

THE HIGH COURT**JUDICIAL REVIEW****2007 1535 JR****BETWEEN****S. O.****(A MINOR SUING BY HIS NEXT FRIEND M. O.)****APPLICANT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND MICHELLE O'GORMAN, REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT of Mr. Justice Edwards delivered the 5th day of February, 2010****Introduction**

The applicant in this matter was born on the 1st January, 1993 and accordingly is now seventeen years of age. He is an Afghani national. He arrived in Ireland in December, 2006 as an "unaccompanied minor" and sought refugee status. He is currently in the care of his brother, M. O., who has been recognised as a refugee by the respondent. The applicant sought asylum status on the basis of a fear of persecution both by the Government of Afghanistan and by the Taliban. His application for asylum was considered in the first instance by the Refugee Applications Commissioner who ruled that the applicant had failed to establish a well-founded fear of persecution in accordance with s. 2 of the Refugee Act, 1996 (as amended) and recommended that the applicant should not be declared a refugee. The applicant appealed against the Commissioner's s. 13 report and recommendation to the Refugee Appeals Tribunal. In a decision dated the 20th September, 2007, the tribunal member ruled that both aspects of the applicant's claim were neither credible nor well-founded and, accordingly, pursuant to s. 16(2) of the Refugee Act 1996 she affirmed the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of that Act.

On 11th February, 2009 the applicant applied for, and was successful in obtaining, an order of the High Court granting him leave to apply by way of application for judicial review for various reliefs as set forth in his draft statement of grounds including an order of certiorari quashing the decision of the second named respondents to reject the applicant's refugee appeal, which said decision was issued to the applicant on 23rd October, 2007. The grounds upon which the applicant successfully obtained leave were-

- (i) that the tribunal member paid insufficient regard to the young age of the applicant in assessing his claim; and*
- (ii) the tribunal failed sufficiently to apply a liberal benefit of the doubt having regard to the applicant's age.*

Background Facts

The applicant is a Pastun and practices the Muslim faith. He was born in Baghlan Afghanistan. He had two brothers and a sister. He stated at interview that he had no specific education and that he studied with his mother and brother. His mother, sister in law and nephew are in Afghanistan and he has no contact with them. The applicant claims that his father had been a member of Hizb-e-Islami and he was killed by the Hazara people in 1997. He further claims that one brother, R., who was not a member of a political party, was killed by the Hazara in 2000. His other brother M. left Afghanistan in 2001 as his life was in danger. His uncle also left at this time. His uncle returned in 2002 and with his help the family moved to Konduz. His uncle was a commander in the Taliban at the time. The applicant also claims that his uncle was arrested at the end of 2003 by the new Government of Afghanistan because of his activities with the Taliban. The applicant claims that his uncle was held in prison and was killed there by officers of the Government in 2006, with his body being released to his family. The applicant claims that in 2004 the Taliban contacted him and said that they wanted him to fight against the Government of Afghanistan. The applicant claims that the Taliban came a number of times to him to get him to join them, but he refused their requests. However, the applicant claims that in 2006 after his uncle was killed, they came back to the applicant and they told him that he could not refuse anymore and that they next time they returned they would take him by force. The applicant believes that the Taliban wish to deploy him as a child soldier or possibly as a suicide bomber. He said in the course of his section 11 interview, "They wanted to give me training to prepare for a suicide bombing and I didn't like to kill someone". The applicant also claims that the Government were aware of the Taliban's attempts to get him to join their organisation. He says that representatives of the Government came to his house and threatened him. He was told that if he had contact with the Taliban, he would be killed and put in jail. His mother then decided that he should leave the country and she asked his maternal uncle for help. He was taken by truck to Pakistan and remained there for two weeks. He later travelled to Ireland via Dubai and an unknown country in which he spent about four months. The applicant claims that if he was to return to Afghanistan, the Government would regard him as a member of the Taliban and the Taliban would think that he works for the Government.

The Decision

The Tribunal member analysed the applicant's claim in the following way:

"Country of origin information on file states that low profile or ordinary members of the Taliban generally do not face problems when integrating into society and that at the present time there is very little persecution of Taliban supporters (UK Home Office Report, April 2006). The Operational Guidance Note (April 2007) states that former members of the Taliban do not have difficulties with the current administration so long as it is clear that they are no longer associated with the Taliban. Former Hizb-e-Islami supporters do not have any difficulty with the current regime and a number of

former Hizb-e-Islami supporters hold prominent positions in Hamid Karzai's Government. The applicant is not a member of the Taliban and refuses to join this organisation. The applicant stated that he did not inform the Government that he was refusing to join the Taliban as the Government was his enemy. Considering that the applicant claims that the Government was apparently watching the applicant, accusing him of being involved with the Taliban and the Government's attitude towards the Taliban, it would be reasonable to expect, even considering his age, that the applicant would have at least informed the Government that he had no intention of joining the Taliban rather than face difficulties with the Government. Further, the Government was aware of where the applicant lived and it would be expected that if the Government wanted to arrest or kill him that they would have had plenty of opportunity so to do. Cumulatively the foregoing serve to undermine any fear the applicant may hold in relation to the Government in Afghanistan.

The applicant has no interest in joining the Taliban and it is difficult to understand what use he would be to the Taliban if they had to force them to join their organisation. Further, it is difficult to understand that, knowing the applicant's opposition to join the Taliban, the Taliban would warn the applicant that on the next occasion they would take him by force -- thereby affording the applicant an opportunity to escape. When asked if he had complained to the Government forces about his harassment by the Taliban and if he told the Government that he had no interest in joining the Taliban the applicant said that he had not as the Government was also his enemy. One would expect that considering the applicant did not want to join the Taliban, and the Government's attitude towards the Taliban and the fact that they were warning the applicant not to join the Taliban, that the applicant would have at least informed the Government of his difficulties with the Taliban, even if just to abate his difficulties with the Government. The applicant's account in this regard, again, would not appear to be credible or well founded."

The Applicant's Submissions

The complaint that the tribunal member paid insufficient

and to the young age of the applicant in assessing his claim

The applicant was 13 when he came to Ireland and 14 when the refugee appeal hearing took place. The age of the applicant is not mentioned at all in the decision. In the conduct of the appeal hearing and in assessing the credibility of the applicant, the second-named respondent doesn't appear to have made any allowance at all for the young age of the applicant. There is no analysis of the level of maturity of the applicant and/or of the effect the youth of the applicant might have on his evidence. No special procedures for taking or assessing evidence were considered or adopted. In the circumstances the applicant submits that the second-named respondent has failed to comply with the requirements of the UNHCR Guidelines on Principles and Procedures in dealing with Unaccompanied Children Seeking Asylum which recommended that when a protection decision maker is making a decision about a separated child's refugee claim he or she should have particular regard to:

- *the age and maturity of the child and their stage of development*
- *the possibility that children may manifest their fears differently from adults*
- *the likelihood that the child will have limited knowledge of conditions in the country of origin*
- *The need for a liberal application of the benefit of the doubt.*

It was submitted that further, or in the alternative, the second-named respondent failed to comply with the EU Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals Of Third Countries (97/C 221/03) which states:

"6. When an application for asylum from an unaccompanied minor is examined, allowance should be made, in addition to objective facts and circumstances, to the minors age, maturity and mental development, and for the fact that he may have limited knowledge of conditions in the country of origin."

It was also submitted that further, or in the alternative, the second-named respondent failed to comply with regulation 5 (1) (c) of the European Communities

(Eligibility for Protection) Regulations, 2006 in terms of a consideration of the individual position and circumstances of the applicant including gender and age. The applicant relies upon the following legal materials in support of his submissions in this regard: UNHCR "Separated Children in Europe Programme (SCEP) - Statement of Good Practice; EU Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals Of Third Countries (97/C 221/03); the European Communities (Eligibility for Protection) Regulations, 2006 and the UN Convention on the Rights of the Child (1989) - and in particular, Article 3 thereof.

The complaint that the tribunal failed sufficiently to apply

a liberal benefit of the doubt having, regard to the applicant's age

The applicant submitted that the second named respondent failed to apply a liberal benefit of the doubt to the minor applicant and/or to take into account the age and individual circumstances of the minor applicant.

It was submitted that the UNHCR guidelines referred to above indicate that the protection decision-maker should apply a more liberal benefit of the doubt to a minor applicant than to an adult applicant. It was submitted that the second named respondent doesn't appear to have applied a liberal (or any) benefit of the doubt to the applicant or to have considered how events during armed conflict might be perceived by a 12-year-old boy. Counsel for the applicant submits that, for example, in finding that it would "have been reasonable to expect" the applicant to inform the Government that he did not in fact want to join the Taliban rather than face difficulties with the Government as a suspected child member of the Taliban, which appears to be the principal finding against the applicant, the second named respondent does not make any real allowance for the fact that the applicant was only 11 at that time (and that his father and uncle were involved in fighting the Government which would obviously lead to considerable mistrust). It was submitted that communicating with the state authorities in such a manner in such circumstances might be an option for an adult but it is not a realistic or fair expectation for a child of 11 or 12. It was submitted that the court would not let it be held against the child of 11 or 12 that he or she did not report (for example) abuse in a residential institution to the Gardaí and find that the abuse did not

happen for this reason.

The applicant submitted further, or in the alternative, that the subjective nature of the fear of persecution is very different for a child. The applicant feared that, because of his family connections with the Hizb-e-Islami (his father) and the Taliban (his uncle), he would be expected to become a child soldier or even a suicide bomber, and that he would eventually be forced to do so. It was submitted that this was an entirely realistic fear for a 12-year-old Afghan boy from the north of Afghanistan which was a stronghold for the Taliban.

The best interests of the minor applicant

It was also submitted that the court should have regard to the well-established principle that in the context of legal proceedings which impact on the child, the fundamental principle to which the courts must have regard is that of the best interests of the child. It was submitted that this should also be the case in refugee applications and that the provisions of the Act of 1996 must be construed, and operated by the authorities, in this way.

The Respondents' Submissions

Counsel for the respondents argued that the tribunal was evidently conscious of the UNHCR Guidelines on Principles and Procedures in dealing with Unaccompanied Children Seeking Asylum, quoted by the applicant in his submissions, as it quotes the same material in the impugned decision. Counsel argued that the onus is on the applicant to prove that there was a failure to apply relevant legal provisions, and he submitted that this onus had not been discharged.

It was submitted that the approach taken by the tribunal was fully consistent with the UNHCR Guidelines. Those guidelines provided that, in the examination of claims on behalf of minors, it may be necessary to have greater regard to certain objective factors, and to determine based on those factors, whether a child may be presumed to have a well founded fear of persecution. In that regard Counsel has referred the court to paragraph 8.6 of the UNHCR Guidelines and to paragraph 5. 1 of the Decision, respectively.

Counsel for the respondents submitted that the Tribunal did not reject the applicant's claim based on a finding that he was not personally believable. Rather, the Tribunal found, having regard to country of origin information, that any fears that the applicant had were not objectively well founded. It was therefore submitted that the criticisms made in the first part of the applicants written submissions are not ad rem. It was submitted on behalf of the respondents that the applicant was found to be lacking in credibility having regard to objective factors. The tribunal did not find the applicant to lack personal credibility, e.g., because of discrepancies in his evidence or lack of knowledge of his country of origin. Rather, the applicant's account, both as regards an alleged fear of the Government and of the Taliban, was found not to be objectively believable.

The respondents say that in assessing the objective credibility of an applicant's account, there can be no difference in treatment as between a person over the age of majority and one under the age of majority. In assessing the objective credibility of an account, the actual beliefs of an applicant (which may be groundless, or exaggerated because of immaturity) are not relevant.

It was submitted that in the present case, as regards the alleged fear of the Government, the tribunal noted that the applicant was not a member of the Taliban and had refused to join it. Former members of the Taliban did not have any difficulty with the Government so long as it was clear that they were no longer associated with the Taliban. It was reasonable to expect that the applicant would have informed the Government that he had no intention of joining the Taliban rather than face any further difficulties with the Government. Furthermore, if the Government in fact had any interest in the applicant, they would have had the opportunity to arrest or kill him. They had not done so.

As regards the alleged fear of the Taliban, the Tribunal was entitled to query what use the applicant would be to the Taliban if he had to be forced to join the organisation (which does not seem to lack recruits). It was submitted that it is difficult to understand why the Taliban would warn him that he would be press-ganged on the next occasion that they called. Again, if the applicant was allegedly caught in between the Government and the Taliban, it was reasonable to expect that he would have told the Government of his difficulties with the Taliban.

The respondents maintain that the Tribunal had to consider the account as given by the applicant, and could not substitute another story or speculate as to whether the applicant might have some other ground for seeking refugee status. It was submitted that the applicant is in substance taking issue with the outcome of his appeal. The arguments that the Tribunal erred by failing to refer to his age in the course of the analysis of his claim mask the reality that the applicant is in effect contending that, because of his age, the Tribunal had to believe him. The respondents submit that this is not the law. The UNHCR Handbook, paragraph 219, simply notes that "[i]f the will of the [minor's] parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt" (the respondents' emphasis). The respondents submit that this is a very conditional and qualified statement.

They say that the Statement of Good Practice of the Separated Children in Europe Programme, paragraph 11.6, indicated that greater regard should be had to objective factors in assessing if there was a well founded fear of persecution. This appears in fact to be contrary to the substance of the argument advanced on the applicant's behalf in this case. In the circumstances the respondent submits that there are no good grounds for judicial review in this case.

The Court's decision

Although the Court is not insensitive to the plight of the applicant, and feels considerable sympathy for him, the Court is not at liberty to decide the case based upon sympathy. The Court has to apply the law and the law is, as the respondent has rightly pointed out, that an applicant for refugee status must establish that his fear of persecution is objectively well founded. It is quite clear that the Tribunal member was of the view that the applicant's claimed apprehensions as to persecution by the Government were not borne out in country of origin information and accordingly were not objectively believable.

With regard to the claimed fear of persecution by the Government the Tribunal member specifically alludes to country of origin information suggesting that low profile or ordinary members of the Taliban generally do not face problems when integrating into society and that at the present time there is very little persecution of Taliban supporters (UK Home Office Report, April 2006). She referred to the Operational Guidance Note (April 2007) which states that former members of the Taliban do not have difficulties with the current administration so long as it is clear that they are no longer associated with the Taliban. Further, she had evidence that former Hizb-e-Islami supporters do not have any difficulty with the current regime and a number of former Hizb-e-Islami supporters hold prominent positions in Hamid Karzai's Government.

Clearly, the decision of Tribunal member on this aspect of the matter was one that was open to her on the evidence. This Court is

concerned only with reviewing the process and is not concerned to act as a Court of Appeal or to substitute its own view, if different, for that of the Tribunal member. Once it is clear that a Tribunal member has acted within jurisdiction, that there was evidence capable of supporting his/her decision, and that natural justice and fair procedures have been observed, his/her decision is unassailable. The Court is satisfied that the challenge to this Tribunal member's decision is not made out with respect to applicant's claimed fear of persecution by the Government.

However, the situation as regards the claimed fear of persecution by the Taliban is somewhat different. The Tribunal member pointed to the fact that the applicant is not a member of the Taliban and refuses to join. She stated

"The applicant has no interest in joining the Taliban and it is difficult to understand what use he would be to the Taliban if they had to force them to join their organisation. Further, it is difficult to understand that, knowing the applicant's opposition to join the Taliban, the Taliban would warn the applicant that on the next occasion they would take him by force -- thereby affording the applicant an opportunity to escape."

She also concluded that it would have been open to him to enlist the assistance of the Government in resisting the overtures of the Taliban. She stated

"One would expect that considering the applicant did not want to join the Taliban, and the Government's attitude towards the Taliban and the fact that they were warning the applicant not to join the Taliban, that the applicant would have at least informed the Government of his difficulties with the Taliban, even if just to abate his difficulties with the Government."

It seems to the Court that the Tribunal member's decision with respect to the applicant's claimed fear of persecution by the Taliban is largely based on speculation and conjecture. Her decision in this regard may be contrasted with her decision with respect to the claimed fear of persecution by the Government where she was able to, and did, point to country of origin information to support it. No country of origin information is called in aid to support the decision with respect to the apprehended fear of the Taliban. In particular she does not engage with the applicant's expressed worry that he was at risk of being press-ganged as a child soldier or that he might even be forced to undertake a suicide bombing. To the extent that there is a consideration of the possibility that the applicant could have availed of state protection the approach is speculative and conjectural, particularly in circumstances where the available country of origin information, referred to in para 4.6.ii of the s. 13 report, was to the effect that the availability of state protection in Afghanistan is confined to certain parts of the country, such as Kabul. Although the issue of the possibility of internal relocation did receive some consideration in the s.13 report, the Tribunal member did not, ostensibly, give it any consideration because she does not mention it. That, of course, is to the applicant's benefit.

The law is quite clear that the Tribunal member should not base credibility decisions on speculation or conjecture. In *Zhuchkova v Minister for Justice, Equality and Law Reform* [2004] IEHC 404 Clarke J., relying upon the judgment of Peart J in the *Da Silveira v Refugee Appeals Tribunal* (Unreported, High Court, Peart J., 9th July, 2004) observed that:

"... there is a wider principle, being the one identified by Peart J., when he says that the decision cannot be based simply upon a gut feeling or a view based on experience or instinct that the truth has not been told. A finding of lack of credibility, it is at least arguable, must therefore be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told."

In the absence of extrinsic evidence tending to show that the claimed fear was not well founded when considered objectively, the tribunal member should not have speculated or engaged in conjecture in the way that she did, but rather should have proceeded to consider the applicant's subjective credibility. Moreover, in doing so, she was required to liberally apply to him the benefit of the doubt having regard to his age and immaturity. During the course of the hearing Counsel for the applicant complained, in the Court's view fairly, that the Tribunal imputed expectations to the applicant without any consideration of his maturity or as to whether those expectations were realistic having regard to his maturity and particular circumstances. The Court considers that the applicant was not afforded a fair hearing in all the circumstances and that the Tribunal member's decision to affirm the recommendation of the Refugee Applications Commissioner to the effect that the applicant should not be declared to be a refugee was flawed, and ought to be quashed by Order of Certiorari.