Neutral Citation: [2017] IEHC 163

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 279 MCA]

BETWEEN

S.A.S.

APPELLANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2012 No. 280 MCA]

BETWEEN

A.A.S.

APPELLANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Stewart delivered on the 20th day of January, 2017.

1. The cases currently before the Court are joint statutory appeals pursuant to s. 21 (5) of the Refugee Act 1996 (as amended) against the decision of the respondent to revoke the appellants' declaration of refugee status.

2. Section 21 of the Refugee Act 1996 (as amended) sets out the conditions for the revocation of refugee status and recourse to the High Court in the form of an appeal against the Minister's decision, which is the subject of these proceedings. It is worthwhile reciting the relevant section hereunder:

"Revocation of declaration

21.—(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—

…

(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular, the Minister may, if he or she considers it appropriate to do so, revoke the declaration.

…

(3) (a) Where the Minister proposes to revoke a declaration under subsection (1), he or she shall send a notice in writing to the person concerned of his or her proposal and of the reasons for it and shall at the same time send a copy thereof to the person's solicitor (if known) and to the High Commissioner.

(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the issue of the notification, make representations in writing to the Minister and the Minister shall—

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) send a notice in writing to the person of his or her decision and of the reasons for it.

(4) (a) A notice under subsection (3)(a) shall include a statement that the person concerned may make representations in writing to the Minister within 15 working days of the issue by the Minister of the notice.

(b) A notice under subsection (3) (b) (ii) shall include a statement that the person concerned may appeal to the High Court under subsection (5) against the decision of the Minister to revoke a declaration under subsection (1) within 15 working days from the date of the notice.

(5) A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration.

(6) A person concerned shall not be required to leave the State before the expiry of 15 working days from the date of notice of a proposal under subsection (3) and, if an appeal is brought against the decision of the Minister, before the final determination or, as the case may be, the withdrawal of the appeal.

3. Article 14 of the Qualification Directive, 2004/83/EC provides:

"3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

[…]

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status."

4. Regulation 11 of the EC (Eligibility for Protection) Regulations, 2006 (S.I. 518 of 2006) provides:

"Refusal to grant or to renew or may revoke a declaration […]

11(2) Where—

(a) paragraph … (h) of section 21(1) of the 1996 Act applies, as respects a person to whom a declaration has been given,

(b) a person to whom a declaration has been given misrepresented or omitted facts (including through the use of false documents) and this was decisive for the granting of the declaration, […]

the Minister shall, without prejudice to section 21(2) of the 1996 Act, revoke or, as the case may be, refuse to renew the declaration."

Background

5. The appellants state that they are cousins, who arrived in the State as unaccompanied minors in December, 2005. They applied for asylum on 9th December, 2005. S.S., the first-named appellant, claimed that he was a Somali national from Ras Kiamboni, born on 31st January, 1989. He claimed that his parents were killed when he was a child and that he moved to Koyama, where he lived with his uncle and cousin, the second-named appellant in these proceedings. The second-named appellant, A.S., stated that he was a Somali national from Koyama and was born on 12th December, 1989. Both appellants stated that they had travelled from Koyama and arrived in Mombasa, Kenya on 26th November, 2005, with A.S.'s father and younger brother.

6. The appellants stated that they travelled from Koyama to Mombasa by boat on 26th November, 2005, where they stayed with a friend of A.S.'s father. They stated that the family was arrested by police for failure to produce documents, detained for a few days and released upon payment of a bribe by the father's friend. The appellants, through A.S.'s father, organised travel to Ireland with the assistance of an agent. A.S.'s father and brother returned to Kayama and the two cousins left for Nairobi, stating that they travelled by airplane, transiting through an unknown country and arriving in Ireland on 2nd December, 2005.

7. The appellants applied for asylum on 9th December, 2005. As both appellants were sixteen years old at the time, their applications were dealt with pursuant to s. 8(5) of the Refugee Act 1996 (as amended), which states as follows:

"(5) (a) Where it appears to an immigration officer that a child under the age of 18 years, who has either arrived at the frontiers of the State or has entered the State, is not in the custody of any person, the officer shall, as soon as practicable, so inform the Health Service Executive and thereupon the provisions of the Child Care Act, 1991, shall apply in relation to the child.

(b) Where it appears to the Health Service Executive, on the basis of information available to it, that an application for a declaration should be made by or on behalf of a child referred to in paragraph (a), the Health Service Executive shall arrange for the appointment of an employee of the Health Service Executive or such other person as it may determine to make an application on behalf of the child."

8. The Refugee Applications Commissioner issued a negative recommendation in respect of both appellants, notified to A.S. on 15th March, 2006, and to S.S. on 21st March, 2006. Both decisions were issued separately and cited issues with personal credibility where the decision-maker did not accept that the appellants were from Somalia. Both appellants appealed these negative recommendations to the Refugee Appeals Tribunal. Both appellants were issued with positive recommendations from the Refugee Appeals Tribunal, dated 24th July, 2006, in two separate decisions from the same Tribunal Member.

9. It would appear from a series of e-mails exhibited during the course of these proceedings that the Investigations Liaison Unit of the Refugee Applications Commissioner used the Eurodac procedures to check A.S.'s fingerprints with the UK authorities when he applied for Irish citizenship in 2011. This check resulted in a match with a Tanzanian national. As a result of the match, S.S.'s fingerprints were also checked through the Eurodac system, which matched another Tanzanian national according to the UK records. The information from the UK authorities stated as follows:

1. A.S. and S.S. applied for a UK visit visa on 29th April, 2005, using Tanzanian passports, with their father named as sponsor. This would make them brothers.

2. Their stated father was also applying for a visit visa and listed the appellants as his son and nephew.

3. The visas were refused due to discrepancies between the father/uncle's application and a previous application made by him.

4. The appellants made another application for UK visit visas on 30th June, 2005, using the same Tanzanian passports. They were sponsored by a company based in the UK. A.S. and S.S.'s dates of birth were given as 1st January, 1989 and 30th June, 2006, respectively. There was also a slight variation in A.S.'s first name.

5. Both appellants were issued multi-trip visas in Dar es Salaam at the British High Consulate, where both appellants were allegedly interviewed and fingerprinted. The stated purpose of the visa was to enable both appellants to visit the UK with their father, A.A., who was born on 1st January, 1963.

6. The visit visits were valid from 30th June, 2005, to 30th December, 2005. Neither visa was ever used.

7. The applicants' interviews were stated to be a tier 1 interview in the case of A.S. and a tier 3 interview in the case of S.S.

10. By letter dated 25th January, 2012, an official from the Ministerial Decisions Unit of the Irish Naturalisation and Immigration Service (INIS) corresponded with each of the appellants and informed them of the Minister's proposal to revoke their declarations as refugees. The reason for these proposals will be set out in full in due course, but it was primarily due to the information received from the UK Border Agency. The Minister now believes the appellants to be Tanzanian nationals who provided false information during the asylum process to secure a grant of refugee status. Both appellants subsequently obtained Somali birth certificates, which were submitted to the department officials on 21st February, 2012. Within the same submission, the appellants, through their solicitors, set out reasons for which the revocations should not occur. The letter stated that, because the appellants are Somali nationals, they had no choice but to travel on fraudulently obtained documents procured from an agent in Kenya with their family's help.

11. By letter dated 4th April, 2012, the official at the Ministerial Decisions Unit set out, *inter alia*, as follows to the appellant's solicitors (p. 226 of S.S.'s booklet):

> *"In your letter dated 21st February, 2012, you stated that your clients contacted an agent in Kenya who did all the necessary arrangements for their travel to Europe, including the procurement of a Tanzanian passport and UK visas.*
>
> *As a result of these representations further enquiries were made with the UK authorities regarding the procurement of visas in Tanzania. Please find enclosed copy of letter received which confirms that at the time of your clients' application for a UK visa, all visa applicants were required to attend in person in order to receive their visa. This clearly contradicts your clients' testimony. The submission of the birth certificate does not negate these facts.*
>
> *In addition, the following questions were put to the UK authorities regarding your client in particular:*
>
> *- Would checks have been done at the time on passports for possible forgeries particularly in cases where the passports were non-biometric passports?*
>
> *A. Yes, there would have been checks. Also, both applicants were interviewed as part of the process. A.S. had a Tier 1 interview and S.S. had a Tier 3. The latter would have been more rigorous than the former, but all the basic stuff would have been covered in person.*
>
> *- Was fingerprinting required by the UK in 2005 for visa applicants applying in Tanzania?*
>
> *A. No, as per original letter it commenced in 2007.*
>
> *- If so, can the UK confirm whether the fingerprints for both these applicants were taken in Tanzania?*
>
> *A. We did some trialling of fingerprints in Tanzania, commencing in 2004/05, but it became mandatory in 2007. It does look as though prints may have been taken as part of the trial activity as there is nothing else recorded against which such a match could have been made.*
>
> *- In 2005 did visa applicants have to present themselves at the BHC in Dar es Salaam either to apply or to collect visas?*
>
> *A. Yes, and as above, both were interviewed at this time. They also both made visa applications on 29th April, 2005 – both refused – using the same passports."*

A letter from the UK Border Agency was enclosed with the letter setting out details of the above, dated 4th August, 2011, predating the above correspondence by some eight months.

12. The appellants' solicitors replied by letter dated 4th May, 2012, requesting copies of all enquiries made to the UK Border Agency in respect of the appellants. The letter states, *inter alia,* that because the UK had initiated the biometric passports after the appellants' visas were procured, there were failures in the process and the system was open to fraud at the time that the visas were granted. The letter also states that it may not have been the appellants but other persons that attended the British High Consulate that day.

13. The official at the Ministerial Decisions Unit responded by letter dated 17th May, 2012, enclosing therewith e-mails from the UK Border Agency confirming that the appellants' fingerprints were taken at the British High Consulate in Dar es Salaam in 2005, as part of a trial process. The appellants' solicitors responded by letter dated 5th June, 2012, wherein it was stated that the appellants have no recollection of attending said office or being in Dar es Salaam. Therein, it was proffered that the unknown location the appellants stopped in while travelling from Nairobi to Dublin could have been Dar es Salaam, where the visas may have been organised. The letter also stated that the appellants were very young at the time, were following the instructions of their father/uncle and later the agent, and if they had a valid visa for the UK, they would have gone there to claim asylum instead of illegally entering Ireland. The appellants then submitted letters from the Somali Association of Ireland attesting to their nationality as Somali, and their active participation in the Somali community in the State.

14. On 13th June, 2012, the Ministerial Decisions Unit's Higher Executive Officer prepared two documents setting out her recommendation that both appellants' refugee status be revoked. These five-page documents, exhibited at p. 307 of S.S.'s booklet and p. 257 of A.S.'s booklet, set out the background and reasons for her recommendation. These documents were then signed and approved by an Assistant Principal Officer on 28th June, 2012, a Principal Officer on 22nd July, 2012, and the Minister's secretary on 4th August, 2012.

Revocation decision

15. The appellants are appealing the respondent's decision to revoke their refugee status, as notified to them by letters dated 13th July, 2012. The reasoning was identical in both revocations. Therefore, both appellants are joined for the purposes of the within proceedings. The letter sent to S.S., exhibited at p. 380 of the booklet, sets out as follows:

> *"I am directed by the Minister for Justice and Equality to refer to your declaration as a refugee in accordance with s. 17 of the Refugee Act 1996 (as amended). I refer also to the Minister's earlier proposal to revoke your refugee status in accordance with the provisions of s. 21 of the same Act. For the reasons set out in his proposal to revoke letter, dated*

25th January, 2012, the Minister has decided in accordance with s. 21 of the Refugee Act, 1996 (as amended) to revoke your declaration as a refugee. Specifically the Minister is invoking s. 21(1)(h) of that Act to revoke the declaration on the grounds that you a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular.

1. You failed to disclose the fact that you were granted a visa for the UK.

2. You provided false or misleading information in a material particular during the course of your asylum claim stating that you are a national of Somalia when in fact all credible evidence indicates that you are in fact a citizen of Tanzania.

3. You were granted refugee status on the basis of your assertion that you were a Somali national of Bajuni ethnicity.

4. No credible evidence has been provided to indicate that you are other than a Tanzanian national.

You provided false and misleading information in a material particular during the course of your asylum claim stating that you are a Somali national of Bajuni ethnicity.

All credible evidence available to the Minister indicates that you are in fact a Tanzanian national.

Before making his decision, the Minister took into account all information on file, including all representations received by or on your behalf.

As your refugee status is now revoked, the letter issued to you on 31st August, 2006 declaring you to be a refugee is no longer valid. Please return the original document post haste. Please return any Convention travel documents issued to you, as you are no longer entitled to hold same.

You may appeal to the High Court under s. 21(5) of the Refugee Act 1996 (as amended) against the decision of the Minister within 15 working days of the date of this notice. The United Nations High Commissioner for Refugees, Daly Lynch Crowe & Morris, your solicitors and the Garda National Immigration Bureau have been informed of the Minister's decision and of the reasons for it."

Appellants' submissions

16. Counsel for the appellants, Mr. Colm O'Dwyer S.C. with Mr. James Buckley B.L. submitted that the interpretation of s. 21(h) of the Refugee Act 1996 (as amended) in light of the provision that Article 14 of the Qualification Directive should be interpreted as set out by Cooke J. in *Gashi v. Minister for Justice Equality & Law Reform* [2010] IEHC 436, wherein he states at para. 25:

> *"[T]he question to ask is whether the application for protection would have been determined differently had the information not been misrepresented or concealed."*

Therefore, the appellants argued, the burden of proof for the purposes of the appeal rests on the respondent; it is for the respondent to prove that the applications would have been determined differently, that is, they would or should have been refused had the information about the visa applications been known. The appellants contended that the function of the Court is to assess whether the respondent has proved that there are new elements and findings, which would demonstrate that the applications for protection would have been determined differently had the information been before the decision-maker at the time.

17. The appellants submit that the fact of the fingerprint match is not necessarily contested. Rather, they allege that the match is not a conclusive indication that the appellants are Tanzanian and that the application for refugee status would have been determined differently had the information regarding their visas been put before the decision-maker. It is also submitted that the quality of the material relied on the respondent is undermined by the fact that checks performed prior to the grant of refugee status did not give rise to the disputes and alleged inconsistencies currently before the Court.

18. The appellants argue that there were evidential flaws and a breach of basic fair procedures in the decision because the documents provided to the appellants as the basis for the decision were heavily redacted. It is also alleged that, upon appeal, only a fraction of the redacted information was provided, much of it inadvertently. Therefore, the appellants submit that they were never informed of all of the evidence before the respondent when she made the final decision and that all the information has still not been disclosed. The appellants rely on Cooke J.'s decision in *Saleem v. Minister for Justice Equality & Law Reform* [2011] IEHC 55 in arguing that the respondent is under an obligation to make full and fair disclosures.

19. The appellants contend that this is a case where the respondent was both the authority obtaining the evidence relied upon and the decision-maker and cite the principle of *nemo iudex in causa sua*.

20. The appellants further submit that the evidence from the un-redacted e-mails shows that the first visas application made on the Tanzanian passports were refused on foot of inconsistencies in evidence, yet applications were granted only two months later to those same people. It is alleged that they were granted without a stated reason and that other paperwork, including interview records, was not retained.

21. The appellants further submit that the documents indicate that A.S. had a Tier One interview and S.S. had a Tier Three interview. They point to publicly accessible information, which indicates that the Tier Three process is a visa for unskilled workers, but that the type issued was a visit visa. Further, the appellants argue that the Tier One skilled migrant visa would not be appropriate for a minor, which A.S. was at the time. The appellants submit that the procedures applicable to Tanzanian nationals at the time that the visas were granted contradict the narrative put forward in this instance. A letter from the UK Border Agency, exhibited at p. 228 of S.S.'s booklet, states that the relevant procedures for visa applicants at the time usually involved making an application in person and attending the following day for interview, at which point they would be told when to expect a decision. In the present case, it would appear that the application, interview and decision all occurred at the same day. As a result, the appellants argue that the respondent has not proved her case, namely, that the appellants are Tanzanian. According to the appellants, the evidence put forward demonstrates the failures in the Tanzanian visa system in operation at that time.

22. The appellants point out that the passports were not biometric and that fingerprints taken for the visa applications are in no way linked to the passports. The appellants argue that there was no evidence before the Court that either appellant is the holder of a

valid Tanzanian passport and no checks appear to have been made with Tanzanian officials as to whether the passports were genuinely those of Tanzanian nationals (it often being the case that agents procure false documents to facilitate travel). The appellants also submit that, throughout the asylum process, they spoke and understood only the Bajuni language, which sees wide use only in Somalia and among the Somali refugee and diaspora communities in Kenya. The appellants submit that the test to be followed in deciding if one is from the Bajuni clan reflects the test set down in K.S. (*minority clans – Bajuni – ability to speak Kibajuni) v. Secretary of State for the Home Department* [2004] UKIAT 00271. In that case, the Tribunal stated at para. 36:

> *"This case exemplifies the need at present for a distinction to be maintained between:*
>
> *(i.) Membership of a clan where the background evidence does not support a conclusion that there is generally a risk of persecution arising from membership of that clan even though on the particular facts of the case an individual claimant may be able to establish a claim on the basis of his own particular background and profile, and*
>
> *(ii.) Membership of a minority clan where membership generally does give rise to real risk subject to the particular circumstances of the claimant. In such a case, while each claim must be individually considered, the claim will normally depend on whether in fact the claimant is genuinely a member of that minority clan."*

It continues at para. 39:

> *"The present appeal follows within the second category. The issue is whether the appellant is genuinely a Bajuni. Mr. Sheikh in his submissions has accepted that if the appellant is Bajuni and if his account of events in Somalia is correct, then he is entitled to asylum. On assessing a claim to be a member of the Bajuni clan, the issue of language is of considerable importance. The adjudicator clearly regarded the language spoken by the appellant as a critical indicator of his credibility"*

The Tribunal then states at para. 43:

> *"What is needed therefore in cases in which claims to be Somali nationals and Bajuni clan identity are made is first of all:*
>
> *(i.) an assessment which examines at least 3 different factors;*
> *a. knowledge of Kibajuni*
>
> *b. knowledge of Somali depending on the person's personal history, and*
>
> *c. knowledge of matters to do with life in Somalia for a Bajuni (geography, customs, occupations etc.).*
>
> *But what is also needed is,*
>
> *(ii.) an assessment which does not treat any one of these 3 factors as decisive: as the Tribunal noted in Omar … it is even possible albeit unusual that a person who does not speak Kibajuni or Somali could be a Bajuni."*

In relation to the foregoing test, the appellants submit that it was not disputed by the Refugee Appeals Tribunal that they both speak Kibajuni and have knowledge of the Somali coast.

23. The appellants submit that they were not required at any point to undergo detailed language analysis testing and that it was accepted throughout the process that the appellants spoke Kibajuni. The appellants argue that the quality and materiality of the information is at issue in this case. It is submitted that the respondent's investigation should be more concrete and thorough in order to ground a decision to revoke refugee status. The appellants also rely on the decision of MacEochaidh J. in *A.A. v. Minister for Justice and Equality* [2013] IEHC 355, where he states at para. 40:

> *"In my view it was incumbent on the decision maker to weigh these reports before rejecting the claims made. In essence, the decision maker should have balanced the evidence from the UK that the applicant was Tanzanian with the evidence from the language reports that he was Somalian. This exercise never occurred. In my view the conclusions reached in the absence of this exercise are unlawful."*

The appellants argue that it is incumbent on the Minister to balance the evidence that they are Somali with the evidence that they are Tanzanian. It is also submitted that the mere fact of involvement or awareness in these visa applications is not, of itself (setting aside a finding that they are or are not of Tanzanian nationality), sufficient to ground a revocation.

24. The appellants further argue that, notwithstanding the fact that the respondent cannot prove that the appellants are Tanzanian, the non-disclosure of travel routes by the appellants would not be enough to warrant a revocation in the terms of s. 21(1)(h). The appellants rely on two previous decisions of the Refugee Appeals Tribunal, made by the same Tribunal member who decided the appellants' case. In those cases, it is alleged that the applicants were given the benefit of the doubt, despite inconsistencies in their stories and in particular their travel to the State. The appellants further relied on the decision of *M.M.A. v. Minister for Justice Equality & Law Reform & Anor.* [2009] IEHC 217, in which Clark J. ruled that credibility findings pursuant to s. 11B(c) could be made, but their standalone status could not sustain a decision.

25. Finally, it is submitted that the suggestion that the appellants should simply apply for asylum again is flawed.

Respondent's submissions

26. Counsel for the respondent, Mr. Robert Barron, S.C. with Ms. Sinead McGrath, B.L. submit that the arguments put forward relating to the burden of proof resting with the respondent are incorrect, particularly in light of the decision of MacEochaidh J. in *Hussein v. Minister for Justice & Law Reform* [2014] IEHC 130, wherein he states at para. 41:

> *"The burden is on the appellant to demonstrate that the Minister's conclusion is incorrect. I reject the appellant's argument that the Minister bears a burden to establish that his decision is correct."*

The respondent further argues that the appellants erred in submitting that the respondent bears the onus of proving that the asylum application would have been refused had the information in relation to the visas and passports been known by the Tribunal Member. The respondent contend that it is for the Court to determine whether or not the false or misleading information had a direct bearing on their claims and/or taints their claims in a material respect.

27. The respondent submits that the country of origin, nationality and background of an applicant is central to the asylum process; because the appellants claimed a fear of persecution in Somalia due to direct attacks by members of the Hawiye clan targeting individuals of Bajuni ethnicity, both their identity and location were central to the claims. The respondent draws the Court's attention to inconsistencies in the appellants' statements to the asylum authorities and the evidence in general. The respondent submits that the appellants were holders of Tanzanian passports and UK visas. Moreover, the respondents submits that they were present in Tanzania before coming to the State; they applied for UK visas on two occasions, attended the British High Consulate in Dar es Salaam for interview and collected their visas. The respondent argues that, if this information had been before the Tribunal Member, it would have been open to him to have concluded that, irrespective of their ethnicity, they had not been living on Koyama had not fled danger or persecution. Thus, this misrepresentation had a direct bearing on the claims presented.

28. The respondent relies upon the decision *Gashi (supra),* where Cooke J. addresses the interpretation of Regulation 11(2) of S.I. 518 of 2006 as follows at paras. 23 – 26:

> *"23. The Court does not accept that the provision should be so narrowly construed. In the view of the Court the expression "decisive for the granting of refugee status" is used so as to require refugee status to be revoked where it is clear that the decision to grant it would not have been made had the true full facts been known. Thus, the provision covers the misrepresentation or omission of facts which are directly relevant to the assessment of the application for international protection.*
>
> *24. In this regard it is to be noted that Article 4.1 of the Qualifications Directive recognises the duty of every applicant for protection to "submit as soon as possible all elements need to substantiate the application for international protection". Amongst the "elements" thus required to be submitted are statements and all documentation at the applicant's disposal regarding, inter alia, "identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes…" etc. (Article 4.2). It is on the basis of these "elements" that the facts and circumstances upon which the application for protection is based will be assessed. In other words, the decision to grant or refuse refugee status is based upon such information. The information in question forms the basis on which the decision is made and is "decisive" in that sense. As already indicated, it is clear that had it been known at the time that the applicant had made an asylum application in the UK; given a false name; been in the United Kingdom for longer than he admitted and arrived in the State other than by the truck from the continent, the assessment of the application would necessarily have been materially different including, in particular, the evaluation of the applicant's truthfulness and credibility. The concealment and misleading information must necessarily, therefore, have a bearing on the decision.*
>
> *25. Although the connotation of the word "decisive" in English could be said to make it open to the interpretation of the provision contended for by the applicant, the Court notes that the use of that term in the English text of the Qualifications Directive is not so precisely reflected in other language versions. The misrepresentation or omission of facts is, for example, qualified in the French text in the phrase: "ont joué un role determinant dans la decision d'octroyer le statut de refugié". The corresponding phrase in the Italian text has the same sense: "ha costituito un fattore determinante per l'ottenimento dello status di rifugiato". Thus the question to ask is whether the application for protection would have been determined differently had the information not been misrepresented or concealed. In the judgment of the Court it is thus immaterial whether the revocation is based upon paragraph (h) as incorporated in Regulation 11(2)(a) or on sub-paragraph (b) and it is therefore unnecessary to consider the argument made to the effect that it was not competent for the Regulations to continue to permit recourse to paragraph (h) of s. 21(1) having regard to the exhaustive effect of Article 14.3 of the Qualifications Directive in stipulating the mandatory grounds for revocation.*
>
> *26. It is accordingly clear to the Court that the declaration of refugee status obtained in 2001 was indeed tainted by misrepresentation and omission of facts and no doubt or dispute can now be raised as to that fact. That being so, this Court could not direct the respondent to withdraw the revocation. In the first place, even if there was some basis for questioning the adequacy of the information from the UK Border Agency relied upon by the respondent, no purpose would be served by directing the withdrawal of the revocation because the respondent would, effectively, be compelled to make a fresh revocation decision based upon the new information, having regard to Regulation (2)(b) and to the now mandatory character imparted to paragraph (h) of s. 21(1) by Regulation 11(2)(a) of the Regulations."*

29. The respondent argued that the appellants provided false and misleading information which was directly relevant and/or material to their claims, and this is shown in the grounding affidavits and representations. The Refugee Applications Commissioner did not accept that the appellants were from Koyama and the Refugee Appeals Tribunal determined that the appellants "may or may not be" Somali and afforded the benefit of the doubt to them. The respondent submits that these misrepresentations had a clear bearing on their asylum decisions and that the test for revocation is satisfied.

30. In regards to the claimed evidential flaws, the respondent argues that insofar as the appellants perceived that there was a lack of fair procedures when the previously redacted e-mails were provided in an un-redacted form in these proceedings, the appeal (namely, this set of proceedings) cures any alleged lack of fair procedures. The respondent contends that the appellants' submissions that the visas issued in June does not make sense for the reasons detailed above and further directly contradicts the grounding affidavits. At p. 14 of S.S.'s booklet and para. 11 therein S.S. avers as follows:

> *"I travelled to Ireland on a passport which was not mine. The only way a Somali can travel to and enter Europe by air is by using documentation which is not theirs or which is counterfeit […] the fact that I travelled on a Tanzanian passport which was not mine does not conflict with this because, as I have said, using someone else's passport is the only way I could fly to Europe because I am Somali."*

31. The respondent argues that the examination of the files addressed the appellants' birth certificates. It is also submitted that the appellant's proficiency in Kibajuni is irrelevant considering the number of persons of Bajuni ethnicity living in Kenya and Tanzania. The respondent argues that the only verifiable evidence before the respondent was the passports, whereas the appellants have not brought any clear or comprehensive evidence before this Court that the appellants are anything other than Tanzanian nationals. Here, counsel referred to *Nz.N. v. Minister for Justice and Equality* [2014] IEHC 31 and *Adegbuyi v. Minister for Justice Law Reform* [2012] IEHC 484 and *Gashi (supra).*

Decision

32. With regard to the question of discharging the burden of proof in these proceedings, I am satisfied that the burden of proof rests upon the appellant, as contended for by the respondent. This matter has previously been considered by MacEochaidh J. in the decision of *Hussein (supra)* and in the decision of this Court in *F v. Minister for Justice & Equality* [2016] IEHC 551. In that case, I

concurred with the finding of MacEochaidh J. that the burden of proof rests on the appellant and that the appellants in those proceedings were incorrect in their submission that the burden of proof rested on the Minister in an application such as this.

33. With regard to the scope of the appeal, this matter was dealt with by Cooke J. in *Gashi (supra),* and was cited with approval in *F. (supra).* The Court also cites with approval Clark J.'s decision in *Nz.N. (supra*), where she states at para. 34:

> *"It is not the function of the court to determine whether the applicant is a refugee or whether she should have been declared a refugee. The issue is whether the Minister correctly revoked that status because she provided false and misleading information to the Commissioner which was instrumental in her recognition as a refugee".*

34. This matter has been dealt with by way of affidavit evidence only. It was open to the appellants to adduce clear and comprehensive evidence for the Court to establish that the respondent was incorrect in arriving at the decision to revoke their refugee status. However this opportunity was not availed of. At the hearing before the Court, the appellants accepted in their respective affidavits that they travelled to the State using Tanzanian passports and visas. The appellants assert that the passports were fraudulent and that they were their only means of travelling to this jurisdiction. They said that they do not have to prove definitively that they are not Tanzanian nationals. It seems to me that the weight of the evidence which the Minister has put before the Court does not support this proposition. The appellants were holders of Tanzanian passports in 2005, which were accepted as valid by the British High Commission in Dar es Salaam and stamped with visas for the United Kingdom (having been sponsored by a U.K. shipping company, Holbud Limited). They travelled to the U.K. on those visas and entered this State illegally in December, 2005. They then applied for asylum in this jurisdiction, claiming that they were Somali nationals.

35. In arriving at its decision, the Court has paid particular regard to the applicants' failure to disclose details of the passport visas they had used to travel, which they now say were fraudulently obtained and are in some way irrelevant to the matters which the Minister had to decide. In the course of their asylum application, they provided no identity documentation whatsoever. It is also of relevance to the Court's decision that the applicants gave different accounts of their involvement with the U.K. Border Agency during the revocation process. The decision-makers were satisfied that they had withheld information and had only seen fit to divulge that information when faced with unequivocal proof of their applications for U.K. visas and the fingerprinting that had taken place at the British High Commission in Dar es Salaam. The appellants produced Somali birth certificates during the revocation process. This contradicted the position they adopted during the asylum process, in which they indicated that they had no identity documents whatsoever.

36. This appeal falls to be determined on the basis of the Court reaching a conclusion as to whether or not the asylum application would have been decided differently if the information which is now before the Minister had been before the Tribunal Member when the RAT decided to afford the benefit of the doubt to the appellants in respect of ORAC's refusal of their application for refugee status. I am satisfied that the content of this new information and, in particular, the appellants' failure to disclose information during the asylum process related to the Tanzanian passports is and would have been central to their application for refugee status. If the appellants are not Somali nationals, their claims during the asylum process of persecution based on that nationality are simply untrue. In my view, the appellants have not discharged the burden of proof needed to warrant this Court's interference with the Minister's decision to revoke the appellants' refugee status. It must be borne in mind that these events were triggered by an application for citizenship by A.S. and that the information contained in the passports suggests that the appellants are in fact brothers (rather than cousins). The evidence can lead to no other conclusion than that the Tribunal member would have decided the appeal against ORAC's decision differently, had all the information been put before them.

37. For the reasons outlined above I would refuse reliefs sought.