unusual matters referred to by the applicant in his affidavit was his account of how he had been subjected to kidnappings whilst in the UK and Ireland. He described how he suffered a lot when he had been kidnapped in England and that he had undergone a more serious experience there than that which occurred in Ireland.
5. He also explained the circumstances in which he had obtained a passport before leaving China. According to him he obtained a passport when someone else applied for it on his behalf but he indicates that he is unable to say whether the same is real or fake. At this stage he no longer has the passport but he has indicated that a copy of it may be available in the office where he looked for a provisional driving licence.
6. Having referred to the background, the applicant in his affidavit goes on to deal with the various decisions made in respect of his application. First of all he refers to the letter of 19th October, 2004 together with copies of the reports in respect of the investigation and the recommendation in respect of his application by which he was notified of the decision of ORAC to refuse his application for refugee status. Because the report pursuant to s. 13(1) contained a finding that he had failed without reasonable cause to make an application for asylum as soon as reasonably practicable and that he had lodged a prior application for asylum in another State Party to the Geneva Convention, he was advised that any appeal against the decision would be based on documents only. He then referred to the notice of appeal together with grounds of appeal, submissions, country of origin information and a covering letter dated 2nd November, 2004 which were lodged with his notice of appeal. Subsequently by letter of 7th December, 2004 he received notification of the decision of the Refugee Appeals Tribunal to refuse his appeal and together with that letter was a copy of the decision of the Tribunal Member who considered the appeal on 29th November, 2004.
7. The applicant then analyses the decision of the Tribunal Member and makes a number of observations (indeed one might say submissions) in relation to the decision. First, the applicant argues that the Tribunal Member had made no negative finding of credibility regarding the experiences of the applicant in his country of origin giving rise to his fear of persecution and that she appears to have accepted his account of his political involvement, activity and experiences of himself and his family arising from same. He complains that the Tribunal Member has failed to carry out any assessment of the applicant's claim with regard to his fear of persecution for political reasons and has confined her considerations solely to the issue of delay in claiming asylum, his having made a prior application for asylum in the UK and his having obtained a passport from the Chinese authorities.
8. He then goes on to deal with information, documents and material placed before the Tribunal Member regarding ongoing and current political oppression and human rights abuse in China. He refers to an Amnesty International report of 2004. He refers to a further report from Amnesty International in relation to the failure of the Chinese authorities to institute any form of public inquiry into events surrounding the Beijing protests of 1989. Having referred to these matters he complains that the decision of the Tribunal Member fails to have regard for and to consider the information referred to above and that no assessment of persecutory risk is evident from the decision.
9. He then states that he has been advised by his advisors that the primary function of an adjudicator in an asylum claim is to assess persecutory risk having regard to all the circumstances as they now pertain or prevail. He then referred to the principle relating to the

adjudication of refugee claims and to UNHCR criteria, guidelines and procedures in this regard which place an obligation on an adjudicator to consider all elements and aspects of an applicant's fear of persecution and the reasons for it and give weight to all elements and strands of the claim advanced. This obligation arises even where an adjudicator entertains some doubt as to the likelihood or chance of certain events having occurred. He concedes that his delay in claiming asylum is a factor which the Tribunal Member may have regard to but that it is not a deciding factor and does not obviate the requirement on the Tribunal Member to actually assess with reference to objective country conditions whether the applicant has a well-founded fear of persecution. He complains that the Tribunal Member in concluding that the applicant could have pursued his asylum claim in England failed to have regard to the fact that he had undergone an experience of kidnapping in the United Kingdom which was very bad and that he had difficulty convincing the authorities in the UK of the seriousness and veracity of his complaint in that regard. The Tribunal Member could not in those circumstances have come to the conclusion that he was safe in England.

10. The applicant then deals with certain findings in respect of the applicant's credibility. In particular he deals with the obtaining of a passport by him in China and the view expressed by the Tribunal Member in respect of his credibility in relation to this particular aspect of the matter is criticised. The mere existence or issuing of a passport from his country of origin is not a sound reason for denial of refugee status or sufficient to justify a conclusion that he is no longer wanted by the authorities in his country of origin. He goes on to state that in circumstances where an adjudicator entertains doubts about the credibility of some parts of a claim there is an obligation to proceed to assess persecutory risk and to conduct such assessment by reference to prevailing country conditions in light of or having regard to the personal experiences of the claimant. This is particularly so where there are no adverse findings in relation to the information presented by the applicant in respect of the core elements giving rise to the fear of persecution.

11. It may be of assistance at this point to refer briefly to the report pursuant to s. 13(1) of the Refugee Act, 1996 dated 12th October, 2004. It was stated in that report that "it is considered that this applicant is a migrant and not a refugee". Its findings pursuant to s. 13(6) were that the applicant without reasonable cause had failed to make an application as soon as reasonably practicable after arrival in the State and that the applicant had lodged a prior application for asylum in another State Party to the Geneva Convention and it was found that the applicant had failed to establish a well-founded fear of persecution as defined under s. 2 of the Refugee Act, 1996. As a consequence the recommendation of the authorised officer was that the applicant should not be declared a Refugee.

12. I have already referred briefly to the criticisms made by the applicant of the decision of the first named respondent herein but for the sake of completeness I think I should briefly refer to that part of the decision headed "Assessment of the applicant's claim". In the course of the assessment three points are made by the Tribunal Member. The first point relates to the fact that the applicant had been in Ireland for nine years before deciding to seek asylum. Reference is then made to his previous application for asylum in England and to the fact that on that basis he would have had knowledge of the asylum process and finally, that having been in contact with the police authorities in Ireland in relation to his kidnap he could have obtained information on asylum at that time. Accordingly, the Tribunal Member concludes as follows:-

"Considering the foregoing it is not considered that international protection was the applicant's primary motive and that s. 13(c) of the Refugee Act, 1996 as amended applies to this applicant."

13. The second part of the assessment makes the point that having applied for asylum in the UK in 1993 the applicant did not wait for the asylum procedure in that jurisdiction to be exhausted. The conclusion is reached that the applicant was safe in England. (This is a conclusion much disputed by the applicant) The assessment goes on to make the point that if the applicant was fleeing persecution in one country he could have pursued his claim in the UK until all procedures there were exhausted. The Tribunal Member concluded that s. 11(A) of the Refugee Act, 1996 as amended applies to this applicant. This section provides that where a prior application for asylum in another State Party to the Geneva Convention has been made then the applicant shall be presumed not to be a refugee unless he or she shows reasonable grounds for the contention that he or she is a refugee.

14. The third point relied on by the Tribunal Member in making the assessment is that it was not credible that if the applicant was wanted by the Chinese authorities since 1992 that he would have been able to apply for and obtain a passport from the police office of Fujian Province in 1993. Accordingly, the Tribunal Member affirmed the recommendation made by the Refugee Application's Commissioner in accordance with s. 13(1) of the Refugee Act, 1996.

15. As this is an application for judicial review to which the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 apply, the applicant has to satisfy the court that there are substantial grounds for contending that the decision of the tribunal is invalid or ought to be quashed.

16. It would be useful to look at certain of the statutory provisions that are applicable in cases such as the present one. Section 2 of the Refugee Act, 1996 as amended provides the following definition of refugee:-

"In this Act 'a refugee' means a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country..."

17. The burden of proof rests on an applicant but there is to some extent a shared duty on an adjudicator to ascertain and evaluate all the relevant facts, in particular by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge and so on. As this is a case to which s. 11(A) of the Refugee Act 1996 applies and as the applicant herein had lodged a prior application for asylum in another State party to the Geneva Convention the applicant in this case is subject to the presumption that he is not a refugee unless he shows reasonable grounds for the contention that he is a refugee. Section 11(A) (3) provides:-

"Where an applicant appeals against a recommendation of the Commissioner under s. 13, it shall be for him or her to show that he or she is a refugee."

18. Counsel on behalf of the applicant takes issue with the consideration by the Tribunal Member of the burden and standard of proof as set out in the decision. It is argued that there is confusion between the standard of proof and the burden of proof. The standard of proof is the threshold to be met by the applicant in discharging the burden which rests upon him. Counsel contends that the question of credibility is of assistance in this regard in determining whether or not an individual applicant has passed the standard required. Insofar as the Tribunal Member has referred to establishing a well-founded fear of persecution as expressed in the case of *R v. Secretary of State of the Home Department, ex parte Sivakumaran* [1988] 1 All ER 193 counsel takes issue with the statement of the Tribunal Member to the following effect:-

"a fear of persecution is well-founded when it can be reasonably anticipated that remaining in the country of origin may result in a form of serious harm which government cannot or will not prevent."

19. It is urged that what is relevant is not what would happen if one remained in the country of origin but rather what would happen if you return as informed by what had happened previously. In that regard Mr. Woolfson, B. L., states that it is important to consider past events in order to consider what may happen on the return of an applicant. He suggests that because there are no negative findings as to the credibility of the applicant insofar as past history is concerned there has been no proper weighing of the negative matters taken into consideration by the Tribunal Member against matters which may occur if the applicant returns.

20. He urged that the provisions of s. 11(A) regarding burden of proof are matters to be taken into consideration by the Commissioner and not the Tribunal on appeal from a decision of the Commissioner. It was conceded by counsel that it is open to the Commissioner to consider the delay in making an application, the fact that there was a previous asylum claim and the negative credibility finding by the Authorised Officer of ORAC but it was submitted that the Tribunal Member has in effect picked out three negative factors determined against the applicant and has not considered the applicant's objective or stated fear.

21. It was pointed out that the assessment of the applicant's claim by the Tribunal Member focussed on three issues namely the delay in applying for asylum, the failure to await asylum decision in England with the consequence that s. 11(A) of the Act applied and the question mark in relation to the passport of the applicant. The thrust of the applicant's complaint is that notwithstanding its views on these points the Tribunal Member should have considered the claim on the basis of considering the application as a whole. In particular, issue is taken with a specific finding that the applicant was "safe in England".

22. Insofar as there is a presumption in this case that the applicant is not a refugee it is argued that to consider whether the presumption has been rebutted it is necessary to consider and assess objective and subjective elements of the application. Reliance is placed on the decision of Brooke, L. J., in *Karakaran v. Secretary of State for the Home Department* [2003] All ER 449 at 469 to 470:-

"... when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision makers believe on what may be somewhat fragile evidence, that they probably did not occur."

23. In other words Mr. Woolfson argues that the view taken by the Tribunal Member in respect of the passport should not have ruled out consideration of other issues. The Tribunal Member should have gone on to consider whether there is a well-founded fear of persecution.

24. Counsel for the applicant referred to the UNHCR handbook on procedures and criteria for determining refugee status and in particular looked at the general analysis of the phrase "well-founded fear of being persecuted" contained at para. 37 thereof. In particular he referred to para. 38 thereof:-

"To the element of fear – a state of mind and a subjective condition – is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element and in determining whether well-founded fear exists both elements must be taken into consideration."

25. It is suggested by counsel on behalf of the applicant that this is precisely what has not occurred in the present case. He goes on to refer to para. 47 and 48 which deals with the holding of a passport by an applicant for asylum. Paragraph 48 states that "possession of a passport cannot therefore always be considered as evidence of loyalty on the part of the holder or as an indication of the absence of fear." It goes on to conclude that the mere possession of a valid national passport is no bar to refugee status.

26. Reference was made to the decision of Gilligan J. in the case of *Rostas v. Refugee Appeals Tribunal* 31st July, 2003 in which it was held by Gilligan J. that an objective fear of persecution required an analysis of the general human rights records of the country of origin and conditions therein and regard may be had to what had happened to the applicant's friends or relatives or other members of the same racial or social group which may show his fear to be well-founded. At p. 14 of his judgment Gilligan J. said as follows:-

"In dealing with the well-foundedness of the applicant's fear of persecution the Refugee Appeals Tribunal had regard to the two part test applicable in determining this issue. As mentioned earlier, this comprises a subjective and an objective element. The subjective element refers to the applicant's perception of persecution or the threat of persecution. According to the Tribunal Member 'the applicant said that the people from the Roma Community were always being beaten up and he was constantly in fear. However, he avoided contact with the Romanians and giving them excuses to do anything.' The Tribunal Member later commented that 'it would be unreasonable to question the applicant's honesty, at least on his experiences, if not on his conclusions.'"

The objective aspect refers to a present or prospective risk of persecution with which the applicant's own perception is consistent. Also relevant to the consideration of whether there is an objective basis for the applicant's fear of persecution is evidence of the conditions in the country of origin. They tested whether there is a reasonable possibility, likelihood or chance that the applicant will face persecution by reason of his membership of one of the convention grounds e.g. race. The UNHCR has stated that while past persecution is not determinative of the issue because the test is prospective, it may in fact be a good indicator of what a person may face on return to his country of origin."

27. Thus, Counsel argued that in relation to this point namely, the fear of persecution, it must be considered not only on what has occurred but what might happen if an applicant is returned to his country of origin.

28. Counsel also referred to Hathaway on the Law of Refugee Status at p. 74 and to *Shah v. INF* a decision of the United States Ninth Circuit Court of Appeal of 15th August, 2000 where it was stated that it is an error to rest a decision denying asylum on speculation and conjecture. To support the contention that the bald conclusion of the Tribunal Member that the applicant could not have obtained a passport if sought by the Police is pure conjecture or speculation and accordingly should not have been a basis for the decision in this case.

29. The decision in *Traore v. The Refugee Appeals Tribunal and the Minister for Justice Equality and Law Reform* of Finlay Geoghegan J. delivered on 14th May, 2004 was also referred to in this context. At p. 8 of her judgment Ms. Justice Finlay Geoghegan stated as follows:-

"The assessment of the credibility of the applicant is a matter for the relevant decision maker who in the scheme established by the Refugee Act, 1996 is either an official of the Refugee Applications Commissioner or on appeal the Tribunal Member. This is often a difficult task particularly as the story normally relates to what is alleged to have happened in the country of origin. The assessment is required to be carried out in accordance with established legal principles and in accordance with the principles of constitutional justice. In this case part of the claim made is that the assessment of credibility was not carried out in accordance with the relevant legal principles."

30. In the course of her judgment Finlay Geoghegan J. also referred to the decision of Kelly J. in *Camara v. Minister for Justice Equality and Law Reform* (the High Court 26th July, 2000) and quoted a passage therefrom which in turn quoted from Refugee and International Law, by Goodwin-Gill, Clarendon Paperbacks Oxford at p. 349:-

"Simply considered there are just two issues. First, could the applicant's story have happened, or could his/her apprehension come to pass, on their own terms and 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 made."

31. I should perhaps also quote the other paragraph quoted from Goodwin-Gill by Kelly J. and which is referred to in the passage of Finlay Geoghegan J. at p. 9 of her judgment:-

"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."

32. The question of credibility was also considered in the case of *Carcu v. Minister for Justice Equality and Law Reform and the Refugee Appeals Tribunal* delivered by Finlay Geoghegan J. on 4th July, 2003. In the course of that judgment she stated as follows:-

"The obligations of a decision maker, and in this instance a member of the Tribunal in relation to the assessment of credibility of an applicant who has admittedly made false claims, or given an untrue statement at an earlier stage in the process were considered by me in a judgment which I gave in a case of Bujari on 7th May, 2003. The principle as stated in that case, which still appears to me to be the position is that the assessment of the credibility of the applicant is a matter for the examiner which on appeal is a member of the Tribunal and it is not a matter for this court on judicial review. However, the process by which such credibility is assessed does appear to be a matter within the remit of this court under judicial review."

33. The other decision that may be of some assistance in considering this question of assessment of credibility is the decision in the case *Kaifa Da Sivreira v. The Refugee Appeals Tribunal*, Peart J. unreported 9th July, 2004. At p. 27 of his judgment he stated:-

"A question related to the assessment of the credibility is the standard by which evidence of past persecution and possible future persecution must be judged by the Tribunal. The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that owing to such well-founded fear for a convention reason is outside the country of nationality, and is unable or owing to such fears unwilling to avail himself of the protection of that country. In other words that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution. A lack of credibility on the part of the applicant in relation to some but not all, past events cannot foreclose or obviate the necessity to consider whether, if returned it is likely that the applicant would suffer convention persecution."

34. The other authority opened to me was the decision in *Kramarenko v. Refugee Tribunal* [2004] 2 ILRM 550, a judgment of Finlay Geoghegan J. I was referred to the head note which sets out the findings of the court at paras. 1, 2, 3 and 6, namely:

1. *There were substantial grounds for contending that the Tribunal or adjudicator was obliged to assess the applicant's credibility either in general or on specific actual issues and make a clear finding on that issue.*

2. *Where a specific adverse finding is made as to the applicant's credibility there were substantial grounds for saying the decision must be based upon reasons which bore a nexus to the adverse finding. Aguilera – Cota v. INS US Court of Appeals (Ninth Circuit) 914 F2D 1375, International Fishing Vessels Limited v. Minister for the Marine [1989] I.R. 149 considered.*

3. *There were substantial grounds for saying that the second named respondent was obliged to consider the credibility of the applicant in the context of the available country of origin information and that he had failed to do so. Horvath v. Secretary of State for the Home Department [1999] INLR 7, R. v. Immigration Appeals Tribunal, ex parte Ahmed [1999] INLR 473 considered.*

6. *Where an applicant's claim is based entirely upon alleged past events and a fear they would be repeated if returned to the country of origin and the applicant does not rely upon a change of conditions in the country of origin since the date of departure it is unnecessary to apply a forward looking test where the Tribunal determined the past events did not occur.*

35. On behalf of the respondents, reference was made to the provisions of s. 11(A) of the 1996 Act. It was argued that this was a case in which from the outset the applicant was presumed not to be a refugee and that pursuant to the provisions of s. 11(A) (3) it was for him to show that he was a refugee. In other words the essence of the application on the part of the applicant was to show that he was persecuted or that he would be persecuted if returned. It was argued that the question of credibility was an issue from the start of the application. Reference was made to the fact that a previous application for asylum had been made by the applicant in the United Kingdom and that although the applicant had been in this jurisdiction for some nine years he had done nothing during the course of that time in relation to claiming asylum. Some twelve and a half years has elapsed since the matters complained of in China occurred. Issue was taken with the view of counsel for the applicant that there was only one adverse finding as to credibility contained in the decision of the Tribunal Member namely in relation to his passport. On the contrary it was argued that the finding of a lack of credibility in relation to the passport issue went to the entire credibility of the applicant and that in fact the Tribunal Member did not accept the story of the applicant at all. There was an express finding as to his lack of credibility in relation to the passport. In this regard counsel for the respondents also refer to the UNHCR handbook and in particular para. 49 thereof which provides:-

"If, on the other hand, an applicant, without good reason, insists on retaining a valid passport of a country of whose protection he is allegedly unwilling to avail himself, this may cast doubt on the validity of his claim to have well-founded fear. Once recognised, a refugee should not normally retain his national passport."

36. In this regard counsel for the respondents specifically referred to the information furnished by the applicant as to how the passport was obtained. It appears to have been obtained in the police office in Fujian. The police were the same authority as those who were supposed to be looking for him in connection with the printing of leaflets. Counsel also referred to the recommendation of the Refugee Applications Commissioner of 12th October, 2004 and in particular para. 4.5 thereof where it was stated as follow:-

"There are certain inconsistencies in the applicant's account which call into question his credibility. When asked at interview when he applied for his passport he stated that he thinks it was 1992 or 1991, the year he left China. However, in his application questionnaire he states that it was issued in 1993 in the Police Office of Fujian Province. He also states in his questionnaire the year he left China was 1993. These inconsistencies call into question his credibility. Furthermore, the applicant states that his passport was issued when he decided to leave China. If the applicant was 'wanted' by the Police in connection with publishing information relating to June 4, 1989, it is likely that the application would be refused. However, the passport was issued, so this calls into question his credibility."

37. In the course of the decision by the Tribunal Member she stated that she had carefully considered all papers submitted to her for the purpose of the appeal and on that basis it is argued by counsel for the respondents that it is clear from her decision that all matters were considered by her and that there is nothing to indicate that all matters were in fact not considered.

38. Counsel raised a number of issues that arose in this particular case namely the delay of the applicant in making the application bearing in mind that the applicant had been in this jurisdiction for nine years approximately before making any application and that prior to this he had spent approximately three years in Britain. Further it was argued having regard to his responses to questions during his interview that it was clear that international protection was not his primary motive in making the application for asylum. In this regard reference is made to the answer to a question at p. 24 of the notes of interview and I set these out verbatim hereunder:-

"Question: Is there anything else you would like to add?

Answer: I think my case is simple. The reason I left China is to avoid persecution. I stayed in Ireland for nearly ten years. I was illegally staying but I don't want to. I want legal status. I didn't have a work permit until my boss applied for me. To get a work permit I need a passport and I got my friend to apply but it was refused. I need to stay here legally so I would like for my application to be accepted."

39. On this basis it is urged that the finding to the effect that international protection was not his primary motive is a rational finding.

40. Counsel further referred to the criticism of the finding by the Tribunal Member that the applicant had been "safe in England". He argued that this finding arose in the context of the explanation given by the applicant for not remaining in England to pursue his application in that jurisdiction. The procedures open to the applicant in that jurisdiction were not exhausted.

41. Counsel on behalf of the respondents accepted that the appropriate test to apply in considering whether someone had a well-founded fear of persecution was both objective/subjective. He referred in this context to para. 37 of the UNHCR handbook. It was urged that the fear of being persecuted must be reasonable. In that regard it is necessary to set the fear of an applicant in its background context. In the assessment carried out the conclusion was reached that the authorities in China were not pursuing the applicant and it was urged that there had to be a doubt about the applicant's version of events. The assessment carried out by ORAC under s. 13 was more complete than the decision of the Refugee Appeals Tribunal and it was taken into consideration by the Tribunal Member. The essence of this decision is that he was not credible. Accordingly, it is argued that the lack of credibility so found is a finding as to his credibility overall. He is someone who by virtue of s. 11(A)(1)(b) must establish that he is a refugee, in other words, the presumption is that he is not a refugee and the onus is on him to rebut the presumption.

Conclusions

42. This is a case to which the provisions of s. 11(A)(1)(b) applies. Therefore the applicant had to rebut the presumption that he was not a refugee. On appeal from the recommendation of the Commissioner, as provided for by s. 11 (A) (3), the onus was on him to show that he was a refugee.

43. To show that the applicant is a refugee it was necessary for him to satisfy the Tribunal Member that he had a well-founded fear of persecution. Having regard to the UNHCR Handbook and to the various authorities I have already referred to it is clear that the expression "well-founded fear" includes both a subjective and an objective element both of which must be taken into consideration. Statutory provisions apply in considering the issue of credibility. In this regard the provisions of s. 11(B) of the 1996 Act are relevant. The Tribunal Member clearly considered the length of time the applicant had been in Ireland before deciding to seek asylum. Reference was made to his contact with police authorities in Ireland in relation to his apparent kidnapping. Having previously applied for asylum in England there is no explanation as to why an application for asylum was not made in this jurisdiction prior to 2004. The decision of the Tribunal Member in this regard cannot be regarded as irrational.

44. Again there is a view expressed in the assessment of the applicant's claim by the Tribunal Member that the position in relation to the application for asylum in the UK in 1993 is unsatisfactory. The assertion is made that the applicant was safe in England. As I have already indicated, exception is taken to this finding on behalf of the applicant. I disagree with the applicant's contentions in this regard. It seems to me that in referring to the applicant being safe in England the Tribunal Member is referring not to the somewhat peculiar circumstances of his kidnapping in England, but rather the fact that he was free from persecution.

45. The final matter raised relates to the lack of credibility in relation to the application for and obtaining of a passport from the police in Fujian Province in 1993. The first thing I should say in relation to the applicant's contentions in regard to this aspect of the matter is that it is viewed by the applicant as being the only issue on credibility that arises. This argument is untenable in my view. Clearly, the Tribunal Member had difficulties in accepting the credibility of the applicant by reason of the failure to apply for asylum before 2004 in Ireland together with the fact that asylum had been sought elsewhere but not pursued prior to the application for asylum in this country. Those are matters which clearly arose for consideration under Section 11 (B).

46. Clearly, the question of assessing credibility is a matter for the Tribunal Member as set out in the Judgement of Finlay Geoghegan J. in the *Bujari* case. I do not see that the applicant has established substantial grounds to show that the process by which such credibility was assessed was flawed.

47. It is expressly stated in the decision of the Tribunal Member that she "carefully considered all papers submitted for the purpose of this appeal and all the matters required to be considered under section 16 (16) of the 1996 Act. In assessing the credibility of the applicant I have considered the factors listed in Section 11 (B)."

48. The assessment of an applicant's claim to have a well founded fear of persecution does not take place in a vacuum. The passage quoted from Goodwin-Gill to which I have already referred is particularly apposite. There are as pointed out two issues - could the applicant's story have happened, or could his/her apprehension come to pass, on their own terms and given what is known from available country of origin information? Secondly, is the applicant personally believable? There is undoubtedly a difference between a case in which there are some inconsistencies in a person's story and a case such as the present where there has been a clear finding on credibility. The applicant simply was not personally believable.

49. In the circumstances, I am not satisfied that the applicant has made out a case for leave. The burden on the applicant is to show that there are substantial grounds before leave can be granted. Notwithstanding the very careful argument made in this case I am not satisfied that this has been done. In those circumstances I must refuse the application for leave to apply for relief by way of judicial review.