THE HIGH COURT

BETWEEN

[2012 No.986 JR]

O. S.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL,

MINISTER FOR JUSTICE AND EQUALITY,

ATTORNEY GENERAL AND

IRELAND

RESPONDENTS

Judgment of Ms. Justice Faherty delivered the 15th day of December 2015.

1. This is a telescoped hearing in which the applicant seeks leave for judicial review and an order of *certiorari* quashing the decision of the second named respondent which affirmed the recommendation of the Refugee Appeals Commissioner not to declare him a refugee.

Extension of Time
2. A short extension of time required and the court was satisfied to grant same.

Background
3. The applicant claims that he is a Muslim of the ethnic group Soninke or Sara Khole. He was born in Mauritania on 25th February, 1977. In 1989, a conflict arose between Mauritania and Senegal which included the specific targeting of black people. The applicant's parents fled either to Mali, a refugee camp or to Senegal. They did not want the applicant to go with them due to the danger so he went to live with his friend's family. He lost all his documents in the conflict and did not thereafter apply for a Mauritanian passport. It was impossible for him as a black African and a member of the Soninke tribe to obtain identity documents in Mauritania. He made a living selling fish on the beach at a market in Rosso, which is a fishing port. The circumstances in which he came to leave Mauritania were as follows: He was in a relationship with a named woman, who was also a market trader and who sold cosmetics. He was not married to this woman. She became pregnant. The applicant feared for the consequences as under Sharia law he would be killed. With the agreement of his girlfriend he decided to flee Mauritania. He bought a passport from a named businessman for which he paid 3,500,000 CFA, money he saved from selling fish together with a sum of money given to him by his girlfriend. She also fled the country and he has since tried to contact her without success.

4. The applicant left Mauritania by boat and went to Spain. From there he travelled to Italy by train, accompanied by the businessman. After two nights in Italy, the applicant and the agent flew to Ireland. On arrival, the applicant was arrested at Dublin airport and indicated his wish to seek asylum on 4th April, 2012. He claimed that if he returned to Mauritania he would have his hands and legs amputated and suffer further mutilation because he was in breach of Sharia law.

Procedural History
5. The applicant arrived in the state on 3rd April, 2012 bearing a passport issued by the Republic of Guinea-Bissau and bearing a name hereinafter referred to as OA.

6. A s. 8 interview took place in Dublin Airport recorded by a GNIB officer on 4th April, 2012 and another was recorded by the Office of the Refugee Appeals Commissioner (ORAC) on 10th April, 2012. The GNIB version states that the applicant is OA and that his country of origin is Republic of Guinea Bissau. The accompanying asylum application form contained the same information, but stated the applicant's address as "Mauritanie". In the s. 8 interview by ORAC, the applicant gave his name as OS, his date of birth as 25/02/1977 and his nationality as Mauritanian, his place of birth was stated as Rosso, Mauritania. He completed a questionnaire on 11th April, 2012 in French, subsequently translated. He gave his name as OA and place of birth Mauritania and nationality as Mauritanian but in *an addendum* claimed that his real name was OS.

7. The applicant was interviewed pursuant to s.11 on 1st May, 2012.

ORAC refused the application for asylum by letter dated 12th June, 2012.

Commissioner's Principal Findings

- There were serious credibility concerns in relation to the applicant's assertion that he was a national of Mauritania. The applicant did not display an adequate knowledge in relation to basic questions about his alleged home of Rosso. In addition, he did not produce identity documents to indicate that he was a native of Mauritania.

- The applicant, despite going out with his girlfriend for 18 months, did not know her date of birth and was unaware if she had any siblings. This gave rise to credibility concerns about his relationship.

- The applicant stated that he decided to leave Mauritania as soon as his girlfriend informed him she was pregnant. He stated that she did not show him any medical evidence and he was unaware if she subsequently gave birth. It was considered unlikely the applicant would flee based on one conversation with his girlfriend.

• The applicant failed to give a valid reason for his failure to apply for asylum in the first safe country following his departure from his country of origin.

8. The applicant appealed the Commissioner's recommendation on 3rd July, 2012. The appeal submissions by the Refugee Legal Service (RLS), his then solicitors, asserted, *inter alia*, as follows:-

• The ORAC erred in law. The applicant had a well-founded fear of persecution in Mauritania because of his political opinion/imputed political opinion, particular social group, his race and his religion.

• The applicant truthfully presented a plausible account which did not contradict generally known facts about Mauritania and was therefore on balance, capable of being believed.

• The authorised officer erred in inaccurately characterising the grounds upon which asylum was sought.

• Information given by the applicant on his questionnaire and in the s.11 interview was not appropriately assessed. In particular, the finding of the RAC that the applicant was from Guinea-Bissau was fundamentally erroneous.

• The applicant displayed a sufficient knowledge of Mauritania.

• With reference to *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *Sangha v Immigration and Naturalization Service* 103 F.sd 1482; and *Raul Rodolfo Lira Pastene Immigration Appeal Board Decision* M79-1132, it was submitted that the applicant, in contravening Mauritanian law, was likely to be attributed a political opinion in opposition to the authorities within Mauritania.

• The applicant established to a reasonable degree of likelihood that he was a refugee within the meaning of section 2 of the Refugee Act, 1996 (as amended).

• State protection was not available to the applicant in Mauritania, nor was internal relocation an option.

• The authorised officer failed to have regard to any or have any adequate regard to the difficulties which the applicant may have experienced in obtaining documents and in regard to those documents actually submitted.

• The authorised officer allowed his personal beliefs to affect the application of the legal criteria in assessing the claim.

• The authorised officer failed to have any or analyse adequate regard to cultural differences.

• The section 13 report and recommendation of the authorised officer was unsustainable in the light of country of origin information.

• The authorised officer failed to afford the benefit of the doubt in accordance with Paras. 196 and 204 of the UNHCR Handbook.

• Adequate regard was not had to the cumulative effect of the applicant's experiences as envisaged by Paras 53 and 201 of the UNHCR Handbook and the effect which those experiences had upon the applicant, forcing him ultimately to leave Mauritania in late March, 2012.

9. The RAC erred in the following:

i. Did not perform its duty of investigation and inquiry under the shared burden of proof sufficiently. In particular, its finding that the applicant was from Guinea-Bissau was fundamentally flawed.

ii. Institutional bias, as the approach taken was adversarial rather than supportive and inquisitorial.

iii. There was a failure to properly summarise the applicant's case.

iv. Failed to consider the definition of "persecution" An applicant does not have to have suffered persecution in order to fall within s. 2 of the Refugee Act.

v. The findings relating to the applicant's lack of knowledge in relation to basic questions about Rosso, his lack of knowledge of his girlfriend's background, his actions in fleeing without medical evidence of pregnancy, and his failure to apply for asylum in the first safe country were errors of law. These were not put to him so he could respond, in breach of his right to fair procedures, thus, the adverse findings were based on conjecture

• The authorised officer failed to have any or due regard to the relevant country of origin information.

• There was no analysis of the burden of proof or standard of proof and it was failed to be considered whether there was a reasonable degree of likelihood that the applicant would be persecuted on his return to Mauritania.

• Regard was not had to the issue of refoulement contrary to Article 33 of the Convention relating to the Status of Refugees and Section 5 of the Refugee Act, 1996 (as amended).

• The authorised officer failed to have any or any adequate regard to violations of the applicant's rights or the reasonable belief that he would be exposed to more violations of his rights if he were to return to Mauritania.

10. In the letter from the RLS dated 4th July, 2012, which accompanied the appeal submissions, the Tribunal was called upon to verify the passport with the Guinea-Bissau authorities.

11. A similar request was made on 1st August, 2012, calling on the "*Irish State authorities*" to produce the passport to the Guinea-Bissau authorities "*to ascertain who is the rightful holder of the said passport"*.

12. The appeal came on for hearing on 9th August, 2012 during which the applicant's legal representative again requested that the

passport be submitted to GNIB "*to see if it is a genuine passport"*. Pursuant to s.16 (6), the Tribunal duly requested ORAC to have the passport examined as to its authenticity and on 19th September, 2012, ORAC wrote to the Garda Technical Bureau in this regard.

13. The Garda Technical Bureau issued its report on 24th September, 2012, which was duly forwarded by ORAC to the Tribunal on 3rd October, 2012.

The report reads:-

"…***Questioned Republic of Guinea-Bissau Passport in the name [OFH]***

Purpose of Examination:

To determine if the questioned document is genuine.

Examination Equipment Used:
Stereo Microscope

A stereo microscope is a microscope that captures two distinct images, one viewed by each eye, which the brain integrates into a three dimensional view of the subject.

Video Spectral Comparator

A Video Spectral Comparator (VSC) is a piece of equipment incorporating various light sources (ultra-violet, infra red, transmitted blue and green lighting) and filters, which allow an examiner differentiate inks and substances, to visualize hidden security features or faded handwriting and to reveal alterations on a document.

Examination & Results

I examined the questioned document with the stereo microscope and the VSC. There was only limited genuine reference material available pertaining to this type of passport. I found that it contains the various security features that should be present in a genuine document of this type, i.e., ultra violet features, watermark, micro-print and certain printing techniques. I found no evidence of any alterations.

Conclusion

In my opinion, the questioned document appears to be a genuine Republic of Guinea-Bissau passport."

14. On 26th October, 2012, a copy of the report was sent to RLS, and on 6th November, 2012, the RLS furnished submissions in respect of the report on behalf of the applicant. These are referred to more particularly elsewhere in the judgment.

15. The decision of the Tribunal, dated 6th November 2012, issued to the applicant on 13th November, 2012.

The Tribunal's analysis
16. The Tribunal's principal findings were:-

• The passport the applicant used to enter the country, based on the GNIB report, was in fact his own passport. Therefore, any claims that the applicant was from Mauritania were held to be not truthful, credible or capable of being believed.

• Ignorance on the part of the applicant of basic facts about his alleged place of birth further undermined the credibility of the applicant's assertion to have been born and to have lived all his life in Mauritania.

• The applicant's alleged inability to be specific about the date of any of the alleged events in his story seriously undermined his credibility.

• The applicant's claim that he left his country purely on the basis of one conversation with his girlfriend and his ignorance of any pertinent details was not credible and not capable of being believed.

17. The credibility findings are more fully set out elsewhere in the judgment.

Grounds of Challenge
18. The grounds being pursued are:

i. The Tribunal erred in law in maintaining a known incorrect name and country of origin when determining the applicant's appeal.

ii. The Tribunal erred in law in determining the applicants appeal substantially on the basis of adverse credibility findings in

-placing complete reliance upon the opinion of the Garda Technical Bureau that the false passport used for travel by the applicant was an unaltered authentic document

-placing complete reliance upon the said opinion as if it were an unreserved opinion, when it was a heavily qualified opinion;

-failing to confirm the authenticity of the passport with the issuing authority, which facility was readily available, and in circumstances where the issue became of such central importance;

-failing to adequately consider the country reports referable to the applicant's country of origin and supportive of the applicant;

-failing to weigh in the balance the geographical and political knowledge disclosed by the applicant;

-failing to consider explanations for perceived inconsistencies and/or failing to state any reason for the rejection of such explanations as were proffered.

iii. The Tribunal erred in law in failing to consider up-to-date country reports.

iv. The Tribunal erred in law in failing to consider the applicant's subjection to past persecution and risk of exposure to future persecution by reason of exposure to severe sanction of Sharia law.

v. Having determined the appeal substantially on the basis of adverse credibility findings, the Tribunal erred in law in foreclosing on any consideration of the likelihood of the applicant being exposed to persecution in the future.

vi. The Tribunal erred in law in taking into account matters irrelevant to its determinations and/or failed to take into account relevant considerations.

19. The applicant's claim for damages for an alleged failure to allow him leave to land to make an asylum application, for alleged false imprisonment, and alleged unlawful attempt at deportation and for being obligated to maintain a false name throughout his dealings with all emanations of the State with whom he has come into contact, while being maintained by the applicant, was not pursued at this juncture.

20. In his grounding affidavit, the applicant avers as follows:

"3 I am a national of Mauritania, and was born on 25th February, 1977. I am a Muslim and of the Sara Khoule ethnic group. In 1989 there was a conflict between Mauritania and Senegal and many were killed. My parents fled the state. I stayed with family friends. I say that my girlfriend became pregnant outside of wedlock and this is contrary to Sharia law. I applied for asylum at Dublin Airport on the 4th April, 2012.

4. I say and am advised that the office of the Refugee Applications Commissioner accepted that my situation would cause problems with the authorities in Mauritania given the application of Sharia law, such that issues of state protection and internal relocation would not be relevant.

5. I say and am advised that the first named respondent refused me refugee status for the reason, inter alia, that I was ignorant of basis (sic) facts relating to Mauritania and therefore she formed the view that I was not from that state. I say that this is in error. I say that at page 9 of my interview, I confirmed that Rosso was on the border between Senegal and Mauritania. My answer in this regard was correct. I was asked the same question again at Q. 59 and I understood the question to be again the location of Rosso. I say that I was not asked what problems Rosso was in. I say that the questioning in this regard was vague and imprecise and I did not know precisely what information was required off me. I say that I also correctly identified the current President of Mauritania. I say that I was not asked any further questions about Mauritania, save that as to the population which I did not know. I say that it was unsafe to find that I was not a Mauritanian national on the basis of the three questions which were put to me.

6. I say that I travelled to the State on a Passport in the name of OA. A Passport and ID card were supplied to me by an agent. I say that I am not a national of Guinea-Bissau, nor have I ever been to that State. I say that in my section 8 interview, completed on the 10th April, 2012, I confirmed by (sic) correct identity and nationality.

7. I maintain my position that I am not OA, a Guinean national. I say that as far as I am aware, the agent who arranged the passport for me and impressed my photograph onto a valid Guinean Passport. I also say and am advised that the Garda who examined the document confirmed that there was only limited genuine reference material available pertaining to this type of passport. I say that, in those circumstances, my previous legal representatives requested that the passport be verified with the relevant authorities in Guinea-Bissau but this was not done."

The submissions advanced on behalf of the applicant

21. Counsel submitted that the central issue in the case is whether the Tribunal lawfully dealt with the question of the applicant's nationality. While it was acknowledged that under the Refugee Act 1996, as amended, the burden of proof is on the applicant; that was in the context of a shared duty of fact finding which was required to be carried out in the instant case. The proof threshold for a protection applicant in refugee cases is low and the reason for that is that the consequences for an applicant, should the Tribunal get it wrong, could be serious and dangerous.

22. The applicant's claim is that he is fish seller from Rosso, in Mauritania, a town on the border of Mauritania and Senegal. He had a relationship with a named woman who worked in the same marketplace and who became pregnant, as a result of which the applicant had to flee Mauritania because of Sharia law. The applicant's asylum claim was rejected almost exclusively on credibility grounds and a key component of the decision was the finding that the applicant was a national of Guinea-Bissau, contrary to what the applicant asserted.

23. The first of the Tribunal's credibility findings was expressed as follows:-

"In support of [his] claim [the applicant] furnished a receipt for a mobile phone made out to one [OS] which bears the address of a shop in Mauritania and is dated 2/12/2011. As there is no way of establishing the provenance of this document which could have been issued anywhere to anybody it is of no probative value in this matter."

24. Counsel submitted that the Tribunal Member's finding with regard to the mobile telephone receipt furnished by the applicant was flawed in that she failed to attribute any value to the document.

25. With reference to *IR v Minister for Justice* [2009] IEHC 353, it was argued that the Tribunal failed to discharge the duty placed upon the decision-maker challenging the provenance of the document. The document provided support to the applicants claim that he was born and lived in Mauritania.

26. In support of his contention that the tribunal's approach was improper, reliance was placed on the English Court of Appeal decision in *Karanakaran v. Sec. of State for the Home Department* [2000] 3All ER 449 which states, inter alia,:

"On classic principals of public law, [decision makers] are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of applicants and include in country reports, expert testimony and – sometimes – specialized knowledge of their own (which must of course be disclosed). No probabilistic cut off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision- makers ultimately make of the material is the matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the Convention issues."

27. The Tribunal Member addressed the issue of the passport in the following terms:

"As requested at hearing by counsel for the applicant his passport was sent to the GNIB for verification. The Tribunal has been furnished with a copy of GNIB report. The report by Detective Garda John Sweetman from the Document, Handwriting and Examination Section states that he 'found no evidence of any alterations' and that the passport submitted 'appears to be a genuine Republic of Guinea-Bissau passport'. As the applicant's evidence is that this is not a genuine passport but one which has been forged or altered (i.e. in that it contains his photo but somebody else's name), this report completely undermines his evidence on this point. The only logical conclusion to be drawn from the GNIB report is that this is the applicant's own passport and that he is in fact the person named and pictured upon it. This being the case it follows that he is not from Mauritania and thus his evidence concerning the risk posed to him in that country is not truthful, credible or capable of being believed.

Subsequent to the hearing, the passport having been submitted to GNIB for verification at the behest of the applicant's legal representative, submissions were made on foot of the GNIB report furnished to them by the Tribunal in which it is stated that 'the applicant having obtained this genuine passport substituted with the aid of an agent his own photo for that of the original holder of the passport'. It is also submitted that the applicant has produced 'a valid Guinea-Bissau passport belonging to another person but with original photo removed and his photo impressed thereon.' It is also submitted that the Tribunal should have sought to verify this passport with the relevant authorities in Guinea-Bissau. However the Tribunal is satisfied to rely on the findings of the GNIB report which states, as already indicated above, that the passport shows no evidence of alteration, and the Tribunal concludes that this amounts to sufficient evidence that the passport is genuine and has not been altered in the manner claimed by the applicant."

28. Counsel submitted that a major defect in the decision was the Tribunal Member's failure to send the passport to the Guinea-Bissau authorities for verification, or at the very least contact them in order to ascertain if the document belonged to the applicant. The Tribunal Member had elected not to do so, based on a report which was not completely unequivocal. In a refugee case such as the present that approach was not acceptable.

29. Counsel stated that the essence of the case is that the report which was duly provided by the Garda Technical Bureau was not unequivocal, as it stated merely that the examiner found no evidence of any alterations to the passport, not that there were no alterations.

30. The expert report had to be viewed in the context where the RLS sent a letter to the Tribunal requesting that the passport be verified with the Guinea-Bissau authorities, a process however which was not embarked upon by the Tribunal.

31. While the applicant travelled on a Guinea-Bissau passport, he advised the Irish authorities in the course of his section 8 interview on 10th April, 2012 that he had purchased it from a businessman in order to leave Mauritania and on that date also he confirmed his true nationality as Mauritanian, his true date of birth as 25th February, 1977 and his true name as OS.

32. In the course of his subsequent section 11 interview, he confirmed that he had never been to Guinea-Bissau and that he bought the document. He had again confirmed his place of birth as Rosso, Mauritania and that he had used the passport and an identity document, in the name of a third party, to leave Mauritania after purchasing the documents from a named businessman.

33. It was argued that the Tribunal Member ignored or discounted the consistent evidence of the applicant that the agent/businessman had provided the passport and changed the photo, the fact that the applicant had been fingerprinted, the request that the authorities of Guinea-Bissau verify the rightful holder of the passport, the failure to give sight of the passport to the applicant's legal representatives, the inability of the applicant to procure his own authentic documents and the statement in the Garda report that *'there was only limited genuine reference material available pertaining to this type of passport'.*

34. Counsel referred to Hathaway & Foster (1st and 2nd editions) on the issue of the use of false travel documentation and the shared duty of fact-finding and in the latter regard, cited the decision of Barr J. in *A.O. v. RAT* [2015] IEHC 253. In *A.O.*, Barr J. stated:-

"29. In relation to the questioned authenticity of the AREF documents, being the letter and the identification card, there was a duty on the decision maker to take steps to investigate the authenticity of the documents. They could have telephoned the numbers given in the letter itself, or as found on the website, and tried to ascertain whether the letter was genuine. Neither of these steps were taken. In the Australian case, Sun Zhan Qui v. Minister for Immigration and Ethnic Affairs [1997] FCA 1488, the following was stated in relation to the duty on a decision maker to carry out investigations in relation to questioned documents before the hearing:-

> *"In my opinion these omissions [referring to investigations which could have been carried out] rendered her decision manifestly unreasonable, within the principle explained by Lord Greene MR in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223. It is now established that a failure by a decision maker to obtain important information, on a central issue for determination, that the decision maker knows to be readily available may result in the decision being branded an exercise of power so unreasonable that no reasonable person could so exercise the power…"*

30. In the circumstances, I am satisfied that the Tribunal did not carry out sufficient investigation of the letter and ID card. The discrepancies identified in the letter certainly raised serious questions in relation to its authenticity. It was up to the Tribunal to take active steps to ascertain the authenticity of the documents. As already noted, the Tribunal could have tried to make contact with the Federation to see if the documents were genuine. They could have sent copies of the documents to the Federation and asked them to verify whether the documents were genuine. In the circumstances, it is appropriate to quash the decision of the RAT dated 28th September, 2009, on this ground."

35. This was the situation which presented in the applicant's case. The applicant's then legal representatives had requested the Tribunal Member to have the passport verified by Guinea-Bissau. If there was a problem in the Tribunal doing this, the Tribunal Member should have set that out in the decision.

36. Moreover, in his decision on an application for a certificate to appeal in the same case *(A.O. v. RAT* [2015] IEHC 352), Barr J. reprised the jurisprudence of the High Court which refers to the investigative role of the Tribunal – *F.K.S. v. RAT* [2010] IEHC 137, X.*L.C. v. Minister for Justice* [2010] IEHC 105 and *H.I.D. v. RAT* [2011] IEHC 33 and *Idiakheua v. RAT* [2005] IEHC 150. Counsel submitted that that investigative duty is reinforced by the provisions of Regulation 5 of the 2006 Regulations which transposed the provisions of Article 4 of the Qualifications Directive, binding on both ORAC and the Tribunal.

37. In the course of the s. 6 analysis, the Tribunal Member had gone on to state:-

> *"In any event, given the applicant's ignorance of basic facts in relation to his alleged home country, the Tribunal is satisfied that that in itself indicates that he is not, as he claims, from Mauritania. The Tribunal is satisfied that, on the basis of the applicant's evidence and of the GNIB report, serious credibility issues arise which are sufficient to undermine the grounds for his claim…(The applicant's) ignorance of basic facts about his alleged place of birth further undermines the credibility of the applicant's assertion to have been born and to have lived all his life in Mauritania."*

With regard to the aforesaid finding, it was argued that the Tribunal Member had focussed only on what the applicant did not know about Mauritania and failed to take account of what he did know, bearing in mind his limited education. One aspect of the factual matrix in the case was that in his Notice of Appeal the applicant set out that he had only two years of primary education in Mauritania and it had to be noted that both the s. 11 interview and the Tribunal hearing took place through an interpreter.

38. Furthermore, in ground 5 of the appeal submissions, the case was made to the Tribunal that the information given by the applicant in his questionnaire and section 11 interview was not assessed appropriately and that the applicant had clearly displayed a sufficient knowledge of Mauritania. Alternatively, it was asserted that ORAC erred in failing to ask the applicant further questions regarding Mauritania.

39. The next finding adverse to the applicant was in the following terms:

> *"It is also notable that, apart from the date of his arrival at Dublin Airport which is already known to the authorities here, the applicant is unable to furnish any dates relating to any aspect of his evidence. Thus he cannot furnish the date or even the month when he allegedly left Mauritania..nor can he tell how long it took to travel from there to Spain…..or the date of his arrival in that country….The applicant's alleged inability to be specific about the date of any of the alleged events in his story seriously undermines his credibility."*

40. It was contended that in coming to this conclusion, the Tribunal Member failed to have regard to the applicant's limited education. Furthermore, the decision maker failed to take account of or credit the applicant with the fact that he gave specific details regarding his travel route out of Mauritania.

41. The Tribunal Member went on to state:

> *"The applicant also claimed to have fled the country despite the fact that his girlfriend did not tell him how advanced her pregnancy was nor whether she had had it medically confirmed….He also claims not to know where she is, merely stating that she ran away herself….Nor does he know her date of birth nor anything at all about her family…..Bizarrely, at hearing he claims that his girlfriend, who allegedly sold cosmetics in the market, gave him some money to enable him to flee, which in itself seems highly unlikely. The applicant's ignorance of any pertinent details about any aspect of his story and his claim that he left his country purely on the basis of one conversation with his girlfriend is not credible and is not capable of being believed. I do not accept this claim as credible."*

42. Counsel argued that in reaching this finding, the Tribunal gave no reason as to why it was considered "*highly unlikely*" that the applicant received money from his girlfriend. The Tribunal Member concluded by stating:

> *"In relation to the standard of proof, the Tribunal must decide whether it is likely that the claim of the applicant is credible. In reaching this decision, account should be taken of such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story: corroborative evidence adduced by the applicant consisting of generally known facts or a known situation in the country of origin. Credibility is established when the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts and therefore is, on balance, capable of being believed.*
>
> *The applicant has failed to produce a coherent or plausible narrative and the numerous credibility issues which arise in his claim, taken together, render it incapable of being believed. In particular the fact that he travelled to this jurisdiction using a passport which identifies him as a citizen of Guinea-Bissau and which has been found by the GNIB to be genuine, fatally undermines his claim to be a completely different person from another country altogether."*

43. Counsel submitted that the standard of proof averted to by the Tribunal Member, namely "*whether it is likely"* did not accord with the requisite standard as indeed had been averted to by the Tribunal Member herself at the outset of the s.6 analysis when she recited that the onus was on the applicant to demonstrate a "*serious possibility*", or "*reasonable chance*" or "*real chance"* of persecution.

44. Counsel contended that the second principal criticism of the decision was that the Tribunal Member had not engaged in a forward looking test with regard to the consequences of the applicant being returned to Mauritania or Guinea-Bissau, as required by Regulation 5 of the 2006 Regulations. The Tribunal erred in law in failing to take into account the applicant's risk of future persecution because of his race and being a member of a minority, as a Black African and a member of the Soninke tribe. Reliance was placed on *M.A.M.A. v Refugee Appeal Tribunal* [2011] IEHC 147 and *MMA v Refugee Appeals Tribunal* (Unreported, High Court, Mac Eochaidh J., 13th February, 2013).

45. In the instant case, the Tribunal Member concluded that the applicant was a national of Guinea-Bissau, something the applicant vehemently denies, but even so, it does not appear in any event that the Tribunal Member did any analysis of the circumstances which pertained in Guinea-Bissau.

46. If the Tribunal Member was not required to carry out a forward-looking test because of the finding made in regard to the passport, this merely compounded the importance of the passport evidence and the need to make extra enquiries as to the passport's provenance, which however was not done by the Tribunal Member.

The submissions advanced on behalf of the respondents
47. In relation to the report produced about the passport it was submitted that the report was produced by a Document and Handwriting expert at the Garda Technical Bureau who used Stereo Microscope and a Video Spectral Comparator. He was satisfied the document was not altered and he was also satisfied that it appeared to be genuine. There was no evidence before the Tribunal or the Court that this expert evidence was unreliable.

48. The Tribunal Member acted fully within her jurisdiction when relying on the expert evidence. It is submitted that the onus to establish his claim was fully on the applicant at the time of his appeal and there is no shared burden in this regard. The applicant submitted no evidence in relation to his identity other than a mobile phone receipt which was addressed by the Tribunal member in her decision in accordance with *IR v The Refugee Appeals Tribunal* [2009] IEHC 353.

49. Counsel also predicated her submissions by emphasising the importance of documents in this case. The applicant had arrived in this state on 3rd April, 2012 bearing a Guinea-Bissau passport without a visa. Consequently he was arrested and he made an application for asylum on the following day. He did so in the name of OA (the name on the passport) and gave his nationality as that of Guinea-Bissau. He confirmed that the information he provided on the relevant asylum documents was correct. On 10th April, 2012, he completed his ORAC ASY 1 form, again in the name of OA and again gave his nationality as Guinea-Bissau. It was at this juncture, in the course of the section 8 interview, that the applicant alleged that his correct name was OS and that his correct date of birth was 25th February, 1977, his correct nationality was Mauritanian and that he was born in Rosso, Mauritania.

50. He completed his questionnaire on 11th April, 2012 and again he sets out his name as OA (not OS), albeit he cites his place of birth as Mauritania and refers at question 21 to leaving his country, Mauritania and by *addendum*, in English translation, stated: "*Right, what I wanted to explain to you is that my name is* [OS]", a claim he persisted with in the course of his section 11 interview.

51. It was submitted that the Tribunal Member expressly questioned the applicant as regards his paucity of knowledge concerning Rosso. The questions concerning his alleged home place took on an added significance given that the applicant was now denying the validity of a Guinea-Bissau passport in circumstances where an expert concluded that it was not an altered document.

52. The applicant was unable to provide any dates as to when he left Mauritania or when his problems began there and was unable to provide any information or details regarding his girlfriend's family or her date of birth or when he became aware of her pregnancy or indeed if she had a child subsequently. The applicant could give virtually no details to the asylum authorities in relation to his claim. This must have added significance in the light of his alleged false identity.

53. The foregoing was the extraordinary narrative with which the section 11 interviewer was confronted. Moreover, the applicant was unable to answer questions asked about Mauritania, save that he knew the name of the President. The Commissioner duly concluded that the applicant was not credible as he knew virtually nothing about Mauritania or indeed about the claim on which his application for refugee status was founded. His lack of knowledge about basic questions concerning the geography of Mauritania and Rosso led the Commissioner to consider, for the purposes of the s. 13 report, that the applicant was a native of Guinea-Bissau.

54. A wholly unexplained phenomenon of the applicant's case was the similarity of his signature as appended on his asylum documentation to the signature which appears on the Guinea-Bissau passport presented by the applicant. Moreover, he had not explained the provenance of the Belgian identity card in the name of OA.

55. Following a request that it do so, the Tribunal instigated the referral of the passport to the Garda Technical Bureau for examination. That was, counsel submitted, highly significant in light of the arguments advanced by the applicant's counsel in these judicial review proceedings. Indeed, the question had to be asked as to what the applicant himself brought to the Tribunal in support of his claimed true identity. He declared nothing save a receipt for a mobile telephone.

56. Contrary to the applicant's counsel's assertions, the report from the Garda Technical Bureau was unequivocal. It clearly stated that no evidence of alterations was found. The applicant's counsel cannot get away from that finding.

57. Counsel contended that the applicant has not grappled with the fact that state authorities are prohibited from making contact with authorities in an applicant's country of origin. The question had to be asked as to why the applicant, who was and is legally represented, did not himself pursue this course of action.

58. Counsel submitted that the Tribunal Member, upon receipt of the report from the Garda Technical Bureau, was properly entitled to rely on the report and to find that the applicant was a national of Guinea-Bissau. For this court to conclude that the reliance was unlawful, it was necessary to find that the Tribunal Member acted irrationally, or in excess of jurisdiction, which was not the case. In any event, the Tribunal did not solely hold against the applicant based on the Guinea-Bissau passport, rather she went on to find that the applicant had other credibility issues such as his failure to answer the questions posed to him regarding Rosso, Mauritania in which he claimed to have been born and lived. His lack of knowledge was evident in the section 11 interview and these issues were canvassed with him at the oral hearing. Thus there was a building block of factors which, the Tribunal Member determined, undermined the applicant's claim that he was a native of Mauritania and which led to the conclusion that he was from a different country altogether. While the applicant's counsel honed in on the issue of the passport, the decision maker had considered the claim in the round, as required by the jurisprudence of the High Court, and properly concluded that the applicant was not credible.

59. Counsel relied on the dictum of Clarke J. in *A.I.M.Z. v. R.A.T. and Others* [2008] IEHC 420

> *"Firstly, it is necessary to reiterate that this judicial review process is not an appeal of the decision of the Tribunal member or a substitution of my views for those of that member who heard and observed the appellant who had availed of the opportunity to personally address the tribunal. A court engaged in judicial review hearings looks to see if there has been any abuse of power on the part of the decision maker or whether the process was flawed by fundamental error of fact or natural justice. A court cannot therefore easily disregard any credibility assessment made by a tribunal member or reverse findings made unless cogent identified substantial grounds are established sufficient for leave to be granted.*
>
> *24. Having carefully reviewed the decision made and the arguments presented by the applicant and the State, it seems to me that there has been some glossing over of some of the findings and a concentration instead on a part of the decision which might, on an isolated basis, be vulnerable to attack. The decision should not be viewed in this way but*

rather as a whole. The same issue was very adequately dealt with by Peart J. in T v. The Minister for Justice, Equality and Law Reform, [2007] I.E.H.C. 287 where he stated that:

"It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon have been clearly misunderstood or mis-stated by the decision maker. The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion."

25. When viewing the decision in this way, it is clear that the core reason why the appeal failed is the finding that the applicant's rehearsal of the events leading to his asylum application in Ireland was simply not credible. The basic premise, from which all the credibility assessments and findings flow, is that the applicant was an illiterate member of the communist party in a village of 20 houses of mainly uneducated people but which included government supporters or informers. It is in this context that all assessments were made

….

34. It is appropriate here to deal with the arguments made relating to any obligation on the part of the Tribunal member to warn the applicant that his appeal might fail on a particular point and to allow him to call further evidence. This in my view is to confuse the application process with the appeal process. The onus is on the applicant when appealing a recommendation not to declare him a refugee to make his case fully before the Tribunal. It is not a shared burden at this stage as outlined in paragraph 196 of UNHCR handbook which refers to the first stages of the refugee process. Paragraph 196 states:

"It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

The appeal process is determined by s. 11A (3) of the Refugee Act 1996, as inserted by s. 7 of the Immigration Act, 2003, which states that:

"(3) Where an applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee."

35. This very issue has already been dealt with on numerous occasions, not least by the Supreme Court in V.Z. v. Minister for Justice, Equality and Law Reform [2002] 2 I.R. 135, which predates the change in the law, and by Peart J. in J.B.R. v. Refugee Appeals Tribunal & Minister for Justice, Equality and Law Reform [2007] I.E.H.C. 288, in July of 2007. The general consensus among academic writers is that at the appeal stage, the burden of proof shifts to the applicant. As Ursula Fraser notes, at p. 109 of Fraser and Harvey (eds.), Sanctuary in Ireland: Perspectives on Asylum Law and Policy (Dublin, 2003), that, before the Tribunal,

"It is for the asylum applicant to show that the Commissioner's recommendation was wrong and that he or she is entitled to refugee status."

Similarly, Ciara Smyth, in "Refugee Status Determination of Separated Children: International Developments and the Irish Response Part I—The Refugee Definition", (2005) I.J.F.L. 15, states that "the burden of proof is placed entirely on the applicant at the appeal stage."

36. In view of these decisions and opinions, it was surprising that the Refugee Appeals Tribunal member referred to the shared burden in the UNHCR Handbook in her decision. I accept that the correct position is that which was argued by the respondent that the burden is on the appellant to establish to the Tribunal that he is a refugee and there is no obligation on the part of the Tribunal member to warn the applicant of any doubts she may have as to the evidential value of a document furnished, provided that the hearing is fair. It cannot be argued that the Tribunal member kept her doubts as to the contents of the "Swedish letter" to herself as the applicant was questioned by her about the source of the information contained in the letter. The Tribunal member has a duty to approach the facts with an open mind and to raise queries on unresolved facts or on issues which are unclear. Thereafter she applies wisdom, experience and common sense in assessing the evidence presented within the confines of a fair hearing."

60. With regard to the applicant's counsel's reliance on *A.O. v. R.A.T.*, while counsel for the respondent was not in entire agreement with the extent of the investigative function attributed to the Tribunal, given that the burden was on the applicant to convince the Tribunal of the merits of his appeal, it was the case that the Tribunal Member here embarked on such an exercise by referring the passport to the Garda Technical Bureau for examination. Subsequently, the Tribunal Member was satisfied to rely on that report and on other factors which undermined the applicant's claim. She fully examined the issue of the passport and the applicant had every opportunity to submit his own evidence/material to establish his identity. The decision maker was fully entitled to weigh the expert report as a significant piece of evidence which fatally undermined the applicant's claim. As previously referred to, the signature on the passport appears on all of the asylum documentation sent in by the applicant and this was a significant fact to be taken into account by the court when determining the bona fides of the within proceedings.

61. In relation to the applicant's claim that a forward looking test should be carried out the respondent directed attention to the closing of the Tribunal Member's decision which states:

"In particular, the fact that he travelled to this jurisdiction using a passport which identifies him as a citizen of Guinea-Bissau and which has been found by the GNIB to be genuine, fatally undermines his claim to be a completely different person from another country altogether"

The applicant's response to the respondents' submissions
62. Counsel submitted that it was not open to the respondents' counsel to advance the case that was sought to make in relation to the signatures, in circumstances where this was not an issue upon which the Tribunal Member pronounced. The Garda Technical report spoke for itself; it found no evidence of alterations on the basis of the limited material available, but did not say that there were no alterations.

63. The applicant was not asking that this court grant him asylum status, rather he sought, for the reasons set out, that the issue be remanded to the Tribunal so that the question of the passport can be raised with the Guinea-Bissau authorities. While the respondents have raised the issue of the state being prohibited from contacting the Guinea-Bissau authorities, the Tribunal Member did not say that that presented a difficulty; she only stated she was satisfied to rely on the expert report. If the Tribunal Member had a problem with contacting the Guinea-Bissau authorities, that should have been set out. Had it been set out, then perhaps the applicant's legal advisors could have retrieved the passport for the purposes of making the necessary enquiries. The applicant now seeks that his legal advisors do this, if the state authority is reluctant to do so.

64. The applicant's erstwhile legal representatives had requested that the Guinea-Bissau authorities be contacted, both before and after the Tribunal hearing.

65. Insofar as the respondents contend that the whole picture had to be looked at, the whole picture included the applicant's denial that he was a Guinea-Bissau national and his assertion that he was from Mauritania.

66. Insofar as the respondents suggested that, if he had a continuing concern about the passport, the applicant could seek to re-enter the asylum process pursuant to s. 17 (7) of the 1996 Act, it was submitted that that was not an option open to the applicant based on the passport issue, as this was not new evidence or a new fact as required under s. 17 (7).

Considerations
The challenge to the credibility findings

67. In Hathaway [1st Ed.], the question of the use of false travel documentation is addressed in the following terms:

> *"In most cases, the claimant's nationality can be discerned from her own testimony, buttressed by documentary evidence such as a passport, visa, or transportation ticket. In some cases however, it will have been necessary for the refugee to secure false documentation in order to successfully exit her country, or in order to circumvent the visa controls imposed by some asylum states on the nationals of refugee producing countries. In these cases of conflict between the applicant's assertion and the corroborative evidence of nationality, primary regard should be had to the characterization of the claimant's status by the country whose travel document the individual holds, or which was her immediate point of departure for the asylum state. Because international law allows each state to determine for itself those persons who are its nationals, a nationality cannot be attributed to a refugee claimant where the authorities of that state take a contrary position.*
>
> *Thus where the refugee claimant alleges that documentary or other indicia of nationality are inaccurate, the authorities of the asylum country have a duty to consult the apparent state of origin in an effort to verify the claimant's status. If the country that issued the documentation cannot confirm the status of the claimant as its national, the need for protection should be determined with reference to the state which the claimant asserts to be her country of origin."*

68. Hathaway advocates this approach in the context of the shared burden on the applicant and the examiner to evaluate *"all the relevant facts*".

69. In Hathaway & Foster, [2nd Ed.], the issue of determining the "*state of reference*" is set out as follows:

> *"The plain language of the Convention requires the substantive evaluation of refugee status to be undertaken by reference to conditions in the refugee claimant's state of nationality…*
>
> *[A]n initial question in the process of refugee status is thus the identification of the applicant's country of nationality, since all other aspects of the refugee definition can only be analysed once this threshold question has been resolved. The question of nationality is to be treated like any other factual matter, with the applicant bearing the burden of proof in the context of a shared duty of fact finding. In most cases, the refugee applicant's nationality can be discerned from her own testimony, buttressed by documentary evidence such as a passport, visa, or transportation ticket. Assuming that the applicant establishes a prima facie case that she is a national of a given country, and that sufficient evidence has not been adduced to counter her assertion, that state should be treated as the country of reference for the assessment of refugee status.*
>
> *If, on the other hand, the applicant is unable to identify her citizenship or if her designation of the country of reference cannot be relied upon, the receiving state should proceed to assess risk in the state which it believes is most likely to be the applicant's true country of citizenship. Because the ultimate duty of the state is to assess whether or not the individual is a refugee, status may not lawfully be denied simply because the applicant's country of nationality was not properly identified by her."*

70. The authors refer to a decision of the Canadian Courts, *Damnan v. Canada* [1993] FCJ 578 which states:

> *"Possession of a national passport as well as birth in a country can create a rebuttable presumption where the claimant is a national of that country. However, the claimant can adduce evidence that the passport is one of convenience or that he or she is not otherwise entitled to that country's nationality."*

71. On the "Shared duty at fact finding", Hathaway & Foster [2nd Ed.] opines, inter alia,:

> *"The most fundamental principal governing the fact finding process is that the responsibility to seek out and present objective evidence of risk is shared between the person seeking protection, and the state to which the asylum request is addressed…. the shared responsibility to produce relevant evidence follows in part from purely pragmatic considerations. While the applicant will sometimes (perhaps even often) be best placed to provide testimonial and other evidence of the*

risk faced, governmental resources and access to information usually provide critical evidence as well. For this reason, the Superior Court of Prague determined the asylum state has a duty to access diplomatic, international, and non-governmental facilities in order to ensure that all relevant information is brought to the attention of the decision maker…"

72. While I note the reliance placed by counsel for the applicant on the foregoing, overall, I do not perceive the essential issue for determination in this case to be the argument on to the extent of the Tribunal's fact-finding function, or indeed the extent of its investigative role in the asylum process. In any event, the latter is provided for by s. 16(6) of the Refugee Act, 1996, as amended, which provides:-

" The Tribunal may, for the purposes 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."

73. Clearly, the Tribunal invoked this power when it requested ORAC to have the passport presented by the applicant "*verified and examined for authenticity*" The Tribunal appears to have done so following a request made by the applicant's legal representative at the hearing on 9th August 2012. This was not the first occasion that such a request was made.

74. On 4th July, 2012, in a letter which accompanied the appeal submissions, RLS advised as follows:-

"Please note that our client asserts that he is one [OS] from Mauritania.

The Refugee Applications Commissioner have made a finding in the Section 13 report dated 29th May, 2012 that the applicant is one [OA] from Guinea-Bissau.

Our client instructs that the Guinea-Bissau passport he held in the name of [OA] was a fake passport given to him by an agent.

In circumstances where the said passport is held by the Refugee Applications Commissioner, and further to section 16(6) of the Refugee Act, 1996 (as amended) we request that the Tribunal direct ORAC to produce the passport to GNIB or such other expert bodies deemed appropriate by the Tribunal for assessment as to whether it is a valid passport from Guinea –Bissau."

75. On 1st August, 2012, the RLS wrote again to the Tribunal, in the following terms:-

"The passport used by the applicant to flee Mauritania was a Guinea-Bissau passport in the name of [OA]. The photo in the said passport is that of the applicant but all other information contained in said passport does not pertain to the applicant.

In circumstances where the passport in question is held by the Irish State authorities, we request them to produce the said passport to the Guinea-Bissau authorities to ascertain who is the rightful holder of the said passport and to provide photographic identification of the rightful holder."

76. Following receipt of the Garda Technical report on 30th October, 2012, the RLS made a submission to the Tribunal on 6th November, 2012 and therein reasserted the applicant's position as had been set out in the letter to the Tribunal of 1st August, 2012. It was further submitted that:-

"[i]t cannot be conclusively determined from the ….report that the passport photo that is attached to the passport is the original passport photo…….

In our letter to the Tribunal of 1st August, 2012 we requested that ORAC produce that passport to the Guinea-Bissau authorities to ascertain who is the rightful holder of the said passport and to provide photographic identification of the rightful holder. We have also by letter dated 4th July, 2012 indicated to ORAC that the passport was required by us to be examined in relation to our client's appeal.

We have never been given sight of our client's passport. In our letter to the Tribunal of 1st August, 2012 we requested the Irish State authorities to produce said passport to the Guinea-Bissau authorities to ascertain who is the rightful holder of the said passport and to provide photographic identification of the rightful holder. This request was never complied with."

77. With reference to paragraph 196 of the UNHCR Handbook as to the shared duty of fact-finding, it was asserted that the Tribunal "cannot rely on the Guinea-Bissau passport as determinative of the applicant's country of origin as Guinea-Bissau without corroborating evidence being confirmation from the Guinea-Bissau authorities that the applicant is a national of Guinea-Bissau."

After referring to Canadian case law, the letter of 6th November 2012 went on to state:-

"In the instant case we have not been furnished with any correspondence from ORAC indicating that they have, at the very least, inquired with the Guinea-Bissau authorities as to who is the rightful holder of this Guinea-Bissau passport, which our client has asserted throughout his application is a valid Guinea-Bissau passport belonging to another person but with original photo removed and his photo impressed thereon.

In the event that the Refugee Appeals Tribunal rely on the documentation being the passport from Guinea –Bissau as determinative of our client's country of origin in relation to our client's application for refugee status, and in circumstances where the writer, despite requests, has never had sight of the original passport, our client reserves the right, in accordance with due process to seek a judicial review of such matter before the High Court."

78. A somewhat curious feature of the RLS letter of 6th November 2012 is the statement that the RLS "by *letter dated 4th July, 2012 indicated to ORAC that the passport was required by* [RLS] *to be examined in relation to* [the applicant's] *appeal*." While the latter phraseology is somewhat ambiguous as to whether it was meant to convey that the RLS had called for the passport to be furnished to them or simply that they required that ORAC have the document examined (on balance, I am inclined to find it is the former), it is certainly the case that the later reference in the letter of 6th November, 2012 to the writer "*despite requests*" never having had

sight of "*the original passport*" suggests to the reader that what is being communicated on 6th November,2012 is that such a request was previously made to ORAC.

79. However, on any reading of the correspondence of 4th July 2012 and 1st August, 2012, there is no suggestion that the applicant's then legal advisors were themselves seeking sight of the original passport on 4th July 2012 and 1st August 2012. I note that this is also the view of the first named respondent, as deposed to in an affidavit sworn on 26th February, 2013. Thus, it is unclear to the court how such an assertion regarding a historical request came to be made in the letter of 6th November, 2012.

80. There is reference however in the letters of 4th July, 2012 and 1st August, 2012 to the passport being "*held by the Refugee Applications Commissioner*" and "*the Irish State authorities*". I have no reason to believe that this was not the case, given that ORAC were in a position to furnish the original passport to the Garda technical expert and it has not been contested by the first named responded on affidavit that the position was otherwise.

81. Notwithstanding the erroneous reference to a historical request for sight of the document, any reader of the letter of 6th November, 2012 could not but be left with the impression that the author was communicating that it was a cause for concern that the applicant's legal representatives had not seen the passport.

82. It seems to me that the salient question to be determined by this court is whether the applicant was afforded due process by the Tribunal Member, following upon the findings in the Garda expert report, and in light of the contents of the submissions made on behalf of the applicant on 6th November, 2012.

83. From the applicant's submissions of 6th November 2012, the Tribunal Member was by then on enquiry as to the claim that the applicant's legal advisors had not had sight of the original passport. The 6th November, 2012 submissions, which also referred to repeated requests to the Tribunal that the Irish authorities produce the passport to the Guinea –Bissau authorities for verification, and which called upon the Tribunal again to do so, were made in the context of the applicant's legal advisors noting that the "*finding of the report that the document appears to be a genuine Republic of Guinea –Bissau passport*" but also noting that the report stated that "[*t]here was only limited genuine reference material available to this type of passport.*"

84. It is clear from the decision that the Tribunal Member placed particular weight on the passport issue as something which "*fatally undermine*[d] [the applicant's] *claim to be a completely different person from another country altogether*", i.e. fatally undermined the applicant's claim for refugee status. His nationality was determined effectively as Guinea-Bissau on foot of the Tribunal Member's acceptance of the Garda Technical report. I accept that the weight which the Tribunal Member duly attributed to the report was a matter entirely for the decision-maker and it is not the function of this court to substitute its view for that of the decision-maker. However, that is not the issue that is of concern to the court.

85. This court's function is to determine, notwithstanding the contents of the expert report, whether in light of submissions which were before her on 6th November, 2012 the Tribunal Member erred in, essentially, rendering her decision without further engaging with the applicant's legal representatives on the issue of the passport or in failing to deal in the decision with their submission that they had not had sight of the passport. I find that the Tribunal Member did err in this regard. I am satisfied that before the Tribunal Member concluded the appeal process, the dictates of fair procedures required that there should have been further engagement with the applicant's legal representatives on the issue of their complaint, as set out in the letter of 6th November 2012, albeit for the first time, that they had not had sight of the passport, given that same was held by the Irish authorities. Alternatively, if such engagement was not to be entered into, it behoved the Tribunal Member, in her decision, to address the complaint that the applicant's then legal representatives had not had sight of the passport in the context of the weighing exercise she clearly embarked on as between her preferment to rely on the contents of the Garda Technical report as opposed to the course of action being advocated by the RLS in their 6th November, 2012 letter. While I take into account that the applicant's legal representatives could have called for sight of the passport earlier in the proceedings, I am not satisfied that that is a sufficient ground to debar the present challenge, given that a plain reading of the 6th November, 2012 letter shows that their complaint in this regard was unambiguously set out at that point, i.e. before any decision emanated from the Tribunal and also bearing in mind that as of September 2012, the request that the decision-maker have the passport verified had been acceded to by referral of the document to the Garda Technical Bureau.

86. There was a great deal of debate in the course of these proceedings on the question of the shared duty of fact-finding as between a protection applicant and the Tribunal. As already stated, given that the Tribunal Member, through her direction to ORAC, engaged on such an exercise, this court did not find it necessary to embark on a consideration of the nature and extent of such a duty from the perspective of a decision-maker. There is no question however but that at appeal stage, pursuant to s. 11 (3) of the Refugee Act, the burden of proof rested on the applicant to establish that he is a refugee. The nature of that burden is concisely set out by Clarke J. in *A.I.M.Z.*, at paras. 35-36 of her judgment, as already quoted elsewhere in this judgment. The applicant must provide, *inter alia*, the factual matrix upon which the Tribunal would be entitled not to affirm the Commissioner's recommendation. From the applicant's perspective, part of that factual matrix was to seek to disprove that he was the individual named on the Guinea-Bissau passport.

87. It seems to me that the Tribunal Member, in reaching her decision on 6th November, 2012 (the same day as she received by facsimile the applicant's submissions on the expert report) foreclosed on the possibility of the passport being provided to the applicant's legal representatives. It is not for this court to surmise as to what course of action might have been embarked upon by RLS but given the twice repeated statement in the 6th November, 2012 letter that they never had sight of the passport and given the repeated requests that the Tribunal verify the document with the Guinea-Bissau authorities, it could not have escaped the contemplation of the decision-maker that they might have required sight of the document for the purpose of their perusal of the document and making whatever enquiry they might have been instructed to make in order to address the findings in the Garda Technical report.

The Tribunal Member's foreclosure on the issue is to my mind sufficient to vitiate her reliance on the expert report. A significant factor which informed my view in this regard is that the determination of the nationality of a protection applicant is a seminal issue in refugee cases. While I note the respondents' counsel's argument that all the applicant's legal representatives called for on 9th August, 2012 was that the passport be examined by "GNIB", it remains the case that by the 6th November, 2012, they were making a complaint that they never had sight of the passport, a complaint which incidentally was not referred to in the decision.

The following extract from Hathaway and Foster 2nd Ed. is apposite:

"[G]overnments of state parties are reasonably expected to commit themselves not simply to ensuring that the benefits of the Convention are withheld from persons who are not refugees, but equally to doing whatever it is within their ability to ensure the

recognition of genuine refugees."

I refer to this not in the context of fixing the decision-maker with any further investigative or fact-finding role over and above that which she embarked on pursuant to s. 16(6) of the 1996 Act, but rather in recognition that the burden is firmly on a protection applicant at appeal stage and in recognition that a protection applicant should be entitled to seek to overcome that burden within the confines of a fair adjudication process. In this regard, I note that the remarks of the learned Clarke J. at para. 36 of *A.I.M.Z*, and the emphasis she placed on a fair process.

In answer to the respondents' counsel's submission, the applicant's counsel also argued that the Tribunal Member does not set out in the decision that there was any impediment to the Tribunal seeking to verify the passport with the Guinea-Bissau authorities. Counsel for the respondents argued that there is such an impediment, namely that state authorities are prohibited from making contact with a protection applicant's country of origin.

88. It is not difficult to understand why a receiving state authority would be reluctant to make contact with a protection applicant's country of origin, given the very nature of an application for protection for Convention reasons. S. 19 (1) of the Refugee Act, 1996, as amended provides:-

> *"The Commissioner, the Appeal Board, the Tribunal, the Minister, the Minister for Foreign Affairs and their respective officers shall take all practicable steps to ensure that the identity of applicants is kept confidential."*

89. In the present case, via his erstwhile legal advisors, the applicant made repeated requests of the Tribunal that the Irish authorities contact the Guinea-Bissau authorities. On his behalf, it was argued before this court that insofar as it is the concern of the Irish authorities to maintain the applicant's confidentiality, the confidentiality was that of the protection applicant and that as far as the applicant in the present case was concerned, the confidentiality was his to waive.

90. I note that other than reciting the applicant's request that the Guinea-Bissau authorities be contacted, the Tribunal Member does not address the merits or otherwise of the request and addresses the request by stating that she was "*satisfied to rely on findings of the GNIB report*". Had it been the case that there was no complaint from the applicant's legal representatives that they never had sight of the passport, as a matter of general principle I could not find that any particular criticism could be directed at the approach adopted by the Tribunal Member, in circumstances where she had before her an expert report which, *as far as the decision-maker was concerned,* sufficiently addressed the question of the authenticity of the passport, thereby rendering any enquiry of the passport issuing authority (if it was ever contemplated by her) redundant. It is not clear however from the decision whether it was contemplated that such an enquiry was permissible and feasible, as this matter is not specifically addressed in the decision. Because this court has found the reliance on the expert report to be impugned (I emphasise solely on the basis of the failure to engage with the applicant's legal representative's complaint that they never had sight of the passport), I do not find it necessary to address the applicant's counsel's argument that the decision-maker should have pursued the matter with the Guinea-Bissau authorities.

91. However, as I have already set out, by reason of the foreclosing by the decision-maker of any engagement with the applicant's legal representatives on the issue of their having sight of the passport, and any action that might follow on their part as a consequence, and of the failure at least to specifically address their complaint in the course of the weighing exercise engaged in by the Tribunal Member in her decision to rely on the expert report, the reliance on the expert report cannot be exempted from challenge in circumstances where this court has found the foreclosure to be an infringement of due process.

92. In addressing the above issue, I have taken account of the respondents' counsel's submission that the issue of the Tribunal Member failing to heed the complaint that the RLS never had sight of the passport was not in the pleadings and that it was raised for the first time in the written submissions. However, I am satisfied that the pleading "*failing to confirm the authenticity of the passport with the issuing authority..*" sufficiently encompasses the issue and I find that there is no prejudice to the respondents given that they addressed the issue in their written submissions.

93. Counsel for the applicant has challenged other credibility findings made by the Tribunal Member. However, I am satisfied that the mobile telephone receipt finding was made within jurisdiction and I am equally satisfied that the finding made as to the applicant's dearth of knowledge about his travel route and his girlfriend's family and other circumstances were open to the decision-maker on the evidence , and thus within jurisdiction. Regarding the applicant's lack of knowledge of Rosso, I find some merit in the applicant's counsel's argument that the Tribunal Member's emphasis was on what the applicant did not know. By way of observation, I note that apart from the factors which came up regarding Rosso at the s. 11 interview, and which were again canvassed with him at oral hearing, the applicant gave other details about Rosso in the course of the oral hearing which were not pronounced upon by the Tribunal Member as to their correctness or otherwise. In that circumstance, the finding as to his lack of knowledge may be somewhat suspect but of itself would not be sufficient to vitiate the decision, if there was otherwise a valid basis for the decision.

94. The question here is whether the Tribunal Member's reliance on the Garda Technical report in the face of the applicant's solicitor not having seen the passport is sufficient to vitiate the decision, notwithstanding that certain credibility findings have been upheld by this court. I am satisfied that it is for the reasons already set out.

95. In *IR v. Min for Justice* [2009] IEHC 353, Cooke J. set out the principles upon which a court must approach a challenge to credibility findings made by a protection decision-maker. Principle 2 provides:-

> *" On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.*

96. For the reasons set out in this judgment, the due process requirement on the decision-maker as referred to in the above principle was breached. I am satisfied that the failure to take on board the argument that the applicant's legal advisors never had sight of the Guinea-Bissau passport is sufficient to infect the decision, particularly in light of the overarching importance of the determining the issue of a protection applicant's nationality. The court has considered whether the other credibility findings, which the court has largely upheld, are sufficient to sustain the decision but finds that not to be the case in circumstances where, on the face of the decision, it is clear that the finding on the passport was a decisive (albeit not the only factor) in rejecting the applicant's credibility. In all the circumstances, I am satisfied that a substantial ground has been made out on the passport issue. I note the argument canvassed by counsel for the respondents that the court, in considering the bona fides of the present application, should take account of what is alleged by counsel for the respondents to be the similarity of the applicant's signature as appended on his asylum documents to the signature on the passport presented by the applicant. However, this is an issue which was not the subject of any expert report or indeed pronounced upon by the Tribunal Member. In those circumstances, it is not for the court to vest itself with

expertise it does not possess and thus, the court must decline to pronounce upon counsel's submission

The lack of a forward looking test

97. Counsel for the applicant argued that irrespective of finding that the applicant was not from Mauritania, the Tribunal Member should have nonetheless conducted a forward looking test and in this regard cited *M.A.M.A. v RAT* [2011] IEHC 147. In *M.A.M.A.,* Cooke J. opined, inter alia, as follows:-

> *"……In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant……"*

98. In light of the above dictum I do not find merit in this particular argument. As a matter of logic, the decision-maker's finding that the applicant was a citizen of Guinea-Bissau, and which thus "*fatally undermined*" the applicant's claim to hail from Mauritania, put paid to any requirement to conduct a forward looking test in relation to Mauritania. That this court has found the Tribunal Member erred in relying on the Garda Technical report because of a procedural deficit does not assist the applicant's challenge on this ground. Had the Tribunal Member found that the applicant was from Mauritania, it may be that the obligation to conduct a forward looking test remained, notwithstanding that the applicant's claim was rejected by reason of other credibility factors but I do not perceive the need to traipse that particular hypothetical path, although the court did factor this issue into its consideration of whether the credibility findings which the court has upheld could sustain the decision.

99. The argument was also canvassed that having found the applicant to be a citizen of Guinea-Bissau, the Tribunal Member should have carried out a forward looking test on the question of the applicant being returned to Guinea-Bissau. Having regard to the dictum of Cooke J. in *M.A.M.A.*, and finding no convincing argument to have been made out by the applicant on this issue, this argument is rejected. In any event, nothing in the pleadings hinted at such a challenge, the plea in the statement of grounds made no reference to Guinea-Bissau, nor was the issue canvassed in the written submissions.

100. Summary
For the reasons set out in this judgment, the court is satisfied that substantial grounds have been made out to warrant the granting of leave and this being a telescoped hearing, the court will quash the decision of the first named respondent and remit the matter to the Refugee Appeals Tribunal for a de novo hearing before a different Tribunal Member.