Neutral Citation: [2014] IEHC 609

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 505 J.R.] and [2010 No. 506 J.R.]

BETWEEN/

R.C. AND G.G.M. [ZIMBABWE]

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 11th day of December, 2014

1. The applicants in this "telescoped" judicial review application are *seeking certiorari* of the decisions of the Refugee Appeals Tribunal ("the RAT"), dated 23rd March, 2010 (erroneously dated 23rd March, 2009), in respect of each of them, affirming recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that they be refused refugee status.

Background

2. The decisions of ORAC in respect of these applicants were the subject of judicial review proceedings before the High Court (Clark J.) in February 2010. On that occasion, the applicants sought to challenge ORAC's decisions, dated 14th May, 2008, for R.C. (the wife), and 15th May, 2008, for G.G.M. (the husband), recommending that they be refused refugee status. The basis of this challenge was that the Commissioner had made s. 13(6) findings against the applicants, which meant that any appeal to the RAT would be on the papers only.

3. The applicants argued that they would be greatly prejudiced by the absence of an oral appeal. They said that the Commissioner based his decisions "*uniquely on credibility grounds and failed to assess the kernel of their claim"* which was that the husband is the brother of a former Zimbabwean opposition politician, T.M., who was forced to flee persecution in Zimbabwe and was granted refugee status in the United Kingdom. The decision of Clark J. in *R.C. and G.G.M. [Zimbabwe] v. Refugee Applications Commissioner & Anor* [2010] IEHC 490provides a full account of the facts of the applicants' claim, and ORAC's s. 13 report. I therefore provide only a brief overview here.

4. The applicants claimed to have been subjected to serious persecution in Zimbabwe between 2002 and 2007. They said they were targeted by Zanu-PF youths because of their close blood relationship with members of the MDC opposition party. Both husband and wife provided detailed accounts of the persecution which they claimed to have experienced during this five-year period. They said that they had to relocate in Zimbabwe as a result of the persecution but that their farmhouse was burnt down by Zanu-PF youths in August, 2007. It was after this that they claimed to have fled Zimbabwe and travelled via South Africa and Germany to Ireland, where they arrived in September 2007.

5. The applicants submitted various documents in support of their claim, including a series of documents relating to T.M. Clark J. noted at para. 5 of her judgment in respect of the applicants' challenge to the decisions of ORAC:-

> *"5. In support of their asylum applications the applicants submitted a number of identity documents and a greater series of documents relating to "TM", a politician in Zimbabwe who they claim is the husband's brother. These documents included a newspaper article, a photocopy of TM's passport and a letter from the U.K. Home Office granting refugee status to the said TM together with a document purporting to be from TM, which discusses the harassment of his brother and sister-in-law (i.e. the applicants) in Zimbabwe in 2006 and 2007. That letter purports to have been sworn before a Commissioner for Oaths in the U.K. The applicants also furnished letters from the Home Office granting refugee status to another man with the same surname together with a document purporting to be from the immigration authorities in Canada stating that yet another male with the same surname (Mr R M) was involved in the refugee process in Canada. In addition, they submitted a further document stating that the third man Mr R M and another person were recognised as refugees in Canada. They also furnished a letter from a Mr. B F M stating that he is a brother of the husband and informing the reader that he sought refugee status in the United States because he feared persecution by reason of his political activities. Finally, a Zimbabwean driver's licence in the name of Mr B F A and a U.S. travel document in his name were furnished."*

6. Both applicants recounted their story in great detail to ORAC at their s. 11 interviews. However, ORAC obtained information from the U.K. authorities which revealed that persons with the same biographical details as the applicants had been in the U.K. on valid visas during the entire period they claimed to be suffering persecution in Zimbabwe. This information was put to the applicants during the course of their second though separate s.11 interviews. The husband denied that he had given false information. The wife, however, admitted that she had been in the U.K. since 2002 and had married the second named applicant there in 2006.

7. It was submitted on behalf of the applicants that the respondent breached fair procedures by failing to put to the husband his wife's admissions that she had told lies. It was further submitted that, notwithstanding the blatant untruth of the narrative given by the applicants regarding past persecution, if the respondent accepted on the basis of the personal documents submitted that the applicants were indeed members of the opposition family, the respondent ought to have accepted that they had demonstrated a well-founded fear of persecution for a Convention reason.

8. Clark J. rejected the husband's submission that ORAC's failure to put the wife's admissions to him constituted a breach of his right to fair procedures. The learned judge held that the husband was given every opportunity to explain why he had lied and as his interview was conducted before that of his wife, it was not possible to put to him the admissions she subsequently made. The

applicants failed to establish any inadequacy in the form of the appeal available to them, and no averments were made outlining any injustice or prejudice occasioned to them by the absence of an oral hearing on appeal. Furthermore, the applicants ignored the fact that they had a duty, when engaging in the asylum system, to cooperate by presenting their account in a truthful manner. Their gross misconduct in abusing the integrity of the asylum process would entitle the court to refuse *certiorari*. Furthermore, Clark J. held that there was no merit to the application for leave. The reliefs sought were thus refused.

The Present Proceedings

Extension of time

9. The decisions of the RAT in both the husband's and wife's cases were communicated to them by letter dated 29th March, 2010, which they averred to having received on 30th March, 2010. The respondents submitted that the time limit under s. 5(2)(a) of the *Illegal Immigrants (Trafficking)* Act 2000 allowed them fourteen days, i.e. until 13th April, 2010, to institute judicial review proceedings. The notice of motion in this case, however, is dated 23rd April, 2010; the applicants were thus ten days late in instituting proceedings. The respondent submitted that the court has to be provided with an adequate reason for this delay by way of affidavit. The respondent argued that the explanation given on affidavit is not adequate. He referred to the relevant paragraph of the wife's affidavit, sworn on 23rd April, 2010, where she states:-

> *"I pray this Honourable Court for an extension of time in relation to the initiation of the within proceedings. I say that I received the said decision on or about 30th March 2010 which was during the Easter vacation. I am advised by my solicitor that papers were sent to counsel and he had difficulties contacting counsel because of the vacation period. Given the failure of the Tribunal to consider the extensive submissions furnished, my solicitor instructed counsel to draft an application under s. 17(7) of the Refugee Act. I am instructed this took some time. This application was completed and submitted to the Department of Justice on or about the 8th day of April 2010. I am advised my solicitor was concerned that the appropriate challenge in the circumstances ought to be by judicial review and he instructed another counsel in that regard. I am advised papers were sent to that counsel and proceedings were not drafted until yesterday. I was surprised and disappointed that the extensive submissions made were not considered at all and I resolved at the time to take whatever action was appropriate."*

10. In support of his argument, the respondents relied on the Supreme Court decision in *S. v. Minister for Justice* [2002] 2 IR 163 where Denham J. held, at para. 11 of her judgment:-

> *11. The delay in issue is essentially delay by legal advisers. Legal advisers have a duty to act with expedition in these cases. In general, delay by legal advisers will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such a delay and to enable the matter to be considered further.*

11. Thus the reasons given by Ms. R.C. on affidavit, which are to do with delays by her legal advisors in preparing submissions during the vacation period, are, in the respondent's submission, inadequate.

12. In reply, the applicants submitted that the first mention of the time point by the respondents was in their intended statement of opposition and in their written submissions in respect of Ms. R.C. The applicants stated that the matter had not been raised hitherto, despite there having been ample opportunity for this to have been done, and it was now unconscionable to permit these proceedings to fail on the time point. In support of this submission, the applicants relied on the decision of Mac Eochaidh J in *K.B. v. The Minister for Justice* [2013] IEHC 169, where the learned judge held, at para. 19 of this judgment:-

> *"I would be extremely reluctant to entertain an application to dismiss proceedings four years after the institution of those proceedings where the first indication of a complaint about delay is to be found in the written submissions filed in the days before the hearing. If a State respondent is keen to pursue a genuine delay point, this itself should not be delayed, and I say this having regard to the particular circumstances of failed refugee judicial review applicants who live, generally, in very difficult circumstances on a mere €19 or so a week. It would be unconscionable to permit proceedings to fail on a time point where an applicant might have endured significant hardship over many years waiting for such a simple point to be determined. There would be much merit in such time points being advanced expeditiously and by motions in limine."*

13. The applicants thus requested an extension of time by ten days, up to the date of the institution of proceedings on 23rd April, 2010.

14. The court is satisfied that, in light of Mac Eochaidh J.'s *dictum* in *K.B.*, the obligation on lawyers to act expeditiously works both ways. Therefore, if the respondents wished to raise a time point, they were obliged not to delay in doing so. In this case, the proceedings were instituted on 23rd April 2010 – 4 years ago – but the respondents failed to raise the time issue until the statement of opposition was furnished to the applicants in the days before the hearing. This is exactly the sort of conduct deprecated by Mac Eochaidh J in *K.B*.

15. In the circumstances, the court is satisfied that there is good and sufficient reason to grant the small extension of time required, particularly where there would be no prejudice to the respondents in so doing. Accordingly, I will extend the time up to and including 23rd April, 2010, which is the date upon which these proceedings were commenced.

Section 17(7) application to be readmitted to asylum system

16. The respondent submitted that in her affidavit Ms. C. makes reference to having made a s. 17(7) application for readmission to the asylum system. Section 17(7) of the Refugee Act 1996 (as amended by S. I. No. 51 of 2011) provides:

> *"(7) A person to whom the Minister has refused to give a declaration may not make a subsequent application for a declaration under this Act without the consent of the Minister.".*
>
> *"(7A) The consent of the Minister referred to in subsection (7)—*
>
> *(a) may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person, and*
>
> *(b) shall be given if, following the preliminary examination referred to in paragraph (a), new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee."*

17. The respondents submitted that s. 17(7) was the appropriate remedy in this case. The respondent argued that the applicants did a U-turn: despite making a s. 17(7) application on 8th April, 2010, they proceeded to launch these judicial review proceedings on 23rd April, 2010. The respondent submitted that on the day that these proceedings were filed in the central office, the applicants' solicitors wrote to the department saying that the s. 17(7) application should not be dealt with until the judicial review proceedings were finalised; and, on 13th July, 2010, the department accepted that.

18. The respondent argued that, effectively, two parallel remedies were being exercised here. Section 17(7) was the first remedy availed of by the applicants in this case and, having availed of the s. 17(7) remedy, the applicants failed to give any explanation for the about-turn. The respondents submitted that the s. 17(7) remedy should have been allowed to proceed and, in the event of a negative decision, the applicant could have challenged that. The respondent submitted that this case this is not, therefore, a matter that should trouble the court given the applicants' choice to proceed under s. 17(7).

19. In reply, the applicants submitted that in order to succeed in a s. 17(7) application, there had to be "*new elements*" to the claim; but that the submissions of 24th March, 2010, contain no "*new elements*" as such.

20. Section 17(7) requires "*new elements or findings... which significantly add to the likelihood of the applicant qualifying as a refugee...*" to have arisen, or to have been presented, in order for the Minister to allow an applicant to be readmitted to the asylum system and to apply, once again, to be declared a refugee. The submissions of 24th March, 2010, may or may not contain "*new elements*" as required by s. 17(7) of the Refugee Act 1996, as amended. That is an argument for another day. However, the court is satisfied that the existence of an application under s. 17(7) does not prevent the applicants from continuing with the within proceedings where they challenge the decision of the RAT dated 23rd March, 2010.

21. I now turn to consider the grounds advanced by the applicants for challenging the decisions of the RAT in respect of each of them.

Failure by the RAT to consider the submissions of 24th March, 2010

22. Grounds C and K are set out in the applicants' written submissions as follows:

> ? It remains unclear whether the submissions furnished were before the decision maker at a time prior to furnishing the decision to the Applicant. The respondent acknowledged receipt of the submissions on the 25th March 2010 and the decision was sent to the Applicant by letter dated 29th March 2010.
>
> ? The apparent failure of the Tribunal to consider the submissions made by the applicant was in breach of fair procedures.

23. The respondents confirmed that the RAT did not receive the applicants' submissions prior to making its decision. On this basis, the applicants argued that the RAT's failure to have regard to the submissions advanced on their behalf, by letter dated 24th March, 2010, constituted a breach of fair procedures.

24. The chronology relating to the submissions is as follows. On 8th March, 2010, solicitors for the applicants wrote to ORAC stating that they were taking instructions and would "*furnish further submissions in early course*." They asked that ORAC notify them "*two weeks before you make a decision in this regard.*" On 11th March, 2010, ORAC wrote to the applicant's solicitors, stating: "*please submit all documents on which you intend to rely immediately*." It was not until 24th March, 2010, however, that the applicant's solicitors sent in the submissions. Unfortunately for the applicant, the Tribunal member had already made and signed the RAT decision the previous day, 23rd March, 2010. The submissions, therefore, were too late. The applicant was notified of the RAT's decision to affirm ORAC's recommendation that she not be declared a refugee by letter dated 29th March, 2010.

25. The respondent pointed out that pursuant to the Refugee Act 1996 (Appeals) Regulations 2003(S.I. 424 of 2003), all grounds of appeal must accompany the notice of appeal. Section 8(1) provides that: "*An appeal shall be in the form specified in Part 1 of Schedule 1 or a form to the like effect.*" The specified form, in s. 3, headed "*Grounds of Appeal*" states:-

> "*All grounds of appeal and documentation (see section 5 below) on which you intend to rely in your appeal must accompany this notice of appeal and (if applicable) the relevant parts must be clearly indicated accordingly. If you are submitting information which was not available to the Refugee Applications Commissioner, you must state why this was so and also the precise relevance of this information to your case.*"

26. Section 5, which is headed "Documentation", provides:

> "*Please list here all documents and/or records on which you propose to rely for the purposes of your appeal. These documents must accompany this form. Where documentation has already been supplied to the Refugee Applications Commissioner in connection with the investigation of your application, or is otherwise available to the Commissioner, the Commissioner will make it available directly to the Refugee Appeals Tribunal: there is no need for you to provide fresh copies. Please note that all documentation on which you intend to rely and which has not already been supplied to, or is otherwise not available to the Commissioner, must accompany this notice of appeal and (if applicable) the relevant parts must be clearly indicated.*"

The respondent submitted that the applicants had failed to comply with these requirements.

27. The respondent further submitted that the RAT has a statutory duty to act expeditiously, as set out in s. 16(18) of the Refugee Act 1996, as amended, which provides:

> "*(18) The Tribunal shall ensure that an appeal against a recommendation of the Commissioner to which section 13(5) or 13(8) applies shall be dealt with as soon as may be and, if necessary, before any other application for a declaration.*"

28. The respondent submitted that s. 13(5) applied to the applicants' case because ORAC had made two s. 13(6) findings in respect of the applicants:-

> *(i) That they failed to provide a reasonable explanation as to why they did not apply for asylum in the UK;*
>
> *(ii) That they did not provide a full and true explanation about their travel to the State.*

The RAT was therefore obliged to process the applicants' appeals expeditiously.

29. The respondent emphasised that in its letter of 11th March, 2010, the Office of the Refugee Appeals Tribunal specifically asked the applicants' solicitors to "*submit all documents on which you intend to rely immediately.*" Despite this request, the applicants did not submit representations until 24th March, 2010 – thirteen days later, and one day subsequent to the RAT having made its decision. Furthermore, the respondent submitted that the applicants' submissions added nothing new.

30. I am satisfied that responsibility for the RAT's failure to consider the applicants' submissions of 24th March, 2010, lies with the applicants. They were warned on 11th March, 2010, that they needed to put in their submissions "*immediately*", but failed to do so for a further thirteen days. The RAT, which was under a statutory obligation pursuant to s. 16(18) of the Refugee Act 1996, as amended, to act expeditiously, cannot be held responsible for this delay on the part of the applicants. Accordingly, grounds C and K must be rejected.

Failure to consider or decide upon applicants' s. 16(6) application
31. Ground F is set out in the following terms:

> *The RAT erred in law and in fact and breached the principles of natural justice and fair procedures in failing to consider and/or decide upon and/or comply with the request of the Applicant made through her legal advisors that the matter ought to be remitted to the Refugee Applications Commissioner under Section 16(6) of the Refugee Act, 1996, (as amended) to carry out further enquiries.*

32. The applicant submitted that the RAT's failure to address the request made by the Applicant's solicitor by letter dated 24th February, 2010, that the Tribunal remit the matter pursuant to section 16(6) of the Refugee Act 1996 as amended, either prior to or in the impugned decision was in breach of natural justice and fair procedures and of the obligation of the Tribunal to cooperate with the applicants.

33. At the core of the applicants' case that they should be granted refugee status, was their claim that the husband's siblings, including, in particular, T.M., a Zimbabwean opposition politician, were granted asylum in the UK and in other countries, on account of persecution at the hands of the Mugabe regime. The applicants claim that they face a similar risk of persecution and serious harm if repatriated because of these political and family connections.

34. The applicants submitted documentation to ORAC purporting to concern the asylum applications of the husband's siblings in other states. In this regard, counsel for the applicants drew the court's attention to the husband's s. 13(1) report dated 15th May, 2008, where the documents that were submitted are listed, as follows:

> ? Documentation regarding asylum applications of two of the husband's brothers in the UK;
>
> ? Documentation regarding an asylum application from the husband's brother in Canada;
>
> ? Documentation regarding asylum application from brother Brian in the USA;
>
> ? Documentation regarding asylum application from sister Dadirai in the U.K.

35. ORAC stated that it was "*unable to verify the authenticity of these documents*."

36. The applicants submitted that, quite apart from the lies told about their experience in Zimbabwe from 2002 to 2007, when they were in fact in the UK, the above listed documents showed that the applicants were related to persons who had been granted refugee status elsewhere. The applicants submitted these documents were accurate and, if authenticated by ORAC, would go a long way towards indicating that the applicants were entitled to refugee status because of these family connections.

Letter of 24th February 2010 from applicants' solicitors making s. 16(6) request
37. The applicants opened the letter from the applicants' solicitors to the RAT, dated 24th February, 2010. This letter, which followed Clark J.'s refusal of the reliefs sought in respect of the challenge to the ORAC decision, noted that ORAC had found that the documentation submitted could not be authenticated. The letter then continued:-

> *"We are of the view that this is an appropriate matter that should be remitted to the Refugee Applications Commissioner to carry out enquiries as to the relationship of our client's husband with his siblings and the genuineness of the documentation lodged. In view of the fact that most of this documentation relates to correspondence confirming the refugee status of various of our client's husband's siblings we would be of the view that the Refugee Applications Commissioner would be ideally placed to make those enquiries with the relevant authorities in the relevant countries which apparently granted refugee status to our client's husband's siblings.*
>
> *Accordingly, prior to our preparing further grounds of appeal, we would be obliged if you would confirm whether the Tribunal member would be willing to remit the matter under Section 16(6) of the Refugee Act to the Refuge Commissioners to carry out the aforesaid enquiries..."*

38. Section 16(6) provides:

> *"The Tribunal may, for the purposes of its functions under this Act, request the Commissioner to make such further inquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary within such period as may be specified by the Tribunal."*

39. The applicants submitted that s. 16(6) was designed to allow ORAC to carry out further inquiries. They submitted that the RAT ought, therefore, to have remitted the matter to ORAC pursuant to s. 16(6) and to have required ORAC to carry out further inquiries with a view to authenticating the documentation.

40. The applicant then referred to the duty to cooperate, and the duty to assess the applicants' claim, as laid down by Council Directive 2004/83/EC of 29th April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"). This directive was transposed into Irish law by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) ("the Protection Regulations"). The applicant opened Article 4 of the Qualification Directive, the salient parts of which are as follows:

> *"Assessment of facts and circumstances*
>
> *Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.*
>
> *The elements referred to in paragraph 1 consist of the applicant's statements and all documentation at the applicants' disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection."*

41. The applicants stated that the decision maker's failure to comply with Article 4 was where the error arose in this case. He said that the RAT failed to cooperate with the applicants in seeking to authenticate the documentation submitted. The applicants stated that the RAT's failure to comply with the minimum standards set out in the Qualification Directive is the core of their argument as to why the RAT decision should be quashed.

42. The applicants submitted that the Court of Justice ("the CJEU") has interpreted Article 4 in its decision in *MM v. Minister for Justice* (Case C-277/11). That case concerned a preliminary reference from the High Court (Hogan J.) about the duty to cooperate under Article 4. In the course of its judgment, the CJEU provided helpful guidance as to the duties imposed on member states by Article 4. At paras. 65-66 of its decision the CJEU held:

> *65. Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.*
>
> *66. This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.*

43. Placing emphasis on the final line of para. 66, the applicants submitted that this was why the applicants' solicitors, in their letter of 24th February, 2010, said that ORAC would be ideally placed to make further inquiries with a view to authenticating the documentation.

44. In their letter of 2nd March, 2010, in reply to the applicants' letter of 24th February, 2010, the Office of the Refugee Appeals Tribunal stated:-

> *"the matter regarding document authentication will be brought to the attention of the Tribunal Member, who has sole discretion whether or not to remit the question to the Applications Commissioner under Section 16(6) (7) of the relevant Act."*

The applicants submitted that this discretion must be exercised within the bounds of constitutional justice, but that this did not happen in the present case.

45. The applicants submitted that it was not permissible that this documentation showing family relationships to others who have been granted refugee status be met by silence in the decision. Counsel for the applicants stated that this documentation represented the one chance the applicants had of establishing sufficient credibility to secure refugee status. He said that, at the very least, the applicants were entitled to a rejection of the s. 16(6) request before the decision was made.

46. The applicants submitted that instead there was a complete disregard of the fundamental claim regarding family relationships; a disregard of the letter of 24th February, 2010; a disregard of the applicants' right to be heard; and the decision maker disregarded his duty to cooperate imposed by Article 4 of the Qualification Directive. The applicants reiterated their argument that the family connections shown by the documents were vitally important to their claim in light of the brutal nature of the Zimbabwean regime, and said there was a clear duty on ORAC to investigate and to cooperate. Counsel for the applicants added that the applicants' lies have little to do with the underlying question: are these people refugees? The documents showing family connections to other refugees were vital in this regard.

47. Finally, the applicants submitted that if the court was satisfied that the RAT's decision was in breach of the minimum standards mandated by EU law, i.e. as set out in Article 4 of the Qualification Directive, and interpreted at paras. 65 and 66 of the judgment of the CJEU in *MM*, then the decision must be quashed. In this regard, counsel made reference to the judgment of Hogan J. in *MM v. Minister for Justice & Ors* [2013] IEHC 9, where the learned judge quashed the Tribunal's decision on the grounds that it breached the applicant's right to be heard.

48. In reply, the respondents said that the duty to cooperate was a two way process and, in that regard, the applicants were required to tell the truth in their applications. The respondent referred the court to the "*Application for Refugee Status Questionnaire*", where it is stated: "*Providing false or misleading information at any stage may affect your credibility and therefore disadvantage your claim*." It is subsequently stated: "*It is important that you provide full answers to these questions. BE COMPLETELY TRUTHFUL IN THE INFORMATION YOU PROVIDE. Providing false or misleading information at ANY stage may affect your credibility and disadvantage your claim*. [Emphasis in original].

49. Despite these explicit warnings, however, the applicants spun a web of lies in their respective questionnaires and in their respective s. 11 interviews, with a view to deceiving the Irish asylum authorities. As Clark J. observed at paras. 24-28 of her judgment on the applicants' challenge to the ORAC decisions:

> *"24. The applicants appear to have ignored that they have a duty when engaging in the asylum system to cooperate by presenting their account in a truthful manner. Those duties are set out in the form which is provided to all applicants at the initial stages of the process and when applicants are asked to fill out a questionnaire where applicants are warned of the consequences of not telling the truth. Those obligations and consequences are based on the terms of the Refugee Act where s. 11B (f) provides:-*

"11B—The Commissioner or the Tribunal, as the case may be, in assessing the credibility of an applicant for the purposes of the investigation of his or her application or the determination of an appeal in respect of his or her application, shall have regard to the following: […]

(f) whether the applicant has adduced manifestly false evidence in support of his or her application, or has otherwise made false representations, either orally or in writing".

25. Section 11C (1) provides that "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." Section 20(2) further provides:-

"If a person, for the purposes of or in relation to an application under section 8, gives or makes to the Commissioner, the Tribunal, an authorised officer or an immigration officer any statement or information which is to his or her knowledge false or misleading in any material particular, that person shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both."

26. Applicants are made aware of their obligation to tell the truth at all stages of their asylum process. That obligation arises from the Convention Relating to the Status of Refugees 1951 where at Article 5 it is stated:-

"Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

27. Article 11 of Council Directive 2005/85/EC ("the Asylum Procedures Directive") provides:-

"1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application."

28. In this case the behaviour of the applicants in knowingly providing the Commissioner with false and misleading information has all the appearance of criminal behaviour. Their gross misconduct in abusing the integrity of the asylum process would entitle the Court to refuse certiorari. It is deeply offensive to the justice system that applicants who have exploited the refugee system by their conspiracy to deceive should now come to this Court and complain that the system was unfair to them in that the husband was not afforded a second opportunity to admit his lies."

50. The respondent pointed out that the wife only came clean in the second s. 11 interview, when the information about her presence in the UK was put to her. The husband, however, continued to lie at his second s. 11 interview, insisting that it was a coincidence that there was someone in the UK with the same name and details as him, and eventually suggesting that someone was using his identity. In this regard, the respondent again referred the court to the judgment of Clark J., where she held at para. 29, p. 12:

"It is difficult to imagine a greater level of dishonesty where the applicants over extended interviews conspired to deceive with minute and consistent details provided of their maltreatment in Zimbabwe. When the husband eventually admitted that his account was untrue he simply said that he furnished incorrect information to the Commissioner in support of his claim and he regrets that he did so. He did not identify which information is "incorrect" and his only explanation for not applying for asylum in the U.K. is that he and his wife would have been detained separately."

51. The respondent further submitted that both ORAC and the RAT were aware of the applicants' relatives who had successfully sought asylum in other countries. Counsel for the respondent referred the court to question 39 of the wife's second s. 11 interview. Question 39 states:

"Having read your file I do not understand why you and your husband didn't apply for asylum in the UK. Your husband has family in the UK who were granted asylum. Why would you and your husband come to Ireland and apply for asylum instead of joining your relatives in the UK?"

52. The respondent submitted that this question showed that while ORAC was unable to authenticate the various documents submitted in respect of the applicants' relatives' asylum claims in other states, ORAC accepted that the applicant had family members who were granted refugee status in the UK. This being the case, counsel wondered why this court was being asked to remit the documents to ORAC so that the Commissioner could attempt, once again, to authenticate them. The respondent submitted that to do so would be futile.

53. The respondent added that the applicants were informed in May 2008, in the s. 13 report, that ORAC could not authenticate the documentation. Despite this, nothing seems to have been done in this regard between May 2008 and February 2010; no documentation appears to have been obtained in relation to any of the husband's siblings by either applicant. The respondent concluded that there was no basis for the s. 16(6) request in the letter of 24th February, 2010, and there was no reason for saying that the Commissioner should carry out further inquiries. The respondent further submitted that the husband, and not ORAC, was best placed to establish his relationship with his siblings.

54. The respondent argued that the s. 16(6) request was a collateral attack on the s. 13 report of May 2008, but that the couple had already challenged the ORAC decision, and Clark J. had forcefully rejected this application.

55. The respondent submitted that in these proceedings the court is being asked to find that the RAT is obliged to remit the matter to ORAC; and yet, the relief being sought here is not an order of *mandamus*. The applicants are not saying this is an unlawful omission; they are accepting that the RAT was entitled not to do what was requested in the letter 24th February, 2010. Instead, the applicants are seeking *certiorari* of the RAT decision – this point, the respondent suggested, is crucial in understanding that the applicants accept that there was no legal obligation on the RAT to remit the matter under s. 16(6).

56. The applicants took issue the respondent's claim that ORAC had accepted that they had relatives in the UK. The applicants pointed out that this submission was based on the way question 39 in the wife's second s. 11 interview was phrased, but that the s. 13 report contained no indication whatever that ORAC accepted that the applicant had relations who had been granted asylum in the UK or elsewhere.

57. The applicants also took issue with the respondent's submission that ORAC's statement that it was unable to authenticate the documentation meant that it had investigated the documents and did not come up with any results. Counsel for the applicant said

that this cannot be the case, because no reason is given as to why it was not possible to authenticate the documents. Was it, counsel asked, because ORAC had written to the UK but received no reply? If so, this should have been stated in the decision.

58. The applicants submitted that the RAT can, under s. 16(6), remit the matter to ORAC and require the Commissioner to conduct further inquiries and seek further information. Counsel for the applicants said that if the applicants themselves had obtained further documentation with a view to proving their relationship to persons who have been granted asylum elsewhere, ORAC may well have said that it was unable to authenticate these documents also. Therefore, it was reasonable to request ORAC to authenticate the documentation submitted. The applicant submitted that if ORAC had made inquiries, the UK authorities would have replied either to effect that they had never heard of these people, or that these people were granted refugee status on such and such a date. The applicants reiterated that Article 4 sets out the minimum standards mandated by EU law and that the RAT failed to comply with it in this case.

59. The applicants' submissions regarding the s. 16(6) request are twofold. First, the applicants submitted that the RAT ought to have remitted the documents to ORAC for further inquires to be carried out with a view to their being authenticated. Second, the applicants submitted that the s. 16(6) request was greeted with silence in the RAT decision and that this constitutes a breach the applicants' right to fair procedures.

60. In relation to the first complaint, it will be noted that the language used in s. 16(6) is not mandatory. It is clear that the RAT may, in its discretion, choose to remit a matter but it is not obliged to do so. Given that ORAC had already found it was unable to authenticate the documentation, sending the documents back for a further attempt at authentication would, arguably, have been futile.

61. Furthermore, as is clear from the language of Article 4 and from the judgment of Clark J., that the duty to cooperate is a two-way process. Article 4 clearly states:-

> *"Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application."*

62. The elements referred to in this provision,

> *"consist of the applicant's statements and all documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection."*

63. However, these applicants, as Clark J. noted, "*appear to have ignored that they have a duty when engaging in the asylum system to cooperate by presenting their account in a truthful manner*."

64. In light of the applicants' mendacity, it is difficult to see why the RAT should have elected to exercise its discretion under s. 16(6) and troubled ORAC with carrying out further inquiries on their behalf. However, this is to invite speculation, as we do not know the reason why the RAT did not make further enquiries as envisaged by s. 16(6) of the 1996 Act.

65. The applicants' second complaint was that the s. 16(6) request was greeted with silence in the RAT decision, in breach of their right to fair procedures. The RAT makes no reference whatsoever to the applicants' solicitors' letter of 24th February, 2010, in which the applicants make their s. 16(6) request that the documentation be remitted to ORAC for further investigation. The Office of the Refugee Appeals Tribunal's letter of 2nd March, 2010, stated:-

> *"the matter regarding document authentication will be brought to the attention of the Tribunal Member, who has sole discretion whether or not to remit the question to the Applications Commissioner under Section 16(6) (7) of the relevant Act."*

66. It is to be presumed, therefore, that this request was brought to the Tribunal member's attention. While the RAT has discretion under s. 16(6), it is nevertheless obligated to exercise that discretion in accordance with the constitutional requirement of fair procedures. In this regard, the dictum of Murray CJ in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 is of assistance. At paras. 93-94 of his judgment, the learned Chief Justice held:

> *"93. An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and context.*
>
> *94. Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

67. In light of this decision, I am satisfied that there was an obligation on the RAT to state its decision on the s. 16(6) application and to disclose the essential rationale for it. Unsympathetic though these applicants may be, they nevertheless have a right to fair procedures. As the RAT did not adhere to its obligations, as enunciated by Murray C.J., the RAT's decision is defective in this respect.

68. It was an important part of the applicants' case that the husband's siblings had been accepted as refugees deserving of protection in other countries. The applicants submitted some documentation to support this assertion. They asked the Tribunal to remit the matter to the RAT for further inquiries. In the circumstances, the RAT had to come to a decision on this request. The Tribunal was also under a duty to communicate both its decision on the s. 16(6) request, and the rationale behind that decision. It was not sufficient merely to ignore the request and to fail to mention it at all in the Tribunal's decision. The decision of the RAT will have to be quashed on that account.

Deficient assessment of the applicants' claim by the RAT

69. The applicants also challenged the decision of the RAT on the following grounds:

> *A. The RAT erred in law and in fact and in breach of fair procedures in failing to have due regard to for its obligations pursuant to the European Communities (Eligibility for Protection) Regulations of 2006 which gave effect to the EU Council Directive 2004/83/EC of 29th April 2004*

B. In particular, without prejudice to the generality of the foregoing, Paragraph 5 of the said Regulations has not been adhered to.

C. No proper objective or subjective analysis of the Applicant's claim has been undertaken.

D. The RAT failed to weigh appropriately the details given by the Applicant and failed to assess the legal requirements as a matter of law to a well founded fear of persecution.

H. No proper regard has been had to the matters set out in documentation furnished with the Applicant's Notice of Appeal furnished herein and the Decision is invalid.

I. No proper objective or subjective analysis of the Applicant's claim has been undertaken.

J. The RAT failed to weigh appropriately the details given by the Applicant and failed to assess the legal requirements as a matter of law to a well founded fear of persecution.

70. The applicants submitted that paragraphs 5(1)(a), (b), and (c) of the Protection Regulations, which reflect Article 4 of the Qualification Directive, were not applied in the decision making process as they should have been. In particular, the relevant statements of the applicants regarding their family relationship with others granted refugee status elsewhere were not properly considered.

71. Paragraphs 5(1)(a), (b), and (c) of the Protection Regulations provide:

Assessment of facts and circumstances

5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

72. Article 4(3) of the Qualification Directive provides:

The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

73. The applicants submitted that the decision maker's failure to assess relevant elements of the applicants' claim relating to family members who have been granted asylum elsewhere and the corresponding risk of persecution and serious harm posed to the applicants if repatriated to Zimbabwe, on account of these family connections, represented a breach of the minimum standards mandated by Article 4. The applicants submitted that this failure to comply with the minimum standards set out in the Qualification Directive is at the core of their argument as to why the RAT decision should be quashed. The applicants submitted that the core of thetheir claim has never been addressed, i.e. the applicants' claimed relationship to persons who have been granted asylum elsewhere.

74. In reply, the respondent pointed out that the RAT decision had concluded that *"the Applicant has provided manifestly false evidence in support of her application as the Applicant claimed that she had been in Zimbabwe until 2007."* The respondent submitted that this is clearly an Imafu-type finding which, by definition, absolves the decision maker from having to consider country of origin information or any alleged future risk of persecution given that the core claim is wholly disbelieved.

75. The applicants argue that the RAT fell below the minimum standard required by Article 4(3)(b) of the Directive in its failure to consider the applicants' claim that their relatives had been granted asylum in the UK and elsewhere, as a result of persecution suffered in Zimbabwe; and that the applicants, because of their relationship to these people, and in particular their relationship to the husband's brother, opposition MP T.M. (who fled Zimbabwe and was granted asylum in the UK), were at a similar risk of persecution at the hands of the Mugabe regime if returned.

76. In order to decide whether the RAT complied with its obligations under Article 4(3)(b), it is necessary to consider the Tribunal's decisions in respect of each applicant in some detail. In this regard, it is important to recall that, as a result of ORAC's s. 13(6) finding, this was a papers only appeal.

The RAT's decision in respect of Mr. G.M.

77. The RAT's decision in respect of Mr. G.M., sets out the documentary basis of the applicant's claim in the following terms:

The Applicant outlined the basis for his application in his Questionnaire and his Section 11 interview together with submissions on file and the Notice of Appeal dated the 9th of June 2008 together with the Section 13 report and other documents on file, including Country of Origin Information.

78. This is the relevant information upon which the RAT relied in carrying out its assessment. On the basis of this information, the RAT proceeds, in the analysis section of its decision, to make a number of negative credibility findings in respect of Mr. G.M. It finds:

i. That the applicant lied about his time in the UK; that he was, in fact, in the UK from April 2002 (i.e. during the entire period in which he claimed to have suffered persecution in Zimbabwe);

ii. That, having regard to s. 11B(b) of the Refugee Act 1996, as amended, the applicant did not provide a reasonable explanation to substantiate his claim that this is the first safe country he has arrived in since departing his country of origin;

iii. That, having regard to s. 11B(c) of the Refugee Act 1996, as amended, the applicant failed to provide a full and true explanation of how he travelled to and arrived in the State;

iv. That he travelled to a number of countries and that, in light of Clark J's decision in *Alavi v. The Tribunal*, the deliberate choice of state is generally indicative of economic migration rather than genuine flight from persecution;

v. That the applicant gave contradictory answers to questioning in relation to the Home Office report – that he denied having been in the UK, despite the fact that the Home Office report showed that he was in the UK from 2002 to 2007.

The RAT decision concluded that, taking the evidence as a whole, the applicant's story was simply not credible.

The RAT's decision in respect of Ms. R.C.
79. The Tribunal carried out a similar analysis in respect of Ms. R.C. The first 12 pages of the decision in Ms. R.C.'s case are identical to that of her husband. The analysis section, however, makes the following findings:

i. That she was in the UK from 2003 to September 2007, i.e. during the entire period during which she claimed to have been subjected to persecution in Zimbabwe;

ii. That the applicant failed to provide a full and true explanation of how she has travelled to and arrived in the State;

iii. That she travelled to a number of countries and that, in light of Clark J's decision in *Alavi v. The Tribunal*, the deliberate choice of state is generally indicative of economic migration rather than genuine flight from persecution;

iv. That the applicant gave contradictory answers in relation to the Home Office report. The Tribunal member referred to s. 11(B)(f) of the Refugee Act 1996 (as amended) and found that the applicant "*provided manifestly false evidence in support of her application*";

v. That despite contending she is at risk, the applicant returned to Zimbabwe in 2005 for three weeks and did not encounter any problems; the Tribunal member found that this was not indicative of any risk of harm to the applicant if repatriated.

The Tribunal member found that each of the above findings undermined the applicant's credibility. ORAC's recommendation was thus affirmed.

Was the RAT obliged, pursuant to Article 4(3)(b) of the Qualification Directive, to assess the core of the applicants' claim and the supporting documentation, despite the negative credibility findings?
80. The core of the applicants' claim for asylum is that the husband's siblings, including, in particular, T.M., a Zimbabwean opposition politician, were granted asylum in the UK and other countries, on account of persecution suffered at the hands of the Mugabe regime. In this regard, the applicants claim that they face a similar risk of persecution and serious harm if repatriated because of these family and political connections. As can be seen from the RAT's decisions, the Tribunal member did not assess this core aspect of the applicants' claim; nor did he assess or refer to the documentation submitted in support of this aspect of the claim. The question is: was the Tribunal obliged to do so by Article 4(3)(b) of the Qualification Directive, as the applicants have contended?

81. I am of opinion that while the Tribunal did not accept the narrative as told by the applicants that they had suffered persecution in Zimbabwe due to their relationship with T.M. in the period from 2002 to 2007, it was still obliged to assess the core claim made by the applicants that they would suffer persecution if returned to Zimbabwe due to their relationship to T.M. and their perceived support for the MDC.

82. To this end, the Tribunal was obliged to assess whether the applicants were related to T.M. and, if so, how they might be perceived in Zimbabwe and whether on account of such perception they might face persecution. The Tribunal did not carry out this inquiry, which it ought to have done. To this extent, the Tribunal was obliged to carry out a forward-looking test. It did so to some extent in the wife's case by holding that her safe return to Zimbabwe for three weeks in 2005 was not indicative of a fear of persecution and on that basis she could safely return to that country. However, such analysis did not constitute a proper forward-looking test in the wife's case. No such test was carried out in the husband's case. On this account, the decision of the RAT will have to be quashed.

Conclusion
83. The RAT's failure to even refer to the applicants' request pursuant to s. 16(6) that the documents concerning the applicants' family members be remitted to ORAC for further investigation, and for failing to provide reasons for its decision not to do this, constitutes a defect in the Tribunal's decision. The applicants are entitled to an order for *certiorari* on this account. In addition, the Tribunal failed to carry out any adequate forward looking test as to whether the applicants would be persecuted if returned to Zimbabwe due to their claimed relationship to T.M. and their perceived support for the MDC. Accordingly, I will quash the decisions of the RAT dated 23rd March, 2010, in respect of each applicant, and remit both matters to the RAT for further consideration.