Neutral Citation Number: [2010] IEHC 188

THE HIGH COURT

2008 804 JR

A. M. S. J.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 18th day of May, 2010

The applicant who states that he is a national of Somalia has sought asylum in the State. An appeal was brought by him from an unfavourable recommendation by the Office of the Refugee Applications Commissioner ("ORAC") stage, but was unsuccessful and the Refugee Appeals Tribunal ("R.A.T.") in a decision dated 2nd May, 2008, dismissed the appeal. By order of 19th January 2010, Clarke J. granted leave to the applicant to seek judicial review of that decision. She did so, on a single ground. The ground on which leave was granted was that "Ms. O'Brien [the Tribunal Member] failed to consider whether the civil war would have a differential impact on the applicant in his capacity as a minority clan member and whether that impact could amount to a risk of persecution within the meaning of s. 2 of the Refugee Act, 1996".

The circumstances giving rise to the issue which is identified in the decision to grant leave is that the applicant has stated that he was born in Somalia in 1950 and is a member of the Ashraf Clan, a minority clan in Somalia, sometimes referred to as the Benadiri clan. His claim for asylum in Ireland was presented on the basis of a fear of persecution at the hands of the Hawiye Clan Militia, the Hawiye being a much more powerful clan. An account he gave of the circumstances that led him to leave Somalia referred to a large number of separate outrages to which, he said, that he and members of his family were subjected.

The negative recommendation issued by ORAC was essentially based on adverse credibility findings. In particular doubts were expressed in the s. 13 report, about whether the applicant was in fact a member of the Ashraf Clan.

An oral appeal hearing took place in February 2008, at which the applicant was legally represented, but a negative decision was subsequently issued.

As is not unusual in the case of applicants for asylum claiming to be from Somali and to be members of a minority clan, a significant focus of attention centred throughout the proceedings on whether the applicant was in fact from Somalia and was in fact a member of the Ashraf Clan. This issue was resolved in a manner favourable to the applicant at the RAT stage, in that the Tribunal Member commented that the appellant appeared to have a considerable knowledge of the background and other factors relating to the Ashraf Clan, and that she was certainly not in a position to doubt his credibility from the answers that he provided.

The Tribunal Member's approach to the wider question of credibility was a slightly unusual one. Having commented that it was difficult to believe many aspects of the applicant's account, and then proceeded to list quite a number of them, she commented that she was well aware that if she relied upon on any of these elements or implausibilities, and made a negative credibility finding on that basis, that her decision would be judicially reviewed in the High Court. Accordingly, she stated that she was constrained to accept the applicant's account at face value.

In a situation where the Tribunal Member felt constrained from reaching a conclusion adverse to the applicant on general credibility issues, though it seems implicit in the decision that she would have wished to do so had she felt that was open to her, she turned her attention to the objective element of the test for refugee status and addressed the question of what was facing the applicant if returned to Somalia.

In the course of the R.A.T. hearing, the Tribunal Member informed the parties that she had accessed two country of origin reports with a view to relying on them. These were the UK Home Office *Report of Information Gathering Mission* 27 – 30 April 2007 of the 17th May, 2007, (the "Information Gathering Report") and a Border and Immigration Agency Country of Origin Information Report Somalia of the 12th November, 2007 (the "Country of Origin Report"). A certain amount of confusion surrounded the second of these documents in that two documents the first, the Country of Origin Information Report and the other, the UK Home Office Operational Guidance Note (The "Operational Guidance Note") document were published on that same day. While initially it was believed by the applicant, that the Tribunal Member was referring to the Operational Guidance Note when putting certain matters to the applicant it now seems accepted that the document sourced by her was the Country of Origin Report.

Arising from her research, the Tribunal Member put it to the applicant that country of origin information now suggested that the situation had changed, in that members of the Darod Clan were in power, and that the Hawiye themselves were now being targeted.

As this aspect of the R.A.T. hearing and decision is at the heart of the present proceedings, it appears useful to quote the paragraph dealing with this issue in full:-

> "He states that if he returns he will be killed, as people will think he has money. The Applicant states that he will continue to be targeted as a member of a minority group. It was put to the Applicant by the Tribunal Member that the country of origin information now suggests that the situation has changed, such that the members of the Darod Clan are in power and that the Hawiye themselves are now being targeted, it was put to the Applicant that there was no evidence that minority clans were being targeted in the same way as they had been prior to the recent upheaval. It was put to the Applicant that it would appear it would be safe for him to return, as there was no evidence that Ashraf were being targeted in this struggle. The Applicant states that all minority members would still get caught in the crossfire of the fighting between these two clans."

Elsewhere in the decision the Tribunal Member addressed the same issue. On this occasion she did so in these terms:-

> "I did point out to the Applicant that the current country of origin information points to the targeting of the Hawiye Clans by the Darod, and that accordingly, it was difficult to understand how the Hawiye Clans would be in a position to exert the same influence that they had previously, in particular insofar as targeting minority clans would be concerned. The

> Applicant however claims that he would be caught up in the crossfire. It is indeed acknowledged in the country of origin information (up-to-date) that many minority clans are being caught up in the crossfire, however, this is in the context of everyone else being caught up in the crossfire of the fighting that is occurring between the Darod and the Hawiye."

Ultimately, the Tribunal Member decided to refuse the appeal and she did so in these terms:-

> "As is apparent from the above, the situation is one of chaos, however, there is no evidence to suggest that members of the Applicant's clan are being targeted, indeed the situation now is that the predominantly Darod TFG [Transitional Federal Government] members are exacting revenge on the Hawiye and that clans which were normally hostile to each other have joined forces against the common enemy – the Ethiopians and Darods.
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> While anyone being returned to Somalia will most likely encounter difficulty simply because of the current situation, that is not to say that members of the Applicant's clan are disproportionately affected by the hostilities so as to warrant a conclusion that there is a reasonable likelihood that an Ashraf will face persecution because they are Ashraf, the current country of origin information does not support such a conclusion. While that may have been the case when the applicant left his country, that is not the case now."

Insofar as the basic premise of the Tribunal decision was that the Ashraf Clan or group (there seems some disagreement in the country of origin information as to which is the more correct term) was no longer being targeted, the conclusion by the tribunal member was one that was fully justified by the information available to her. In the case of *H.H. and Others v. The Home Secretary,* [2008] UKAIT 00022, a determination of the Asylum and Immigration Tribunal in the United Kingdom on which heavy reliance is placed by the applicant, the Tribunal there embarked on a remarkably detailed assessment of the current situation in Somalia. This involved a four day oral hearing, at which a number of experts in relation to the situation prevailing in Somalia were called, and there was an exchange of what would seem to have been extremely elaborate written submissions. At para. 293 of the determination the following comment is made:-

> "… whatever else the evidence may show, the security situation in Mogadishu and its immediate environs is currently incapable of being characterised as one where majority clans are actively targeting minority clans or groups for persecution."

It may be noted that the applicant's case is that he is from Mogadishu and specifically from the Shangani District, a locality mentioned in the country of origin reports as an area of particular difficulty.

So, that targeting of the Ashraf is no longer an issue, is not in dispute. However, that is not necessarily the end of the matter because, as the tribunal member recognised, a very difficult situation prevails in Somalia and specifically in Mogadishu. A situation of internal armed conflict has long raged there. In the case of *Adan* [1998] 2 W.L.R. 702, the leading authority on the whole area of refugee protection in situations of armed conflict, to which I will be referring, Lord Slynn of Hadley at p. 705 referred to the situation then prevailing as one where "law and order has broken down" and, "…where every group seems to be fighting some other group or groups in an endeavour to gain power". While, there have been a number of significant developments since then, such as the withdrawal of the United Nations (UNOSOM), the intervention by Ethiopia, the emergence of the Union of Islamic Courts (UIC) to take control of the capital only to be ousted by Transitional Federal Government (TFG) and Ethiopian Forces, one might be forgiven for thinking, on the basis of the country of origin reports included with the papers that little, if anything has changed since Lord Slynn made his comments.

The case of *Adan* is authority for the proposition that killing, torture and ill treatment incidental to a civil war and more specifically, to a clan and sub-clan based civil war, will not give rise to a well-founded fear of being persecuted and so, to an entitlement to refugee status when the asylum seeker was at no greater risk of such ill treatment by reason of his clan or sub-clan membership than others at risk in the war situation. It must be appreciated that the *Adan* case does not require decision makers dealing with applicants claiming refugee protection on the basis of exposure to an armed conflict to reject such a claim out of hand, nor indeed does it permit decision makers to reject their claim in such a manner. The *Adan* case jurisprudence requires that consideration be given to the distinction between the ordinary risks of clan warfare on the one hand, unattractive as that concept is, and cases involving a "differential impact". It is for that reason that Clarke J. granted leave on the basis that there were substantial grounds for contending that the Tribunal Member failed to consider whether the civil war would have a differential impact on the applicant in his capacity as a minority clan member and whether that impact could amount to a risk of persecution. This case has proceeded on the basis that the differential impact test is the one that applies in Ireland.

The respondents have addressed this question by saying that yes, indeed, the tribunal expressly considered whether or not the civil war in Somalia would have a "differential impact" on the applicant in his capacity as a minority clan member. It is accordingly necessary to consider the decision of the Tribunal Member in some detail to consider whether that is so, and if so, to what extent the Tribunal Member considered the question of differential impact. I say "whether and to what extent" because it seems to me that the reference to "failing to consider" in the order granting leave must be read as a reference to "failing to consider adequately". If there was a requirement to consider the issue of differential impact, obviously that can be satisfied only by proper and adequate consideration.

It may be said that the Tribunal Member did not receive much assistance at the hearing from the applicant as to how this issue was to be addressed, or as to the conclusions that should be reached following consideration. With the benefit of hindsight it would certainly have been preferable had the applicant and his advisors sought an adjournment so as to have a full opportunity to consider the issue and to make submissions in relation to it. However, it is easy to say this in hindsight, and I entirely exempt from blame the applicant's legal advisors at the hearing who must have been quite surprised that the hearing was taking such an unexpected direction.

If one looks at the decision of the R.A.T., there is no specific reference in the analysis section to the "differential impact test" or to that line of jurisprudence. The decision includes the usual lengthy recital of the legal background to the decision, much of which has no direct relevance to Mr. J.'s application, does not contain any specific reference to the legal issues that arise as a result of situations of internal armed conflict.

However, on behalf of the respondents, it is said that some of the language used in the decision is consistent only with a situation where the Tribunal Member had the "differential impact" test in mind. There is no doubt that some of the language of the decision and, in particular, the reference to the situation facing the applicant, having to be seen in the context of everyone else being caught in the crossfire, and the reference to the absence of disproportionate effect, is consistent with the Tribunal Member having this issue in mind. As against that, the reference on a number of occasions to minority clans not being targeted as they once were is somewhat

suggestive of the fact that the Tribunal Member was posing to herself the question of whether Ashraf clan members were being targeted. If the Tribunal Member was of the view that the absence of targeting precluded a grant of refugee status, then she was in error.

It would seem helpful to look at the country of origin information that was available to the R.A.T. to see what clues emerge as to the extent of the consideration given by the Tribunal Member.

As is not unusual when it comes to country of origin information, both sides have been able to point to passages in the same document that they say support their respective positions. So, the respondent draws attention to part of para. 20.14 of the Country of Origin Report. The portion to which the respondents draw attention is in these terms:-

> "The Danish Refugee Council and the Danish Immigration Service, in their Joint Fact Finding Mission report on human rights and security in central and southern Somalia, published August 2007 noted:-
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> > 'Hibo Yassin, Regional Co-ordinator, Cooperatione per lo Sviluppo dei asei Emergenti (COSPE) explained that minority populations in Somalia, *i.e.* members of ethnic minority groups and members of clans being in a minority position are no longer victims of targeted looting and other targeted human rights violations. However, it was added that any person in Somalia who does not enjoy strong clan protection because he or she is from a weak clan or minority group has to keep a low profile.'"

In contrast, the applicant draws attention to the provisions of some of the surrounding paragraphs and says that anyone reading these paragraphs and giving consideration to them in terms of whether they established or suggested that the Ashraf would experience a differential impact could not have concluded that there was no differential impact. The applicant says that this leads to the conclusion that the proper test was never applied by the Tribunal Member. So, attention was drawn to sections of para. 20.11, where it is stated:-

> "The [USSD] United States State Department Report for 2006 and the [JFFMR] Report of the Joint British Danish and Dutch Fact-Finding Mission December 2000 reflect that politically weak social groups are less able to secure protection from extortion, rape and other human rights abuses by the armed militia of various factions. As stated in the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) Minorities Study of August, 2002:-
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> > 'In a country where there is no national Government that would be responsible for safeguarding and upholding the rights of minority groups, Somalia minorities are truly in a vulnerable position.'"

Attention is drawn to para. 20.13 where there is a reference to a UNHCR Report by independent expert Ghanim Alnajjar, dated the 13th September, 2006, which contains the following statement:-

> "They [members of minority clans] are prohibited from inter-marrying and often face discrimination in accessing the limited social services that exist in Somalia, and are as well targeted for all forms of harassment and violence."

The applicant takes issue with the use made by the respondent of the reference to the Joint Fact Finding Mission Report of the Danish Refugee Council and the Danish Immigration Service pointing out that the same paragraph, 20.14, relied on by the respondent, makes the point that a member of an ethnic minority group who does not enjoy strong clan protection has to keep a low profile and that such a person should never be outspoken or express political opinion openly or he or she will have to go into hiding or conceal his/her identity. The point is made in that paragraph that during the period of UIC control, members of minority populations were in a much better position and some were even able to reclaim property, however, this is no longer so. Instead the report comments that "everyone is now under threat and many are afraid, not least members of minority groups". Reference is made to the greater difficulty experienced by minority groups when they seek to obtain blood compensation.

The applicant draws attention to the fact that para. 20.15 of the Country of Origin Report sourced by the Tribunal Member notes the same report, (the JFFM Report) as recording that OCHA (Office for Coordination of Humanitarian Affairs) and NOVIB, which I understand to be the Dutch arm of Oxfam, continue to regard minorities in Somalia as vulnerable and targeted.

The applicant attaches particular significance to a statement in the same report that:-

> "Looting of humanitarian aid from minorities still continues and that members of minority groups are also more vulnerable during armed conflicts as they do not have the same access to medical treatment and hospitals as many others have. Members of minority groups also find it harder to flee and move around to escape the fighting, as they are not as easily accepted in new surroundings as is the case for many other IDP's from major clans. IDP's from more influential clans, often have a better chance of being tolerated in the area to which they have fled."

It seems to me that there is sufficient material in the documentation indicating that the situation for members of minority clans, and Ashraf clan members in particular, is a particularly difficult one, and that, if the member was concluding that there was, in fact, no differential impact then one might have expected a more specific reference to the issue and an explanation as to how the conclusion arrived at was reached. Given the ongoing situation in Somalia and given the acceptance by the Tribunal Member that the applicant was a member of the Ashraf clan, it goes without saying that the issues under consideration could scarcely be more serious.

The issue of whether the Tribunal Member considered whether the Civil War gave rise to differential impacts was, of course, central to the decision to grant leave but I do not ignore that Clark J. appeared to have a view on the matter and to have been of the view that there was indeed a failure to consider the position of civilians who are minority clan members caught up in the crossfire. At para. 15 of her judgment of 19th January, 2010, she comments:-

> "The Tribunal Member quoted from extracts in the U.K. Home Office *COI Report* and there is no dispute that she quoted correctly. However, it is her conclusions and her failure to consider the position of civilians caught up in the crossfire who were minority clan members which are contested."

One must be cautious about an over-analytical or over-linguistic approach to the judgment, particularly a leave judgment, but it does appear from this paragraph that Clarke J. was accepting that there had in fact been a failure to consider the position of minority clan members.

It is useful to consider the conclusions reached in the *H.H.* case to which I have referred. That was a case where the members of the

Immigration Appeals Tribunal were considering the situation in Somalia, apparently with a view to offering guidance, as is the practice in Britain, to other decision makers. In doing so, one has to exercise caution because there was an amount of expert evidence before the Tribunal which was obviously not available to the R.A.T. member. However, reading the United Kingdom Asylum and Immigration Tribunal ("UKAIT") determination it appears that this aspect of the decision relating to the position of members of the Ashraf clan was to a considerable degree grounded on the country of origin information, and it appears that the information relied on was the same as was accessed by the Tribunal Member.

UKAIT considered the specific issue of the position of a member of the Ashraf clan at paras. 306, 307 and 308 of the determination. The UKAIT emphasised that a division between minority and majority does not represent a bright line on one or other side of which every clan must fall. It went on, however, to observe that being an Ashraf will still usually be a significant step on the path to establishing a claim to international protection while making the point that the evidence before them pointed towards a less mechanistic approach to the consequences of being an Ashraf or other minority group member than may have been thought necessary previously. The Tribunal posed to itself this question - what, then, of a person who is found to be an Ashraf (or other such minority) from an area that has not accepted her or would not accept her in such a way as to offer any requisite protection? It answered the question by saying that "notwithstanding the fact that the minority population of Mogadishu are no longer the victims of targeted looting and other human rights violations at the hands of majority militias they did not see how it could properly be said that the return of a lone Ashraf did not result in that individual facing a real risk of serious harm, referring specifically in that regard to the findings of the UN Commissioner on Human Rights, that members of minority groups found it harder to flee and to move around to escape fighting, because they were not as easily accepted in new surroundings which fell to be contrasted with displaced persons from majority clans, who often had a better chance of being tolerated in the area to which they had fled". These observations would seem to have their origin in para. 20.13 of the report of the 12th November 2007, which, as we have seen, was a document sourced by R.A.T. It will be noted that the language of UKAIT was quite unequivocal – commenting that it did not see how it could be said that the return of a lone Ashraf did not involve the applicant being at risk of serious harm.

At para. 308 of the determination UKAIT posed a further question to itself asking whether, assuming the feared serious harm was persecutory, the risk contained any sufficient differential impact as to engage the Refugee Convention. The Tribunal answered its own question by explaining "it is because the person has no identifiable home area and thus, a community in which she could find protection, that she is particularly vulnerable to criminality, both within the area itself but also, in the event of displacement for security reasons, by reason of having nowhere to go other than an IDP camp or some roadside refuge". The UKAIT continuing that this state of affairs directly related to her minority status. The Tribunal then stated that applying the principle enunciated in *Adan* that they were satisfied that the differential requirement would be met and that such a person (male or female) would be a refugee, as well as succeeding under Article 3 of the ECHR.

Counsel for the respondent has cautioned that there are risks involved in over-relying on the approach taken in *H.H.*. He points out that there was great volume of evidence available to the UKAIT that was not available to the decision- maker in the present case. That is a point that is well made but it seems to me reading the *H.H.* judgment that this aspect turned largely on consideration of country of origin information. He points to the fact that the applicant, whose situation was under consideration in *H.H.* was female, and says that, therefore, the reference to the fact that a person male or female would be a refugee is obiter. The first point to be made is that it is of course the situation that the decision of the UKAIT was not binding on the R.A.T. and even more obviously is not binding on the High Court, so in that sense the entire determination was persuasive but it is the extraordinarily careful and detailed manner in which the assessment of the situation in Somalia was approached that makes the decision of value. It must also be appreciated that it is apparently the practice of the Asylum and Immigration Tribunal in Britain, to deal with a cluster of cases together giving rise to similar issues so that the determination that emerges offers guidance for other cases. The determination was prepared with a view to providing general assistance.

In support of his contention that it is unlikely that there was any detailed consideration of the issues raised by the fact of a situation of internal armed conflict prevailing where the tribunal member had the correct test in mind, Counsel points to the assessment of the available information undertaken by the United Kingdom Home Office and says this is instructive.

The Operational Guidance Note deals with the issue at paras. 3.5.5 and 3.5.6. It does so in these terms:-

> "Information provided by the Foreign and Commonwealth office in January 2007 about the fluid country situation following the ousting of the UIC indicates that the risk to personal safety for the vast majority of Somalis, whether affiliated to majority or minority clans, is the same and that individuals are not targeted simply on the basis of their ethnicity. This view of the current situation should not however detract from previously held information which indicates that clan alignment and the associated support networks remain the cornerstone of Somali society. While for the vast majority of Somalis clan status may not in itself risk mistreatment, the Benadiri or Bravanese are not only outside the clan system and cannot rely on a patron clan's support but also continue to be isolated and given their "lowest of the low" status are vulnerable to discrimination and exclusion wherever they reside…in general, Benadiri (Rer Hamar) and Bravanese based in southern or central Somalia are culturally and ethnically distinct from Somali clan families and are unlikely to be able to secure protection from any major clan family."

For this purpose it appears that references to Ashraf and Benadiri are, as I understand it, effectively interchangeable. The Operational Guidance Note was, of course, not the document which was accessed by the Tribunal Member and there are limitations as to the use that can now be made of it. However, insofar as it was published on the same day as the document was that was accessed, it is a further straw in the wind, or a further indication that the information available to the Home Office was not such as to establish an equality of risk across Somalia such that, it could not be said that any group suffered a differential impact and accordingly, that no one was entitled to refugee status.

In seeking to identify what would be the likely outcome of a careful and detailed consideration of whether the position of majority and minority clans can be differentiated with a view to identifying whether that careful and detailed consideration in fact took place, it is useful to bear in mind how clans come to be categorised as majority clans or minority clans. It appears from the opening sentence of para. 122 in the United Kingdom Immigration and Asylum Tribunal determination in *N.M.*, 31st March 2005, that a majority clan can be characterised as one which has its own militia. Having referred to this designation in the course of the determination in *H.H.*, the UKAIT observed that the evidence before the Tribunal did not indicate that majority clans had lost their militias or had otherwise become unprotected, and that accordingly, the distinction drawn in *N.M.* between majority clans and minority clans and groups continued to hold good both in Mogadishu and the rest of Southern Somalia. Without laying any claim to any particular expertise in relation to the security situation in Mogadishu, the question does seem to arise whether there is a distinction to be drawn between the position of a member of an unarmed clan or group and someone who is a member of a clan having its own armed militia.

Counsel for the respondent emphasised, in particular, the fact that having observed that the question had to be asked whether the

risk contained any sufficient differential impact, the UKAIT then reformulated the question by saying "in other words, assuming that the feared serious harm is persecutory, could it be said to be "by reason of the persons membership of the Ashraf"? He says this willingness to assume that the harm was persecutory was an assumption that could not and ought not to have been made, and that it invalidates all that follows. With respect, this seems to me to misunderstand what UKAIT was seeking to do. In this sentence it was doing no more than recognising that the situation in Somalia was a very dangerous and difficult one and the Tribunal was, in effect, saying assuming that the situation reached an intensity that, were it not for the fact that it was due to the ordinary risks of civil war that it would be said to amount to persecution, there was present the element of differential impact so as to engage the Convention.

Counsel for the respondent has suggested that the claim now advanced on behalf of the applicant is speculative in nature. He referred in particular to the European Court of Human Rights decision in the case of *Vilvarajah & Ors v. United Kingdom*. [1991] E.C.H.R. 13163/98. The applicant countered by referring to another ECHR decision, the case of *Salah Sheekh v. The Netherlands*, a judgment of the 11th January, 2007. I do not find these decisions particularly helpful. *Vilvarajah* establishes that a mere possibility of ill treatment is insufficient to give rise to a breach of Article 3 and as much was specifically acknowledged in the *Salah Sheekh* case, when consideration of very detailed evidence from a number of sources that was available to the court persuaded it that, as of that time, that it was foreseeable that the return of members of the Ashraf minority to relatively unsafe areas of Somalia would expose the applicant returnee to treatment in breach of Article 3. However, it is a case that very much turns on the assessment by the court of the situation as of a particular time and it cannot be seen as laying down any immutable principles. In passing it may be noted that the documents referred to by the court included an earlier edition of the UK Home Office Operational Guidance Notes for Somalia to the one referred to above. However, as we have seen the situation in Somalia is a constantly changing one, and too much significance cannot be attributed to the view formed as of a particular time. The remarks of Hopper L.J. in *A.G. (Somalia) v. Home Secretary* [2006] E.W.C.A. 1342, when he commented "a week is not only a long time in politics but it is also a long time in the life of a country as sad and war torn as Somalia" come to mind.

It does seem to me that in one sense that any asylum application involves some degree of speculation. One is looking forward, trying to assess what is likely to happen or what is the real risk of something happening in the future. However, making an assessment of what the future holds is by no means confined to asylum cases and that is a task that has to be undertaken in very many areas of the work of the courts. Predicting how an injury will progress, what impact it will have on individual's future career in the personal injuries list, or whether an applicant for bail will stand trial are examples that come immediately to mind. Obviously, no one can foretell the future and trying to predict what will happen in Somalia is a particularly difficult task, but the documentation available puts a decision-maker in a position to assess whether an applicant is at real risk of persecution.

On behalf of the respondent it has been argued that this is not a situation that fits comfortably within the asylum process and that rather than seeking asylum that it is a matter that would fall more appropriately to be considered in the context of subsidiary protection and humanitarian leave to remain. It is, undoubtedly the case, that if the stage is ever reached that an application for humanitarian leave to remain or subsidiary protection comes to be determined that these would require the most careful consideration. However, while the applicant might be in a position to advance a very strong claim for subsidiary protection, or humanitarian leave to remain in the future it does not mean that he is not entitled to have a satisfactory consideration of his asylum application.

Having carefully considered the decision I am left in some doubt as to whether there was ever any detailed consideration of the specific question of whether the situation in Somalia would have a differential impact on members of the Ashraf Clan or whether the reference to disproportionate impact was merely in the nature of a general, almost passing, observation. In these circumstances I am satisfied that the justice of the situation is best met if the situation is reconsidered. I am reaching my decision with some reluctance because I am very conscious that the Tribunal Member's approach to this case was a particularly diligent one and it is very much to her credit that she took the initiative in seeking out information on the up-to-date situation in Somalia. Had she had the advantage of argument on behalf of the applicant and by the presenting officer addressing specifically this question of differential impact, her task would have been made a great deal easier and it is very likely that her treatment of the issue would have more developed and more complete.

In conclusion, I am left in a position of uncertainty as to whether the tribunal member applied her mind to the differential impact test, and indeed the exercise I have engaged in leads me to the view that it is on balance more probable than not, that she did not advert to the test, and that the reference by her to the absence of disproportionate effect and to everyone being caught up in the cross fire, were merely observations made in the context of saying that there was no targeting taking place. If that is so, then there was no adjudication on whether the applicant's particular circumstances were such that he was entitled to refugee status, even in the absence of being targeted. Accordingly the decision cannot stand. I am, of course, expressing no view on what conclusions should be reached when the issue of differential impact comes to be specifically considered.