THE HIGH COURT

Record Number: 2002 No. 596 JR

Between;

Skender Memishi

Applicant

And

The Refugee Appeals Tribunal, Rory McCabe, The Minister for Justice, Equality and Law Reform, The Attorney-General, and Ireland

Respondents

Judgment of Mr Justice Michael Peart delivered the 25th day of June 2003

By Order of this Court made the 13th November 2002, the applicant was granted leave to the following reliefs by way of Judicial Review:

(a) An order of Certiorari quashing the decision of the first and second-named respondents to refuse to recommend that the applicant be declared to be a refugee pursuant to the Refugee Act, 1996, Section 16;

(b) A Declaration that the second-named respondent, acting on behalf of the first-named respondent, erred in law and/or in fact in his conduct and determination of the applicant's appeal hearing of the 9th July 2002;

(c) Such further and other order as to this Court shall seem meet;

(d) Costs

The applicant had also sought injunctive relief, but the third-named respondent has given an undertaking to the court on the 13th November 2002, not to take further steps in the deportation process pending the decision of the Court.

The application is grounded upon an affidavit of Anthony Conleth Pendred sworn the 24th September 2002 and its exhibit, an affidavit of the applicant sworn on the 22nd October 2002 and its five exhibits, and the Statement of Grounds dated 24th September 2002.

The Respondents have filed a replying affidavit of John English sworn on behalf of the Refugee Appeals Tribunal on the 1st November 2002 to which there are two exhibits, and a Statement of Opposition dated 14th February 2003.

Background Facts:

The Questionnaire:

The applicant was born on the 14th June 1977, and is now aged 25 years of age. He is an Albanian Kosovan. He has no brothers or sisters. He is a single man and is of the Muslim faith. According to his Application for Refugee Status Questionnaire, completed on the 3rd March 1999, he left school at the age of fifteen years, and did not work in Kosovo thereafter. He says that he did not complete his military service, and consequently does not have any passport. He was also, according to the questionnaire, refused an Identity Card. This document says that on the 15th December 1998 he departed from Kosovo to Albania on foot, and later by truck. He paid 3000 DM to a person for assistance with his departure. The questionnaire states that he did not stop in any other country before coming to Ireland, and therefore he has not claimed asylum in any other country. He says that he has never lived in any other country, apart from his country of origin. In the section of the questionnaire which seeks full details of his reason for seeking asylum in this State, he says as follows:

"*I am looking for asylum for fear of continuing to live in Kosovo. I don't know the reasons why, but all I know is that in the past year, after many other villages, my village was grenaded also. Everyone that was there left the village, and we never went back as the whole village was totally ravaged. We stayed wherever we could, but mainly in the mountains.*

I suffered a lot until, with the help of some people whom I didn't even know, I was able to cross into Albania. There I fell into the hands of some people that got me out, and today I find myself in Ireland.

I thank you for understanding and I greet you hoping that here I will manage to get back to a normal life."

The Interview:

In the interview which took place on 19th June 2001 (some 27 months after the questionnaire was completed on his arrival here) with an authorized officer of the Refugee Appeals Commissioner, and in the presence of an interpreter, further information is added to that which was included in the application form. It appears that his parents were alive in Macedonia about two months prior to the interview, but that since then he has lost contact with them. He does not have any address for them in Macedonia.

He says that he was only in Albania for two or three weeks after escaping into there. When asked at interview why he did not stay in Albania since he claims ethnicity with Albanians, he replied that it was dangerous there also, and that people were killing each other everyday.

He says that he remained in Albania until the 9th/10th January 1999, when he was put into a truck by some people whom he did not know. He says that his father paid these people,

and that he was in Pristina at that time. When asked why his father paid for him to get out but not himself and his mother, the applicant said that they had wanted the applicant to get out, being their only son, as the Serbs picked up and killed young Kosovan males. Any who were picked up never returned. It was then put to him that he had said that he was in Albania at this time, and not in Kosovo; and in reply he said that from the time he left home in 1998 he spent a lot of time in Pristina because it was safer, and that his father organised for him to get away, but that he had to go to Albania first in order to get away. He said everything was organised from Pristina. He was asked why he had not left from Pristina, and he explained that that was how the journey was organised. He has no idea who his father paid the money to, except that they were Albanians.

He was also asked whether he was persecuted in Kosovo, and he replied that he was beaten by Serbian police two or three times about four or five years previously, which would be when he was 17 or 18 years of age. He said that the only reason he was beaten was that he was Albanian. He said there were no witnesses to the beatings. He said that they took place near his house at about 2pm or 3pm, and once in the morning when he was going to school he was kicked and slapped a couple of times.

He was asked why he did not return to Pristina after the war ended, but he said that there was nothing to return to, that his house was destroyed and that his family were not there. The reason he gave for not returning to rejoin his parents was that, at the time, the Serbs had driven everyone out of Pristina, around the time, he says, that the U.N. had started bombing Serbia and Kosovo. He was also asked why he would not go back to Macedonia where his parents were, and he said that there was war there also and that he did not know where his parents were.

When asked what he intended doing now, he said he wanted to rebuild his life, try and forget the past, and get some education so that he could contribute to Irish life. He did not know how to answer when it was put to him that he was an economic migrant.

It was explained to him that in fact thousands of Kosovans had now left Ireland and returned to Kosovo, but he said he believed many of them would like to come back again.

The applicant then said that before his village was shelled by the Serbs, he was approached by the Kosovan Liberation Army and was asked to join them and fight. He says that his mother said she would commit suicide if he joined, because she lived only for him. He now says that he has heard that people who refused to join are being killed, and that nobody has answered for these killings.

He was then asked to give the dates, times and full details of his journey to Ireland. In answer he said that he left Kosovo around the 15th December 1998. He says they went to Albania (Tirana) where he was taken to a house. This would be just before New year. Most of the journey was at night and lasted about three or four days. He says he stayed at that house until about the 9th or 10th of January 1999, and that there were about five or six of them, including one female. He says they were then picked up by some people in cars and he was then put in a truck. They were given some food and water to last a week. He was apparently put in a box and told to be quiet and not make any noise. He says there were many boxes but it was not closed very tight. He says he was let out of the box after about one and a half days, and was put in a truck carrying tractors and he was on his own. When he arrived here he just got out and heard people speaking a different language.

He was asked why after two and a half years he has not found work, and he said that he wanted to get some education first, but he was not allowed to do that. He says that he has been in touch with other Kosovons in Tralee, but that they have to leave there also. He has also met others in Kildare and Dublin.

At the conclusion of the interview, the applicant put it to the interviewer that if he thought somebody was going to come after him with an automatic weapon, he too would try and get away as far as possible.

Following this interview, the authorized officer prepared a Report pursuant to Section 13(1) of the Refugee Act, 1996 (as amended) in which he concluded that the applicant's claims of persecution are of a general nature and that there were no witnesses to same, and that the nature of same would not be termed of a serious nature. It went on to state that the applicant had nothing to produce as evidence for any of his allegations and that his stay in Albania would not put him in the area of fighting when it occurred, as he left Albania in 1998 and was in Ireland on 14th January 1999. It concluded that the addition of the allegation of attempts to conscript him into the KLA was unconvincing, as he had not mentioned these in his original application for asylum which he made shortly after his arrival in this country. The report also refers to the fact that in a number of respects his account of his movements prior to coming here do not tally. It goes on to refer to the fact that the applicant did not stay in Macedonia with his parents, which he could have done. Furthermore, it states that *"fear of the Serbs in Kosovo at this time is not credible as the Serbs are a minority living in a virtual state of siege in mono-ethnic enclaves under heavy KFOR guards."*

The report recommends that the applicant has not established a case such as to qualify him for refugee status. On the 16th July 2001, Mr Michael Stenson on behalf of the Refugee Applications Commissioner, made the necessary recommendation to that effect having considered the reports carried out under section 11 and section 13 of the Refugee Act, 1996 (as amended).

This recommendation was communicated to the applicant by letter dated 24th August 2001 and he was informed of his right to appeal the recommendation within 15 days. A Notice of Appeal was filed on the 24th September 2001 by Messrs. A.C.Pendred & Co., solicitors. The Grounds of Appeal lodged refer to the facts already outlined by me earlier, and in particular states that:

"in April 1998, Mr Memishi was approached by members of the KLA, Kosovan Liberation Army and asked to join them. When Mr Memishi told his parents about this

overture, both of his parents especially his mother were vehemently opposed to his joining the KLA. His mother threatened suicide if Mr Memishi joined the KLA."

The Grounds also refer to the situation in Kosovo still being extremely volatile and that many people are murdered or go missing, and that the KLA have targeted young men who have refused to join the KLA. The applicant also refers to the fact that the UNHCR has considered that persons who are known to have refused to follow the laws and decrees of the former KLA or former self-proclaimed 'Provisional Government of Kosovo' are persons "deserving of special protection as they would face serious persecution if they were returned to Kosovo at this time." This appears in **'Kosovo Albanians in Asylum Countries: UNHCR Recommendations as regards return, Update March 2000, p.2, Tab 2'**. Therefore, it is submitted that the applicant, who says that he refused to join the KLA, would be such a person and would be at great risk of assault or murder at the hands of the KLA if he were returned to Kosovo.

The applicant relied also on the following matters for the purposes of his appeal:

1. The decision to reject his application for refugee status was arbitrary and capricious;
2. He was not provided with an independent lawyer of his choice to assist him with his application;
3. He was not provided with funds for legal fees to assist him in choosing an independent lawyer to represent him;
4. That he is a refugee within the meaning of Section 2 of the Refugee Act, 1996 as amended, the 1951 Convention relating to the Status of Refugees, and the 1967 Protocol (as interpreted by the UNHCR guidelines).

The Appeal Decision:

This Appeal was heard on 9th July 2002 before the Refugee Appeals Tribunal. The Appeal was refused by decision of the second named Respondent dated 9th September 2002, which was communicated to the applicant by letter dated 10th September 2002.

The decision recites the facts which I have already set out regarding the assaults which the applicant had referred to which took place on his way to school when he was much younger. These were apparently at the hands of Serbian forces who did not want Albanians in Kosovo to receive education. It also refers to the fact that during 1992-1998 Serb forces called to the applicant's home on the pretext of searching for arms, and that his father would give them money to go away. It also refers to the incident recounted by the applicant when he was asked to join the KLA, and that he did not do so, because of objection by his parents. It also refers to the applicant's flight into Albania and his journey to Ireland by truck in January 1999.

The decision also specifically refers to the applicant's fear of reprisal at the hands of the Serbs if he was to return to Kosovo, because of his refusal to join the KLA. The decision says the following in this regard:

"Amnesty International – Country Reports, Federal Republic of Yugoslavia, 2001 pp 270/1 – confirms that the KLA target young men and conscript them where possible and that persons who have refused to follow the laws and decrees of the former KLA are persons 'deserving of special attention' as they would face serious persecution if they were returned to Kosovo at this time – per Albanians in Asylum countries, UNHCR Recommendations as regards return, Update, March, 2000."

The decision states that a person is a refugee if, in accordance with the provisions of Section 2 of the Refugee Act, 1996, he or she can show 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; or who, not having a nationality and being outside the country of his or her former habitual residence owing to such fear, is unwilling to return to it.

The decision states that the burden of proof lies on the person who makes the assertion, and that an applicant for asylum must establish the proof of the assertions made and the accuracy of the facts on which the application is based. It goes on to state that this burden will be discharged if the applicant renders a truthful account of facts relating to the claim, and that because of the peculiarities of a refugee's situation, this burden is shared with the determining authority, which must ascertain and evaluate all the relevant facts. This burden of proof involves an assessment as to whether there is a reasonable likelihood that the applicant will be persecuted for one of the reasons mentioned in Section 2 of the Refugee Act, 1996, if he/she was returned to his/her country. The decision also states that the test takes into account the gravity of the possible consequences of an erroneous consequences, and is less stringent that the ordinary civil 'balance of probabilities' test.

In its conclusions, the decision states that apart from the one approach that the applicant received from the KLA in 1998, the applicant gave *"evidence of no other any incident which could amount to persecution that could be considered as well-founded, having regard to the present state of Kosovo and the effective destruction of the Serb influence there"*, and *that "it may be significant that no mention of the KLA approach to the applicant was made by him in his initial application, and that it only arose at interview."*

In this regard, the decision states that at the appeal hearing the applicant significantly embellished his previous account, and that this might have arisen as a consequence of the additional time the applicant has had to reflect on events that had occurred, or from a realisation that his previous account had, at least according to the Refugee Applications Commissioner, been lacking in detail and consistency, and that it may also have arisen as a consequence of the applicant's realisation that he needed to add to his original account in order to satisfy the requirements for refugee status. In some instances, the Tribunal felt that the applicant was making up the account as he went along, and it was felt that the applicant's inability to explain these inconsistencies, and the fact that he in fact compounded them at the hearing, was significant.

In its decision, the Tribunal states that *"the beatings that the applicant received from Serb soldiers occurred when he was a very young boy. The Serbs are now in a minority in Kosovo and there is no likelihood of the applicant being targeted now."*

The Tribunal concludes that nothing happened to the applicant which could be regarded as persecution at this time, and that although his stated fear was of being picked up by Serb forces and "disappeared", he had mentioned this only at the hearing for the first time, even though such a fear would be understandable and terrifying.

The Tribunal states in its decision that some form of reprisal by the KLA is the only risk to which the applicant remains subject, and that while the UNHCR believes that this may be a real risk for persons who refused to join the KLA, it was not satisfied that the fact that the applicant received only one approach from that organisation could conceivably result in the reprisal he now fears. It also refers to the fact that the situation in Kosovo is now profoundly different to when he left, and that it was to be hoped that the international peacekeeping efforts in Kosovo would result in a lasting peace.

The decision refers to the fact that the KLA has now been disbanded and that it is so unlikely as to be discountable that the applicant could come to the attention of any post-KLA people who knew that the applicant had refused to join in their activities, and also that UNIMIK forces took control of the administration in Kosovo in June 1999, that Serbian forces were no longer in control and that Kosovo is no longer a threat to ethnic Albanians.

The decision concludes that the applicant has not made out a well-founded fear of persecution should he return to Kosovo, and that accordingly he is not a refugee.

The Legal Submissions:

Conjecture as to well-founded fear of persecution:

Against this background, Mr Mel Christle, Senior Counsel for the applicant, submits that the process by which the Tribunal reached its conclusions, is flawed in that the second named respondent failed to properly apply the UNHCR country of origin information in relation to the risks faced by people such as the applicant who had refused to join the KLA, and that he discounted the possibility that the applicant could come to the attention of any post-KLA people. In relation to the latter, Mr Christle submits that there is no stated basis for this finding, that there is no country of origin information which can support such a conclusion, that such a finding is mere conjecture, and that such a finding is unreasonable given the country of origin information available to him, and given the evidence of the applicant himself.

In submitting that the finding in relation to the risk to the applicant is mere conjecture, Mr Christle refers to that part of the decision where the second named respondent, referring to that risk arising from the one request to join the KLA, states:

"I have grave doubts that this one event could conceivably result in the reprisal he fears",

and also to a passage in the following paragraph wherein it is stated:

"It is so unlikely as to be discountable that the applicant could come to the attention of any post-KLA people, who knew that the applicant had refused to join them in their activities."

Mr Christle submits that these comments are conjecture in as much as there is no documentation which can support either finding, and that accordingly the decision is

flawed. He submits that the second named respondent has ignored completely the opinion of the UNHCR that persons who have refused to join the KLA could face serious problems, including physical danger were they to return to Kosovo, and that this is the very fear of persecution which the applicant has. He also refers to the fact that the UNHCR has stated that such claims from persons in the position of the applicant must be carefully and individually examined and considered in order to ascertain the need for international protection.

In aid of this submission, he has referred the court to the decision of the House of Lords in **Jones v. Great Western Railway Co.(1930) 47 TLR 39**, which considered the distinction between drawing an inference from proven facts, and mere conjecture. Mr Jones had died as a result of being trapped by a train being shunted at the time towards a stationary carriage. He was apparently crossing the railway line in front of the stationary carriage when the shunting train trapped him. Prior to the shunting operation commencing, no audible warning had been given. The court found that accordingly there was evidence of negligence, but the question arising was whether that negligence had necessarily caused the death of Mr Jones, or was that mere conjecture on the part of the jury, in the absence of further evidence. The court held that it was a fair inference and not mere conjecture on the facts of that case, and in so deciding, Viscount Hailsham stated at page 41 of the judgment that *"it is not enough that the evidence affords material for conjecturing that the death may have been occasioned by the defendant's negligence unless it furnishes data from which an inference can reasonably be drawn that, as a matter of fact, it was so occasioned."*

He was of the view that since the defendants were aware that the line was crossed at this point by persons wishing to reach the other side, and since it was a fact that no audible warning was given, and since the deceased was found trapped between the shunting train and the stationary carriage, it was reasonable to infer that it was the defendant's negligence which caused the death of Mr Jones. He was satisfied that there was enough factual evidence upon which to draw the inference that the negligence had caused the death. On the other hand, Lord Macmillan in his dissenting judgment, took the opposite

view, concluding that there was not present the necessary causal connection, other than by mere conjecture. Mr Christle, nevertheless relies on a passage from the judgment of Lord Macmillan in which he discusses the principles involved at page 45 as follows:

"……the real difficulty of the case resides in the question whether the jury were on the evidence entitled to take the next step and to find that the negligent omission to give any warning was the cause of the accident to the deceased. It may have been, but that is not enough. If the evidence establishes only that the accident was possibly due to the negligence to which the plaintiffs seek to assign it, their case is not proved. To justify the verdict which they have obtained the evidence must be such that the attribution of the accident to that cause may reasonably be inferred. If a case such as this is left in the position that nothing has been proved to render more probable any one of two or more theories of the accident, then the plaintiff has failed to discharge the burden of proof upon him. He has left the case in equilibrium, and the court is not entitled to incline the balance one way or the other."

This was the passage upon which Mr Christle placed reliance in his submission. However, Mr Mohan on behalf of the Respondents referred the court to the paragraph immediately following the above, which goes on as follows:

"*The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation, there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved."*

Lord Macmillan was of the view that even if an audible warning had been given by the defendants, there was no evidence from which the jury could infer that the unfortunate Mr Jones would have necessarily heeded it, and that it was equally possible that had such a warning been given, he might still have reckoned that in the time available he would made it to the other side. The fact that he might have heeded such a warning was in the realm of conjecture only, and not an inference that could be reasonably drawn from the available evidence and possible inferences that could be properly drawn therefrom.

Mr Christle also referred the court to the judgment of the late Chief Justice Hamilton in **Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare (1998) 1 I.R. 34** at page 37 where he stated:

"……I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

In this regard, Mr Christle submits that in the present case the Tribunal has made a finding that is unsustainable on the evidence of the UNHCR before it, as well as the evidence of the fear of persecution expressed by the applicant. He says that there is no evidence to support any inference to the contrary, and that what the Tribunal has done amounts to mere conjecture on its part, and that it is clear that the Tribunal has simply disbelieved the applicant's testimony without actually saying so in any reasoned way. He submits that the Tribunal has placed unreasonable reliance on the evidence of only one request to join the KLA and one refusal to do so, whereas there is nothing in the UNHCR

Report which indicates any view on its part that more than one request must be made before the fear can be regarded as a reasonable fear.

Mr Christle submits that the evidence of the applicant as to his fear of persecution amounts to a well-founded fear, and he has referred the court to the decision of the U.S Court of Appeals for the Ninth Circuit in **Diaz-Marroquin v. Immigration and Naturalization Service (2001) U.S. App. Lexis 2352.** In relation to what would constitute a well-founded fear, the court stated:

"To establish a well-founded fear of persecution, Diaz must show both that his fear is subjectively genuine and that it is objectively reasonable……. In order to find that Diaz has a well-founded fear, persecution need not be more likely than not; even a one-tenth possibility of persecution may be sufficient to establish a well-founded fear".

It is worth noting that at the conclusion of its judgment, the court went on to find that while Diaz had established a well-founded fear of persecution, he had failed to establish *"that it is more likely than not that he will be persecuted if he returns to Guatemala……Substantial evidence supports the BIA's holding that Diaz has not established a likelihood of persecution if he returns."* The facts in Diaz were much stronger than in the present case, where the only basis of a fear of future persecution is the single fact that on one occasion the applicant was asked to join the KLA and that he refused.

On behalf of the Respondents, Mr Hugh Mohan S.C. submitted that in the present case, there was material and evidence before the Appeal Tribunal on which it could reasonably arrive at its decision that the applicant's fear of persecution was not a reasonable fear, even though it might be a fear actually held by the applicant. The applicant, he submits, gave the only evidence on which this fear was based, namely that he had on one occasion only, been approached by the KLA and had been asked to join that organisation, and that he refused to do so, owing to his parents', but especially his mother's, opposition to him doing so. Furthermore, there was no evidence given to the Tribunal, or at any earlier

stage of the application, that the applicant had been threatened in any way when he refused, or that he had been approached again, or threatened again that if he did not join the KLA, there would be adverse consequences for him. Mr Mohan refers to the detailed reference in the Respondent's decision as to the applicable law as to the burden of proof which rests with the applicant to establish the truth of the assertions made and the accuracy of the facts on which the application is made, and that this burden of proof is one shared with the determining authority, which must evaluate and ascertain the relevant facts. The decision also states the burden of proof as:

"whether there is a reasonable likelihood that the applicant will be persecuted for one of the reasons mentioned in Section 2 of the Refugee Act, 1996, should he or she be returned to his or her country. This test takes account of the gravity of the consequences of an erroneous judgment and is less stringent than the ordinary civil 'balance of probabilities' test."

While I might take issue with the final sentence of this quotation having regard to what I state in relation to the test of 'anxious scrutiny' appearing below, Mr Mohan submits that there is nothing to suggest that the Respondent applied incorrect principles of law to its determination of the case. In relation to Mr Christle's submission that the Respondent engaged in mere conjecture in rejecting the applicant's application on the basis that his fear of persecution was not a well-founded fear, Mr Mohan has submitted that the decision cannot be said to be so based, but rather that there was adequate material available to the Tribunal from which it could properly infer from the facts and material that the fear was not a well-founded or reasonably held fear. He referred to the passage I have already quoted from the judgment of Lord Macmillan in **Jones v. Great Western Railway Company** at page 45 (supra), and submits that it was a perfectly reasonable for the Respondent to draw the inferences from the evidence given by the applicant, and from the available country of origin information:

1. That the Respondent had grave doubts that the one event, namely the request to join the KLA and his refusal, could conceivably result in the reprisal he fears;

2. That it is so unlikely as to be discountable that the applicant could come to the attention of any post-KLA people who knew that the applicant had refused to join.

This second inference was based on the stated knowledge on the part of the Respondent that the KLA has been disbanded and that in June 1999 the UNMIK forces had taken control of the administration in Kosovo, and Serbian forces were no longer in control of the region, and that Kosovo is not considered a threat to ethnic Albanians. Mr Christle points out that it is not the Serbs in fact that are the source of the applicant's fear, but the KLA.

Mr Mohan submits that since this court is looking at the process by which the decision was arrived at, and not the decision itself, the requirements are met, namely that there was material before the Tribunal on which it could reach the decision it in fact reached. The fact that this court might have, on the same facts, reached a different decision, is not the point at issue. He submits that the Respondent did not engage in conjecture. The evidence was before it and it was entitled to reach its conclusions from those facts and the inferences reasonably drawn therefrom. In this regard he refers to the UNHCR material to which I have already referred, where it is stated that persons who refused to join or deserted from the KLA could face problems were they to return.

He says that whether or not the applicant necessarily falls within this category of persons is something which depends on an assessment of the evidence of the applicant, and the fact that he gave evidence of only one request and his refusal, is not of itself sufficient to establish a probability that the applicant would, if returned, be subjected to persecution of any kind, and that it is clear from the decision made, that the Tribunal carefully considered the relevant facts and evidence, that they did not fail to consider relevant evidence, and they did not apply the law incorrectly. Accordingly, he submits that the process by which the decision was arrived at was a reasonable one, and one which it was entitled to arrive at.

Anxious Scrutiny:

Mr Christle submitted that this court, when examining the process by which the decision of the Appeal Tribunal was arrived at, must apply a more stringent test to that applied in other types of applications for judicial review. While in the latter cases, the test was as laid down in **O'Keeffe v. An Bord Pleanala (1993) 1 I.R. 39**, in a case such as the present case where possibly the life of the applicant may be put at risk by his being returned to his country of origin, the test was one which has been described as "anxious scrutiny". In support of this submission, the court was referred to the decision of the House of Lords in **R. v. The Home Secretary, Ex p. Bugdaycay (1987) 1 A.C. 514** at page 537, where Lord Templeman stated the action of an authority can be investigated by the court with a view to seeing whether they have taken into account matters which ought not to be taken into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to have taken into account. These are the so-called Wednesbury principles, which are broadly in line with the principles emerging from the decision in O'Keeffe v. An Bord Pleanala, so well known in this jurisdiction. But Mr Christle refers to a further passage from Lord Templeman's judgment in Bugdaycay at page 537 where he states:

"In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process. In the case of Mr Musisi, a first reading of the evidence filed on behalf of the Secretary of State and Mr Musisi, gives rise to a suspicion that the dangers and doubts involved in sending Mr Musisi back to Kenya have not been adequately considered and resolved. As a result of the analysis of the evidence undertaken by my noble and learned friend, Lord bridge of Harwich, I am not satisfied that the Secretary of State took into account or adequately resolved the ambiguities and uncertainties which surround the conduct and policy of the authorities in Kenya."

Mr Christle points to the reference to a flawed decision imperilling the life of the applicant and to the special responsibility of the court in such a case. He also refers to the

decision of the Court of Appeal in **Gardi v. The Secretary of State for the Home Department (2003) Imm AR. 39**, in which the decision of the Respondent was quashed on the ground that the applicant had not been afforded an opportunity to make certain submissions on the appeal. But having arrived at this decision, Keene LJ stated:

"Particularly in asylum cases, where a Tribunal has to give 'the most anxious scrutiny' to a decision refusing asylum (see R v. Secretary of State for the Home Department ex parte Bugdaycay (1987) AC 514, 531 per Lord Bridge of Harwich), it would only be in an extreme case that such a procedural error could be treated as of no practical effect. This case does not come into that category."

This court was also referred to the judgment of McGuinness J. in **Z. v. The Minister for Justice, Equality and Law Reform and others (2002) 2 ILRM 215** in which that learned judge considered the meaning of terms such as "anxious scrutiny", "heightened scrutiny", "careful scrutiny" and other such phrases, and whether the use of such phrases meant that in a case where they were used, some sort of higher standard of scrutiny was required than would be necessary in other types of cases. She states at page 236:

"I have a certain difficulty in the interpretation of the phrases used by the English courts in the cases to which we have been referred – 'anxious scrutiny', 'heightened scrutiny', and similar phrases. From a humane point of view it is clear that any court will most carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, 'scrutiny', 'careful scrutiny', 'heightened scrutiny', or 'anxious scrutiny'? Can it mean that in a case where the decision-making process is subject to 'anxious scrutiny' the standard of unreasonableness/irrationality is to be lowered/ Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase."

In response to this submission regarding the test of "anxious scrutiny", Mr Mohan on behalf of the Respondent referred the court to the judgment of Smyth J in **Mohsen v. The Minister for Justice, Equality and Law Reform and others, 12th March 2002,**

unreported). Starting at page 11 of his judgment, the learned judge dealt with submissions which had been made to him that in these cases the court should submit the decision to 'the most anxious scrutiny', rather than the conventional Wednesbury approach. He traced the origin of the expression "anxious scrutiny" in relation to asylum/refugee cases to the judgment of Lord Bridge of Harwich in Bugdaycay (above) when that learned judge stated at page 531 of the judgment:

"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put an applicant's life at risk, the basis of that decision must surely call for the most anxious scrutiny."

Having considered the submissions made to him and the authorities to which he had been referred, Smyth J. concluded as follows:

"From the foregoing, I am satisfied that there is no different standard for cases dealing with refugee/asylum/immigration matters and ordinary judicial review. The dictum of Lord Bridge is a cautionary guidance that in dealing with these matters extra care and attention is devoted to them. Whether the expression 'anxious scrutiny', 'exceptional care', 'the very best attention', or any other like is used does not detract from the fact that as conceived, as I have tried to trace, it is "within those limitations" i.e. the Wednesbury principles."

I respectfully agree with this conclusion. The introduction of such phrases cannot be regarded as requiring a different test for cases such as the present one, albeit emphasising the need for great care to be taken in considering whether the Wednesbury test is passed. Neither in my view is there any room for any suggestion, if made, that in reaching a decision as to whether, as in this case, there is a well-founded fear of persecution, and in deciding that there is not, the Tribunal must approach the matter in a way more akin to the burden of proof in a criminal matter, namely beyond any reasonable doubt. The requirement, if it be such, to subject the case to 'anxious scrutiny', is perfectly possible

on the basis of a balance of probabilities, based on the material and evidence before the Tribunal.

The applicant's credibility:

On the question of the credibility of the applicant's testimony, Mr Christle also relies on the Diaz decision in his submission that the second named respondent had no basis before him on which he could make an adverse finding as to the applicant's credibility. It will be recalled that the second-named respondent stated in his decision that it may be significant that the applicant had made no mention of his having been approached by the KLA when he made his first application for asylum, and that it was mentioned for the first time at the interview. Also, he formed the view that the applicant had significantly embellished his previous account which had lacked detail and consistency, and that the Tribunal had felt that the applicant was *"making up the account as he went along"*.

When dealing with the question of credibility in the Diaz case, the court stated:

"……adverse credibility determinations must be (1) supported by specific, cogent reasons, and (2) the reasons set forth must be substantial and must bear a legitimate nexus to the finding……The inconsistencies in Diaz's testimony do not provide adequate support for finding that Diaz lacked credibility. The inconsistencies were minor……they did not enhance Diaz's asylum application…… Also, they were communicated through an interpreter…… The second reason that the IJ used to justify her adverse credibility finding was that she found parts of Diaz's testimony implausible. Without more, personal conjecture is an insufficient basis for an adverse credibility determination."

It is submitted on behalf of the applicant that the Tribunal was not entitled to come to an adverse conclusion as to the applicant's credibility simply on the basis that he had not included in his first application the incident about being asked to join the KLA, and that it was of the view that he had embellished his story as he went along, the latter being a matter of pure conjecture on the apart of the Tribunal. In further support of this

submission, this court has been referred to another decision of the U.S. Court of Appeal for the Ninth Circuit, namely **Cordon-Garcia v. Immigration and Naturalization Service, 204 F.3d 985** in which that court laid down some guidelines in relation to the question of credibility as follows:

"Even under the substantial evidence standard, an adverse credibility finding must be based on "specific cogent reasons" which are substantial and bear a legitimate nexus to the finding……In determining what "valid grounds" exist for an adverse credibility finding, an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application. Similarly personal conjecture about what guerrillas would or would not do is not a substitute for substantial evidence. Finally, corroboration is not necessarily required to establish an applicant's credibility."

The court was also referred to a decision of the Federal Court of Canada in **Najeebdeen v. The Minister of Citizenship and Immigration (1999 Fed. Ct. Trial Lexis 1026)**, which stated that negative credibility findings must be stated in clear and unmistakable terms. That case is of limited use in any general way, as it very much depends on the particular facts of that case, which bear no relevant similarity to the present one.

Mr Mohan, on behalf of the Respondent, submitted that the Respondent was perfectly entitled to have regard to facts such as that the applicant had made no mention of his fear of persecution resulting from his refusal to join the KLA, when he first entered the country, and to the fact there were unexplained inconsistencies in his evidence given at the appeal hearing, and that they were entitled to reach a conclusion that he had embellished his story as the application proceeded, and that these factors were relevant to the weight attached to the applicant's evidence generally.

Conclusions:

As far as the test of reasonableness/irrationality to applied in cases such as this one is concerned, I have already given my conclusions and it is unnecessary for me to repeat them or add to them in any way.

In relation to credibility, Mr Christle referred to the Diaz decision and that in Cordon-Garcia, to which I have referred and quoted relevant passages. The principles which emerge from these decisions are that a Tribunal is not entitled to make adverse credibility findings against an applicant without cogent reasons bearing a nexus to the decision, that the reasons for any such adverse finding on credibility must be substantial and not relating only to minor matters, that the fact that some important detail is not included in the application form completed by the applicant when he/she first arrives is not of itself sufficient to form the basis of an adverse credibility finding, and finally that the fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient. Mere conjecture on the part of the authority is insufficient, and that corroboration is not essential to establish an applicant's credibility.

As general principles I agree. But in the present case, I am of the view that the Tribunal did not simply make its decision based on a disbelief of the applicant's account of events. While it is clear from its decision that it had grave reservations about whether the applicant was being completely truthful about how the KLA asked him to join the KLA, and also his account of the events leading up to his flight from his country, it quite clearly allowed him the benefit of any doubt it might have had. In basing its decision on the fact of only one request to join being made, the absence of any actual threat occurring from his refusal, and as they see it, the lack of any likelihood that the applicant could come to the attention of any post-KLA people who knew that the applicant had refused to join, it indicates to me that it accepted, for the purpose of its decision, the version of facts given by the applicant. Otherwise the decision, apart from noting its reservations about the applicant's truthfulness, would have indicated in a clearer way that the reason for the refusal of the appeal was because it did not believe the applicant. This is not what it

recorded in its decision. In this case there is no question of the applicant having given evidence of numerous facts which he maintains ground a fear of persecution, and that the Tribunal chose in any way to not believe some of those facts, and accept only one or two, which they then found did not amount to a reasonable fear. The fact is that there is just the one fact, namely the single request and refusal, and the Tribunal have given him the benefit of the doubt on that. Accordingly, credibility is not really an issue in this case.

The core of this case is whether the Tribunal reached its decision correctly and lawfully, not whether it is the correct decision in the sense that this court might have reached a different conclusion. Mr Christle's central argument relates to what he says are matters of conjecture made by the Tribunal, rather than reasonably drawn inferences, because if the former, then the decision based thereon is invalid.

To establish refugee status the applicant must establish a well-founded fear of persecution. That is clear. What is or is not a well-founded fear involves both a subjective test and an objective test. The onus is on the applicant to establish this as a matter of probability, and this burden is shared also by the Tribunal in these cases. The subjective test involves an assessment of the applicant's own state of mind as to this fear. The fear can exist in relation to past events, but it is necessary to establish that there is a continuing fear of future persecution. It may well be that an applicant had good reason to fear persecution in the past before he left his country, and that this was the reason for his flight, but to acquire refugee status there must in addition be a fear that, if returned, he would in the future be likely to suffer persecution. The objective element of the test involves a consideration of whether that fear is a reasonably held fear, looked at from an objective point fear, or can it be regarded rather as an irrational fear, even though genuinely held.

In this regard I refer to the judgment of Finnegan J, as he then was, in **Zgnat'ev v. The Minister for Justice, Equality and Law Reform, 29th March 2001, unreported**, to which I was referred, and where at page 4 of his judgment he referred to the appropriateness of referring to the Handbook on Procedures and Criteria for Determining

Refugee Status published by the office of the United Nations High Commissioner for Refugees, and stated:

"The Handbook deals with the phrase 'well-founded fear of being persecuted' at page 11 et seq. 'Fear' is subjective so that determination of refugee status will primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin. The fear must be well-founded and this implies that the applicant's state of mind must be supported by an objective situation. The phrase therefore contains a subjective and an objective element. If such a well-founded fear exists and if offered by an applicant as a reason for being outside the country of his nationality, it will in general be irrelevant that he also offers other reasons which would not entitle him to refugee status. The objective element requires an evaluation of conditions in the country of the applicant's nationality. Such consideration need not be confined to the applicant's personal experience but regard may be had to what has happened to his friends and relatives or other members of the same racial or social group and which may show that his fear is well founded."

I also want to refer to a passage from the judgment of McGuinness J. in Z**. v. Minister for Justice, Equality and Law Reform** to which I have already made reference above. In a passage at page 227 of the judgment, the learned judge helpfully sets out the entire text of paragraphs 37 to 42 of the same handbook referred to above. They have been well summarized in the passage quoted from the judgment of Finnegan J. (as he then was) in Zgnat'ev above, so I will not set out again the same paragraphs in detail. But it is worth setting out one passage from paragraph 42 which is as follows:

"The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility. In general the applicant's fear should be considered well- founded if he can establish, to a reasonable degree, that his continued

stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

What is clear therefore is that the applicant is obliged to establish that he has, from a subjective point of view, a fear of persecution, and that this fear must be objectively justifiable, and that in assessing whether the fear is a well-founded one, both from a subjective and an objective point of view, the Tribunal is entitled to take into account the applicant's credibility, and to consider that in the light of a knowledge of the conditions in his country of origin.

I am therefore of the view that when the decision made in this case is read as a whole, it is clear that the applicant was given the benefit of any doubt the Tribunal had in relation to truthfulness; that it took into account knowledge they had in relation to the state of affairs in the country of origin; that there was enough evidence from which it could reach a decision that the applicant had not made out a sufficient case amounting to a well-founded fear of persecution should he return; and that while the UNHCR are of the view that a person in the position of the applicant could be the subject of adverse attention, it did not follow that in all such cases it was so. This latter factor involved an assessment by the Tribunal as to whether in the particular circumstances as outlined by the applicant, the fear was objectively reasonable. It concluded that it was not reasonable, in view of the isolated request made that he join, and which was not accompanied by, or followed up at any later stage, by any threat to him for his refusal. The Tribunal was entitled to form the view, which Mr Christle submits is mere conjecture, but which I prefer to characterise as a view, that could reasonably follow from the facts - perhaps an inference as submitted by Mr Mohan - that this one event did not constitute reasonable grounds for a well-founded fear, especially when judged objectively. The same applies to the view expressed in the decision that that it was extremely unlikely that the applicant would come to the attention of any post-KLA people who may know that the applicant had refused to join. This was something they could reasonably conclude from the facts and information available to them. These are inferences reasonably capable of being drawn from the fact, for instance, that the KLA are now disbanded.

Although I have concluded that the Tribunal did in fact give the benefit of the doubt to the applicant in relation to his version of what had happened, it seems clear from the extract from the UN Handbook to which I have referred, that the Tribunal would be entitled to have regard to any perceived lack of credibility in his evidence if they had wished to do so, provided of course that there were substantial reasons for doubting his truthfulness, and provided that these doubts had a nexus to the decision.

For all these reasons, I refuse the relief sought by the applicant.