Neutral Citation Number: [2009] IEHC 435

THE HIGH COURT

JUDICIAL REVIEW

2007 881 JR

BETWEEN

M. S. A.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (PAUL McGARRY) AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 13th day of October, 2009.

1. This is a substantive application for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 15th May, 2007, to affirm the earlier recommendation of the Refugee Applications Commissioner that the applicant should not be granted a declaration of refugee status. Leave was granted by Cooke J. on the 20th March, 2009 and the substantive hearing took place at the Kings Inns, Court No. 1, on the 22nd June, 2009. Mr. David Leonard B.L. appeared for the applicant and Mr. Daniel Donnelly B.L. appeared for the respondents.

The Asylum Application

2. The facts of the applicant's asylum history are important and are recited in detail. The applicant applied for asylum at the offices of the Refugee Applications Commissioner on the 16th January, 2006 saying on his ASY-1 form that he was a national of Afghanistan from a village in the Ghazni province. He claimed that he left his wife and two children in Afghanistan and was without any identifying documentation. He claimed to have left Afghanistan on the 11th November, 2005 and to have travelled to Ireland by sea and road, arriving on the 13th January, 2006. He claimed not to know his place of arrival or the countries he had travelled through or how much his wife's family had paid an agent to arrange his journey.

3. The ASY-1 form records that during his preliminary s. 8 interview the applicant gave the following information:-

"Applicant states that he had never applied for asylum before, in this or any other country. Applicant states that he went to search houses in Gharbagh village (Ghazni) with Taliban members, 4 months ago, they found guns in people's houses (the people who work with the current government). He states these people (whose house they searched) are now trying to kill him."

4. It was also recorded that the applicant later wished to clarify that "they

searched house from members of the Wahdat group (who are against the Taliban)."

The Questionnaire
5. The applicant completed an ORAC questionnaire on the 27th January, 2006 in which he again said he lived in Afghanistan until he came to Ireland and that he worked for twenty years as a farmer. He said that he had no identity card as his father had kept it and it had been lost with him when he was "martyred" by the Taliban. He claimed to be illiterate and had no education and that his questionnaire was filled in by a Kurdish man in the hostel where he was staying. He claimed to fear persecution by reason of his nationality and his political opinion. When asked why he left Afghanistan he said that originally his family had been persecuted by the Taliban as they were supporters of the Wahdat party. The Taliban killed his father and imprisoned the applicant for six months after which he was forced to work for the Taliban. When the Taliban were removed and the new government was established the Wahdat party supported the government. A person by the name of Q.A. sent "strange people" to the house of the applicant's brother to kidnap them. The applicant went to the local police station and clearly explained his problems but he received no assistance from the police so he went to a friend's house for two months and then left Afghanistan. He entered Ireland "illegally by a smuggler". He travelled by foot and by lorry and his father-in-law paid the money to the smuggler. Again he said he did not know what countries he had travelled through and said that he had not applied for asylum in any other country.

The s. 11 Interview
6. The applicant attended for his s. 11 interview on the 26th June, 2006. He submitted no documentation. He repeated the claim that he had left Afghanistan by truck two months before he arrived to Ireland (that would have been roughly mid-November, 2005) and that immediately before that he lived in his family home in Qharabagh, Ghazni province where he had lived all of his life. He didn't give any dates and said "I don't know any of the years in Afghanistan". He clarified that his imprisonment by the Taliban for a period of six months was six years before he came to Ireland (i.e. 1999 / 2000). He was tortured while in prison and lost the sight in one eye and sustained several scars. He did not fear the Taliban at the time he left Afghanistan; his only fear was of the Karzai government because of his past activities for the Taliban.

7. The applicant described how after his release by the Taliban he had been forced to accompany members of the Taliban in searching the houses of people in his own and surrounding villages. This occurred about five years before he left for Ireland. The people in the houses saw him doing this work. During one of these searches, the Taliban killed A.A., the brother of Q.A. who is now a member of the Karzai government and for the previous year had been responsible for security of the applicant's province. For that reason the applicant now feared that Q.A. and his followers would kill him if they found him. His problems with Q.A. started two months before he left for Ireland (according to his account that would have been roughly September, 2005), when Q.A. sent people to the applicant's house and to his brother's house. The applicant had no documentation to support that claim. He said his mother had been beaten in the family home. She asked why he was being searched for and told him he should change his behaviour. His in-laws arranged for his travel to Ireland.

8. The applicant was asked in several different ways if he was sure he had never been outside of Afghanistan before travelling to Ireland and on each occasion he said he had not been outside of Afghanistan before. He was then told that there

was a positive fingerprint confirmation that he was in another E.U. Member State before coming to Ireland and said "No I was never outside of Afghanistan before my journey to Ireland" and "No, it is not me."

The s. 13 Report

9. The s. 13 report prepared following his interview contained a negative recommendation. The authorised ORAC officer noted that the applicant claimed to have been targeted in late 2005 even though the Taliban collapsed in late 2001 and even though he said his family had remained at the home location. He noted that the applicant had nothing to support his claim that he was targeted by a man named Q.A. He also noted that the applicant had denied being outside of Afghanistan and said he remained at the family home until November, 2005 but that a Eurodac "hit" and a letter from the Greek authorities indicated that he had been in Greece on the 27th November, 2004. The ORAC officer found that the applicant's story was neither tenable nor sustainable and that there was nothing to indicate that he was in Afghanistan in late 2005. It was concluded that these issues cast doubt on the sustainability of the claim and a finding was made under s. 11B (f) of the Refugee Act 1996 (i.e. that the applicant had adduced manifestly false evidence in support of his application or had otherwise made false representations).

10. The documentation from the Greek Dublin Office relating to the Eurodac "hit" (dated the 16th January, 2006) was appended to the s. 13 report. Those documents indicated that the applicant's fingerprints were taken by the Greek authorities in respect of an illegal entry registered in Mytilini on the 27th November, 2004.

The Appeal

11. In August, 2006 the applicant lodged a Notice of Appeal with the RAT in which he repeated the account of his alleged persecution that he had given to ORAC except that on this occasion, he said that he fled Afghanistan at the end of 2004. It was stated that he travelled to Ireland via Turkey where he remained for two days before travelling to Greece where he was detained by the Greek authorities for three months after which he lived on the streets for nine months. It was repeated that he arrived in Ireland two days before claiming asylum on the 16th January, 2006.

12. The appeal documents submitted that ORAC failed to have regard to the applicant's lack of education when rejecting his credibility and failed to have regard to country of origin information (COI) and in particular to a U.K. Home Office Afghanistan Country Report (April, 2005) appended to the Notice of Appeal.

13. It was submitted that there was no effective protection available to the applicant in Afghanistan and that this had not been appreciated by ORAC. It was further submitted that ORAC had attached undue weight to the absence of corroborative documentation. The discrepancy between the Eurodac "hit" and the applicant's earlier narrative was explained by stating that "he was ill-advised not to reveal same, and he was terrified that he would be returned to Greece" and reliance was made on a report compiled in 2005 by the Helsinki Foundation for Human Rights, detailing inter alia the poor conditions and "chaotic situation" in detention centres in Greece.

14. Several COI reports including the U.K. Home Office and Helsinki Foundation reports referred to above and a Human Rights Watch Country Summary – Afghanistan of January, 2006 were appended to the applicant's Notice of Appeal. On the 13th December, 2006 the RLS made further submissions to the RAT,

referring to the European Communities (Eligibility for Protection) Regulations 2006 and furnishing a letter from Human Rights Watch entitled Afghanistan: Security Council Upcoming Mission (dated 9th November, 2006).

The oral hearing

15. An oral hearing took place on the 14th December, 2006 at which the applicant was represented by counsel and an RLS caseworker. No note of the hearing was exhibited in these proceedings, which is surprising as in the Court's almost invariable experience, the RLS representative takes a careful note of the appeal proceedings. The Court relies therefore on the contents of the RAT decision which indicates that the applicant provided evidence of departing from Afghanistan because of his support of the Hezb-i-Wahdat which led to his father being killed by the Taliban and his own imprisonment and torture. He was released by the Taliban on condition that he spied on the Hezb-i-Wahdat commanders and pointed out their homes. After the fall of the Taliban his life was peaceful and he worked on a farm. At the end of 2005 he became aware that Q.A. was seeking him out because he had identified his home to the Taliban and as a result was implicated in the killing of Q.A.'s brother. He became aware that the group associated with Q.A. was looking for him by name. Although his mother went to the council of elders in his village they said that they could not help. A number of people came to his home seeking him and when they discovered that he was not there they beat up his father-in-law who then advised him to leave the country.

16. The Tribunal Member records that the applicant said at the oral hearing that he travelled to Ireland via Istanbul, where he remained for two days and that he spent 12 months in Greece of which three months were spent in jail. The applicant said "some people who were involved with the United Nations told him that there was no possibility to seek asylum in Greece." He feared that he would be killed by government attached groups if he returned to Afghanistan at the present time. In the earlier part of his evidence he said his father was killed by the Taliban because of his support for the Wahdat party but then later told the Presenting Officer that his father was killed because of his role in irrigating local land and that the applicant himself was arrested by the Taliban because they feared he would take revenge for his father's death. He said that the Taliban did not arrest his brother because he lived in a mountainous area in another part of the country. Everyone in the local village knew the applicant was working for the Taliban.

17. The RAT decision recounts that the applicant suggested that Q.A. waited for two years after the fall of the Taliban before he came looking for the applicant as "because Mr. [Q. A.] and his group were not in Afghanistan during this time." He said he gave false information at the s. 11 interview because his agent had advised him that if he told the truth it would create problems for him. He accepted that he had not been truthful about his time in Greece where he said he spent three months in prison and then lived rough and in hostels for nine months. He obtained help from churches which provided him with food and blankets. He said the agent found him after he was released from prison and arranged for his travel to Ireland.

18. The RAT was made aware that the applicant was waiting for an appointment with a doctor working with SPIRASI (the Centre for Care of Survivors of Torture) and that when that medico-legal report was prepared it would be furnished. This occurred in January, 2007, some weeks after the hearing. The report recorded that the applicant has minimal vision in one eye and ten different scars on his body which were itemised. Some of the scars by the applicant's own admission

had nothing to do with his alleged torture. The applicant was described as a "confusing historian, with a poor memory for dates", possibly due to difficulties in translating from the Afghan calendar and possibly due to the traumatic experiences he alleges to have sustained. The SPIRASI report confirms several scars which "could be of forensic significance and which by their distribution would be consistent with a history of random abuses." No reference was made to the SPIRASI report in the negative decision which issued from the RAT on the 15th May, 2007. As the torture was attributed solely to the Taliban, who the applicant never claimed to be the source of his current fear, this matter was not of relevance to the challenge.

The RAT decision

19. Before turning to his analysis of the applicant's claim, the Tribunal Member stated in full the requirements of ss. 11B and C of the Refugee Act 1996, as amended, and Regulation 5(3) of the European Communities (Eligibility for Protection) Regulations 2006 as general guidelines for the assessment of credibility. The Tribunal Member summarised the applicant's claim and the evidence given and submissions made at the oral hearing and in his analysis of the claim stated that he was not prepared to accept the applicant's credibility for the following reasons:

a. He had not provided any documentary evidence from his country of origin specific to the individual circumstances of the case;

b. He had not provided any photographic identification or other documentation that would tend to corroborate his identity and nationality;

c. He admitted that he had provided false information when he first applied and admitted that he was in Greece for a year only after this was discovered by a fingerprint check;

d. It was implausible that his tormentors would wait for two full years after the fall of the Taliban if they sought to take revenge on him for his involvement in the killing of the brother of a local commander; and

e. Section 11B (f) of the Refugee Act 1996 was relevant and material in circumstances where the applicant had produced false evidence or made false representations in support of his claim.

20. The Tribunal Member found that "For these reasons, the Applicant's claim can be dismissed in limine and accordingly I find that he has failed to discharge the burden of proof with respect to the substantive aspects of his claim." He went on to say that "even if" the applicant had succeeded in convincing him that he had given a plausible and credible account, he did not accept that the applicant qualifies for refugee status because he had not provided any corroborative evidence that former members of the Wahdat party in his position were liable to be persecuted. The Tribunal Member further noted:-

"In addition the Applicant did not appear to have sought any assistance or help from the authorities in Afghanistan, thereby rendering it impossible for me to conclude that in his case the State has either been unable or unwilling to afford him protection in such circumstances."

21. The Tribunal Member also found that there was no nexus to the Convention in the applicant's case; his findings in that regard are discussed further at para. 40

below. The applicant was notified by letter dated the 22nd May, 2007 that the Tribunal Member had affirmed the ORAC recommendation.

THE ISSUES IN THE CASE

22. The applicant was granted leave to seek judicial review on the grounds that the RAT erred and misdirected itself on the law in three ways:-

A. In the manner in which it concluded that the applicant had failed to discharge the burden of proof with regard to substantive aspects of his claim to be a refugee, it failed to consider when weighing the factors affecting his credibility (i) the explanations offered for the non-disclosure of his one-year presence in Greece; and (ii) the country of origin information relating to the conditions prevailing in the Ghazni region of Afghanistan and to the risks for persons in conflict with Hezb-e-Wahdat commanders;

B. In holding that it was impossible to conclude that Afghanistan was unable or unwilling to afford the applicant protection upon the sole ground that he did not appear to have sought such assistance without considering whether such protection might reasonably have been forthcoming;

C. In finding that because the applicant's fear of persecution derived from the threat of a local commander to kill the applicant in personal revenge for the death of the commander's brother in which the commander believed the applicant to have been implicated, that fear was incapable of constituting a Convention reason for according international protection.

A(I). FAILURE TO CONSIDER EXPLANATIONS FOR NON-DISCLOSURE

23. Mr. Leonard B.L., counsel for the applicant, argued that the Tribunal Member erred in his assessment of the applicant's credibility by failing to take account of the applicant's plausible explanation for his failure to initially disclose that he had spent one year in Greece before coming to Ireland. Aside from saying that he had been ill-advised by his agent that to tell the truth would cause difficulties for him, the applicant also said he initially denied having been in Greece because he was terrified of being returned to Greece and from there to Afghanistan.

24. Mr Donnelly B.L., counsel for the respondent, argued that the primary reason why the applicant's appeal was rejected was that his personal credibility was not accepted and that was principally because the applicant blatantly lied about having spent a year in Greece. He came clean at the RAT stage following legal advice and then effectively moved all of the dates he had given during the ORAC stage backwards by one year. Mr Donnelly argued that if varying cultural attitudes to truth and honesty are to be allowed for as a tool in the assessment of credibility then such tool would be nullified. The applicant's reasons for denying that he had been in Greece are exiguous and the Tribunal Member was clearly aware of this inadequacy. The duty to give reasons was fulfilled. The applicant's lies at the ORAC stage and the fact that he changed his evidence were corrosive of his personal credibility.

The Court's Assessment of Ground A (i)

25. Both of the excuses given by the applicant as to why he did not initially come clean about his time in Greece were in fact first provided by the applicant's legal representatives in the Notice of Appeal and not by the applicant himself. The RAT decision records that the applicant said he had given false information on the advice of his agent who told him that if he told the truth this would create a problem for him. In his grounding affidavit the applicant says he gave evidence at the appeal hearing of his fear of being returned to Greece and then Afghanistan

but this was not referred to in the decision nor was there any reference to the Helsinki Foundation report which had been appended to the Notice of Appeal and which outlines the difficulties experienced by asylum seekers, illegal immigrants and detainees in Greece at that time. The applicant did not refer the Court to any notes taken at the hearing to support this claim that he gave evidence in that regard.

26. It seems to this Court that there is little substance in the applicant's submission which if followed to its logical conclusion suggests that outright lies can be condoned if sufficient self-serving excuses are provided and that a decision which does not outline all those excuses ought to be quashed. In reviewing the applicant's reasons / excuses the Court finds no real difference between "I lied because my agent told me that to tell the truth about my 12 month stay in Greece would cause my claim to be rejected" and "I lied because I was afraid to be returned to Greece where conditions were awful". Both excuses seek to explain why the applicant concealed from ORAC his previous stay in a safe country, which he appears to have done in order to avail of a more benign asylum process in this State. The effect of both excuses is the same. He did not want safety from persecution in Greece, preferring instead to come to this State. A person fleeing persecution is primarily seeking freedom from fear in the first country where his persecutors cannot follow and does not normally remain there for twelve months and then select a country which requires the passage through at least five other countries almost 4000 kilometres from his first safe country. The deliberate choice of the state in which an asylum applicant is made is generally indicative of economic migration rather flight from persecution. These are the very abuses which the Dublin II Regulation sought to identify and minimise.

27. The Tribunal Member was fully aware that the reasons for non disclosure of the year spent in Greece only came following legal consideration of the s. 13 report and not from the applicant when he was confronted with the incontrovertible evidence that he had not been in Afghanistan in late 2005 as asserted. The self serving statement made in his Notice of Appeal and at the oral hearing was therefore of minimal value. The inescapable fact is that the applicant made a conscious decision to provide false information at the ORAC stage which was observed by the Tribunal Member. He was entirely correct to attach weight to the requirement for candour and cooperation when seeking refugee status and not to condone outright lying. Section 11C of the Refugee Act 1996, as amended, places the obligations of asylum seekers on a statutory basis, as follows:-

"(1) It shall be the duty of an applicant to co-operate in the investigation of his or her application and in the determination of his or her appeal, if any.

(2) In compliance with subsection (1), an applicant shall furnish to the Commissioner or the Tribunal, as may be appropriate, as soon as reasonably practicable, all information in his or her possession, control or procurement relevant to his or her application."

28. On his own admission, which came at a late stage, the applicant breached this obligation. The Tribunal Member, as any other decision maker, was entitled to view all the evidence furnished by the applicant thereafter with a degree of scepticism. The Court is not at all convinced that the failure to recite both excuses (even if actually given by the applicant orally) was a breach of fair procedures. Several previous decisions of the High Court support the proposition that a decision maker is not obliged to recite all arguments and address each one in

turn- see the judgment of Clarke J. in Muia v. Refugee Appeals Tribunal [2005] I.E.H.C. 363 and that of Muanza v. The Refugee Appeals Tribunal (Unreported, High Court, Birmingham J., 8th February, 2008). The argument that the Tribunal Member failed to consider the applicant's reasons for lying is not made out.

A(II) FAILURE TO CONSIDER COI

29. The applicant's second complaint is that the assessment of credibility was flawed because the Tribunal Member failed to consider the COI furnished which indicates that persons formerly associated with the Taliban and persons who are targeted by a Wahdat commander would face a real risk of persecution in Afghanistan and particularly in Ghazni province where the applicant claims to come from. Counsel referred the Court to paragraphs 6.363 and 6.387 of the U.K. Home Office report of April, 2005 which indicate that persons who are in conflict with Wahdat commanders can find it difficult to return to Afghanistan and that people can be persecuted if they return to areas where they are in conflict with the local commander.

30. Counsel for the respondents went through each of the findings made by the Tribunal Member. He submitted that on the face of the decision, there was no error with respect to the absence of any documentary evidence corroborating his claim, identity and nationality. He submitted that the Tribunal Member was entitled to make the findings that he did in relation to credibility, having regard to the fact that the applicant changed his story at a very late stage in a very fundamental way. He argued that if the decision is upheld on that basis, the Tribunal Member cannot be faulted for failing to consider the COI in great detail as there could not be said to be any obligation on his part to do so in the light of the rejection of his personal credibility

31. It seems to this Court that as the Tribunal Member rejected the fundamental elements of the applicant's claim that he was targeted by Q.A. because of his alleged involvement in the death of Q.A.'s brother while forced to work for the Taliban, the particular portion of COI relied upon was not really of relevance. The Tribunal Member appears to have approached the applicant's claim from a forensic viewpoint based on statutory requirements found in the Refugee Act and the Protection Regulations and found that his claim fell at the first hurdle for failing to discharge the burden of proof on the substantive aspects of his claim. His claim was stated to be "dismissed in limine", that is that it failed to reach a minimum threshold.

32. The five primary negative credibility findings in the operative part of the Tribunal Member's decision cannot be disputed. Four findings are established and the fifth is a finding that it was implausible the applicant's tormentors would wait for two full years after the fall of the Taliban to take revenge on him for his involvement in the killing of the brother of a local commander. It is difficult to see how this story could be made more plausible because COI states that known Taliban supporters run the risk of receiving serious threats if they return to the areas of Ghazni in northern, north western and central Afghanistan where acts of revenge related to the conflicts were being carried out. The stated implausibility was not that such acts of revenge were occurring but why, if the applicant had remained on in his village where everyone was aware of his activities in spying for the Taliban, Q.A. and his supporters would have waited two full years after coming to power to extract their revenge. No convincing arguments were advanced to establish that this COI could have affected a fair evaluation of the applicant's credibility. This ground therefore fails.

B. CONSIDERATION OF STATE PROTECTION

33. Mr Leonard went on to argue that the Tribunal Member's subsidiary findings were flawed. He submitted that the Tribunal Member erred by applying the presumption that state protection would be available to the applicant in Afghanistan if he had sought it. He argued that the COI furnished to the Tribunal Member and the U.K. Home Office report of April, 2005 in particular indicate that there was an almost complete breakdown of state apparatus in Afghanistan which would support unwillingness and inability on the part of the State to provide protection to the applicant. It was therefore not open to the Tribunal Member to conclude that the applicant's failure to seek state protection defeated his claim. The reality of such protection was the test as outlined in Canada (A.G.) v. Ward [1993] 2 S.C.R. 689 and followed by Herbert J. in D.K. v. Refugee Appeals Tribunal [2006] 3 I.R. 368.

34. Mr Donnelly argued that the Tribunal Member's finding on state protection is an additional or subsidiary finding and was not a material or significant reason for the decision. On that basis, the finding could be severed if found to be flawed.

35. Before considering this claim it has to be said that the applicant must have informed the Tribunal Member that he did not seek out state protection when threatened by Q.A.'s followers. In his questionnaire he said the contrary. As no challenge was raised on any error made, the Court will ignore the earlier statement.

The Court's Assessment of Ground B

36. As the core finding that the applicant's narrative of persecution was not credible stands, it follows that the subsidiary reasons provided by the Tribunal Member while interesting were not strictly speaking relevant. While they give some indication of how the Tribunal Member approached all the evidence, they are subsidiary reasons for his key determination. If error can be found in his additional reasons, I do not believe those errors can detract from or infect his primary findings that the applicant's story of being sought out by Q.A. was not credible.

37. In any event, it is important to note that the decision of the RAT was not to the effect that the applicant's claim failed because he did not seek state protection or that state protection was available if sought but rather that because "the Applicant did not appear to have sought any assistance or help from the authorities in Afghanistan, thereby rendering it impossible for me to conclude that in his case the State has either been unable or unwilling to afford him protection in such circumstances." He in fact made no decision of the availability of state protection and therefore the well accepted principles of law deriving from La Forest J. in Ward are not relevant to his decision.

38. It is not disputed that a Tribunal Member is obliged to consider COI to determine the reality of state protection before denying refugee status to an applicant who did not seek such protection. The Tribunal Member did not engage in any such assessment in this case; instead he simply stated that he was unable to determine the issue of state protection as the applicant had not sought any such protection. Had he made the determination attributed to him by Mr. Leonard of presuming that state protection was available without assessing the COI furnished, he would have been in error but he did not make such a finding.

39. I believe that it deserves to be said that when a decision maker actually determines that an applicant's account of persecution is not credible it seems a little unreal to expect him to then go on to consider whether state protection

might reasonably have been available if sought. It is usually where no determination on credibility is made and the decision maker seeks to explore the availability of state protection that the consideration of COI on the reality of state protection becomes an imperative.

C. ABSENCE OF A CONVENTION NEXUS

40. After making his determination on the applicant's credibility and his comments on state protection, the Tribunal Member went on to comment as follows:-

"Even if the foregoing were not so, it is clear that there was no nexus to the convention in this case. If the applicant's story is true, it rests on the claim that he was sought out for vengeance by a local commander because he had been (rightly or wrongly) implicated in the murder of the commander's brother. The "reason" therefore for the perceived persecution does not derive from any imputed or other political opinion on the part of the Applicant, but rather the fact that he was blamed for involvement in the death of this action. Even though he may have been a member of the Taliban (or coerced into so being) it does appear that this fact alone was not the reason why the Applicant was the subject of his perceived persecution. I therefore find as a fact that the reason for the perceived persecution (if the Applicant were credible) is linked to the unfortunate circumstance of his having been blamed for involvement with the killing of the commander's brother, and not "because of" any imputed or active political involvement."

41. Mr Leonard argues that the Tribunal Member erred in law in making this determination. He argues that the existence of mixed motives does not defeat a legitimate Convention nexus. If personal animosity is connected to a Convention reason, that is sufficient to satisfy the definition of a refugee. Mr. Leonard accepted that the inference could be drawn that Commander Q.A. was motivated in part by his desire for personal vengeance but he argued that the Commander's actions must also be seen as related to the applicant's political opinion as a person who worked for the Taliban. Reliance was placed on the decision of the English Court of Appeal in Noune v. Secretary of State for the Home Department [2000] EWCA Civ 306, where Schiemann L.J. held that "[t]he motives of the persecutor may be mixed and they can include non-Convention reasons: it is not necessary to show that they are purely political."

42. The Court noted that in Noune, Schiemann L.J. merely utilised the extract relied upon by the applicant as one of the premises on which he approached the issues before him and the phrase was not a finding which he made on the facts of the case. As the Court found little assistance in the decision of Noune, the applicant was granted an adjournment to develop the argument on mixed motives a little further.

43. The applicant filed additional authorities to support the argument that "mixed motives" do not negate a Convention nexus. He relied on a number of decisions from other jurisdictions including the United States (Singh v. Ilchert 63 F.3d 1501); Australia (El Merhabi v. Minister for Immigration and Multicultural Affairs [2000] F.C.A. 42; Chen Shi Hai v. Minister for Immigration [2000] I.N.L.R. 455); and the U.K. (Sepet v. Secretary of State for the Home Department [2003] 1 W.L.R. 856; R (Sivakumar) v. Secretary of State for the Home Department [2003] 1 W.L.R. 840). Stressing the use by the Tribunal Member of the word "alone", the applicant argued that the Tribunal Member applied an incorrect causative test by requiring the Convention reason (i.e. race, religion, nationality, political opinion or membership of a social group) to be the sole reason for the

persecution. He argued that it is well established that where a persecutor has more than one motive, as long as that motive has a connection to the Convention it is sufficient to satisfy the refugee definition set out in s. 2 of the Refugee Act 1996. He also submitted that in any event, proof of motive is not essential and he relied on a number of Australian cases as sources for that contention.

44. Mr Donnelly argued that, like his finding on state protection, the Tribunal Member's finding on the absence of a Convention nexus was a subsidiary finding and was not the primary basis on which the appeal was rejected. He nevertheless addressed the issue of motive for persecution generally. He submitted that two approaches appear to have been adopted on the issue of causation in refugee claims: the "but for" test in Canada and the "effective cause" test in the U.K. Applying the "effective cause" test, the primary or proximate cause for the Commander's actions was the applicant's apparent involvement in his brother's murder. Applying the "but for" test, even if the applicant had been perceived to be complicit in the murder with or without Taliban involvement, he would equally have been the object of retaliation. Whichever test one used, Q.A.'s motive for seeking revenge was the death of his brother and not applicant's Taliban connections.

45. In reply, Mr. Leonard submitted that the legal test for causation is set out in Regulation 9(3) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) as follows:-

"There must be a connection between the reasons mentioned in Regulation 10 and the acts of persecution referred to in paragraph (1)."

46. Regulation 9(1) regulates the threshold of acts of persecution. The "reasons mentioned in Regulation 10" are the five Convention grounds of race, religion, nationality, political opinion and membership of a particular social group. Thus there must be a connection between the Convention grounds and the acts of persecution. Mr. Leonard further submitted that whatever the correct legal test for causation is, whether it be a "connection" test, a "but for" test, a "real cause" test or an "effective cause" test, the Tribunal Member has erred in law by applying the patently incorrect test of whether the persecution feared was solely for a Convention reason.

The Court's Assessment of Ground C

47. The Court is of the view that the Tribunal Member made no finding that as a matter of law the threat of persecution had to be solely by reason of the applicant's political opinion. If he did, the Tribunal Member would have erred in law as the existence of personal motivation for persecution does not detract from a parallel political reason, provided that the political or other Convention connection is established. The need for acts of persecution to have a nexus with a Convention reason is outlined in Regulation 9(3) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) which clearly states that that there must be "a connection" between the acts of persecution and the applicant's race, religion, nationality, membership of a particular social group or political opinion. It is well accepted that the existence of other motives does not necessarily mean that persecution for Convention reasons is not established. Lord Roger of EarlsFerry in the House of Lords' decision in R (Sivakumar) v. Secretary of State for the Home Department [2003] 1 W.L.R. 840 phrased the principle as follows at p. 853:-

"As has long been recognised, persecutors may act for more than one reason. Dyson LJ was drawing attention to this when he said, in his judgment in the Court

of Appeal [2002] INLR 310, 317, para 22, that, just because someone had been persecuted for suspected involvement in violent terrorism, it did not follow that he had not been persecuted for his political opinion. In other words, he might have been persecuted for both reasons. In the next paragraph Dyson LJ identified the task of the person considering a claim for asylum as being "to assess carefully the real reason for the persecution". Dyson LJ was there concerned to make the point that in many cases it is necessary to look below the surface and identify the true reason for any ill-treatment. Of course, there may turn out to be more than one "real reason". The evidence may show, for instance, that an applicant was ill-treated both because he belonged to a particular ethnic group and because he was suspected of taking part in terrorist crimes that were the work of members of that ethnic group. Not only is it often hard to draw the line between legitimate government counter-terrorist activity and racial and political persecution (Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 160 ALR 24, 48, per Merkel J), but indeed members of security forces may act for both legitimate and illegitimate reasons. In such a case the appropriate inference may be that, if the applicant returned home, he would be ill-treated for a combination of Convention and non-Convention reasons. If so, the person considering the claim for asylum will properly conclude that the applicant has a well-founded fear of persecution for that combination of reasons." (This Court's emphasis)

48. The Court is very conscious of the danger of being seen as replacing the Tribunal Member's view with that of its own and does not seek to do so. The Tribunal Member's view, having heard the evidence of the applicant, was that the case was that the Commander sought to avenge the death of his brother by seeking to eliminate the applicant. The applicant's Taliban history had no relevance to Q.A.'s animosity which was directed towards the applicant personally for the death of his brother and not because he had been in the Taliban. That factual finding of the real reason for the persecution was not challenged in these proceedings. Instead it was argued that the Tribunal Member erred in law by holding that it was necessary to establish a sole Convention related motive for persecution. I do not believe that this misapprehension was either held by the Tribunal Member or that a decision to that effect was made.

49. The Tribunal Member's finding of fact that the alleged persecution was linked to the death of the Commander's brother and not for any imputed political opinion was because the Taliban motive was not asserted by the applicant. The facts presented were that his family were Wahdat supporters and they themselves were victims of Taliban atrocities. The Applicant's father was killed and he himself was tortured, losing the sight of an eye and sustaining scars and injuries before he was forced to work for the Taliban. He and his family were supporters of the Wahdat which the applicant says is part of the Karzai government. The Commander who seeks to harm the applicant is also associated with the Wahdat. Against that framework, there is no dispute on the law or the application of that law to the Tribunal Member's decision. The decision determined that the reason the applicant was targeted was solely for his connection with the killing, which was not for a Convention ground.

50. At risk of repetition it has to be recalled that the primary reason for the rejection of the applicant's appeal was his failure to satisfy the decision-maker as to his own credibility. The Tribunal Member's comments on state protection and the Convention nexus were subsidiary to the primary assessment in relation to credibility. Any criticism on his approach to the subsidiary issues would not have made any significant difference to the overall decision.

Conclusion

51. While the arguments made at the leave stage were certainly arguable, on a fuller examination the applicant has failed to establish that the Tribunal Member erred in law or acted in breach of fair procedures. In the light of the foregoing, I am not satisfied that the applicant is entitled to the reliefs sought. The application fails.