Neutral Citation: [2015] IEHC 834

THE HIGH COURT

[2011 No.493 JR]

BETWEEN

K.A.H.

APPLICANT

AND

REFUGEE APPEAL TRIBUNAL

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Ms Justice Faherty delivered the 21st 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 first named respondent which affirmed the recommendation of the Refugee Appeals Commissioner not to declare him a refugee.

Background

2. The applicant's claim is as follows: He was born in Muhajlria, South Darfur, Sudan. He is a Muslim and is a member of the Bergid tribe. He married on 19th October, 2004 and has one child. He has one older brother and two older sisters. The applicant fled Sudan, where is wife and child remain, on 25th October, 2007 and arrived in Ireland on 20th November, 2007. His friend has tried to contact his family for him but did not succeed.

3. The claimed circumstances of his fleeing Sudan arose in the following circumstances: The applicant ran a shop in the market selling flashlights and batteries. On 26 June, 2007, he was detained by Sudanese government forces, assisted by information from the Sudanese Liberation Movement (SLM also know as Sudanese Liberation Army (SLA)/ Minnawi), led by Mustapha Tirab. He and several others were taken from Souk/Market. The applicant was blindfolded and said he was taken to a detention centre in the Shearia area, with another 7 people. On arrival, he and the other detainees were tortured and beaten and left in the sun for hours.

4. He was not questioned at that stage but he knew he was suspected of collaborating with small rebel movements which were against the government and Minnawi. After six days he was transferred to another detention centre about an hour away where he was again beaten and kept for 9 or 10 days. He and the others were then taken to a third detention centre. It was a big camp, surrounded by a high wall with a large garage and 30-40 Toyota Land Cruisers. The applicant says there were lots of prisoners but there were eight in his small cell, some from Fur, Masaalit and Bergid. He knew a man (N) from Muhajirya, where the market is located, but none of the others. The beatings continued. They were all taken to the middle of the camp and beaten. One man named lost consciousness and was taken away, back to the cell. The applicant was kept there for 4 or 5 days.

5. One day an Officer came to the centre. Three people were taken from the applicant's cell. They were told that they had been executed. The Officer asked the applicant why he was there and said he had information about the applicant, namely his collaboration with some Movement in the area which was anti- Government and anti- Minnawi. The applicant was made to sign a piece of paper stating that he would never cooperate with or supply goods to such groups against the Government and SLA/Minnawi. He was also to report immediately if he received any information from those movements. That night, 16 July, 2007, the applicant and two others were taken from the camp and left not far Labado.

6. The applicant made his way back to Muhajirya sought treatment for the beatings. He returned to Souk Market from time-to-time but did not resume selling in his shop for fear of the reaction of the insurgents if he refused to sell to them and the reaction of the government forces if he did so. On 8 October, 2007, while the applicant was at home there was an air bombardment in the market area. He went towards the market to see what was happening as his shop was there. He saw heavy artillery, military cars and Janjaweed coming from the South West side. He was unable to return home so he ran to the North West side, in the direction of Labado about 23 km away. He then smuggled himself on a maize truck to Nyala where he arrived that night.

7. He went to his supplier for his shop and told him if he was caught by the military forces he would be killed. He asked the supplier for money as he had already paid for goods which he had not yet received. He was afraid of staying in Nyala because the government forces might find him. The supplier found a truck driver to take the applicant to Port Sudan and the suppliers contact in Port Sudan arranged for him to stay with another person. The journey took eight days and he arrived in Port Sudan on 17 October, 2007, without any money. His goods supplier ultimately gave money owed to him (7,000 Sudanese pounds) to another driver and this was brought to the applicant. He spent eight days in Port Sudan. The applicant was reluctant to stay in Port Sudan because of the government army and intelligence presence and the fact that residents would report any strangers in the area.

8. The applicant gave the money he received to a trafficker. He left Port Sudan on 25 October, 2007. He changed ship at sea once and says he arrived in Ireland 25 days later on 20th November 2007. While on aboard the ship he got onto a truck and after an hour or an hour and a half after the truck disembarked the ship, the applicant jumped out of the truck. After making enquiries he was directed to the office of the Refugee Applications Commissioner.

Procedural History

9. The applicant applied for asylum on 20th November, 2007 and underwent a s. 8 interview on that date. An asylum questionnaire was completed on 29th November, 2007 and he underwent a s. 11 interview on 9th July, 2008.

10. The Commissioner's report is dated 17th and 21st July 2008.

Commissioner's Principal Findings

• The Commissioner was not convinced that having arrested the applicant, the government forces would have released him on the

basis described by the applicant, if they believed he was a threat and supplying or supporting anti-government forces.

• According to the applicant, although sometimes unsure, a named individual [T] led the SLA/Minnawi in Muhajirya. According to country of origin information [T] was listed as the General Secretary of the SLA and as State Minister by decree of the President but there was no country of origin information linking him to the SLA/Minnawi in Muhajirya.

• The Commissioner found it contrary to common sense that during the bombardment and attack by the Janjaweed on 8 October, 2007, the applicant, notwithstanding his explanation that he had his shop there, would run towards the sounds of explosions.

• The Commissioner was not convinced by the applicant that he abandoned his family and could not stay in Nyala (where he had completed his military service) because of his fears that there were government forces there which might catch him. According to the COI account, the attack on Muhaiaiya was indiscriminate and directed towards the SLA (Minnawi) militia rather than targeted at individuals.

• The Commissioner was not convinced that the applicant's supplier was holding over 7,000 Sudanese pounds (approximately €2,000) worth of the applicant's money for torches and batteries from 26 June, 2007 when the applicant was detained, until 8 or 9 October, 2007 and in circumstances where the applicant had hardly traded in the interim.

• According to the applicant, his supplier was the same person who forwarded the applicant various documents but was unable to contact his family in Muhajirya as it was not safe.

• The Commissioner was not convinced that the applicant would not instead make his way to Chad, where there are many thousands of Sudanese in refugee camps, and which is only 250 kilometers from Nyala. Furthermore, the Commissioner was not convinced that the applicant had any need to leave Sudan once away from Darfur, despite his explanation.

• The Commissioner was not convinced, having considered the applicant's claim as stated in his Application Questionnaire and at interview, and having studied the applicant's demeanor at interview, that he suffered persecution in the past or was likely to suffer persecution in Sudan in the future. He was found not to be in need of international protection.

Notice of Appeal Submissions
11. The applicant appealed the Commissioner's findings on 16th August, 2008 and further appeal submissions dated 31st July 2009 were sent on 3rd August, 20o9.

12. In summary, the salient arguments made on appeal to the Tribunal were:

• The Commissioner erred in law and fact in misconstruing facts, was factually incorrect and failed to adhere to fair procedures in that the applicant was not allowed or made feel he could tell his story.

• The interpreter did not know or understand about the applicant's part of Sudan, as a result of which the applicant's story was misinterpreted resulting in a wrongly informed decision-maker, hence the wrong decision.

• The Commissioner erred in failing to elicit sufficient information from the applicant.

• The Commissioner erred in fact and adhered to unfair procedures in the format of the interview and answers given by the applicant were taken out of context to draw unfavourable conclusions. The applicant was not given an opportunity to expand on material issues and there was inappropriate reliance on trivial issues.

• Relevant country of origin information was ignored.

• The Commissioner erred in law and fact in failing to properly assess the information given to him.

• The Commissioner erred in concluding that Mr. [T] did not lead the SLA in Muhajira.

• The internal relocation finding was in error.

• The Commissioner erred in fact in concluding that the applicant's location and previous detention did not justify refugee status.

• The Commissioner erred in allowing her own personal beliefs and prejudices influence the application of legal criteria.

• The Commissioner wrongly relied on the fact that the applicant supplied little or no supporting documentation.

• Application of an inappropriate burden of proof.

• The applicant had established that he is entitled to a declaration of refugee status under Section 2 of the Refugee Act 1996 owing to a well founded fear of persecution on the basis of his nationality and experiences in Sudan.

• The applicant's fear of persecution was based on his experiences in and knowledge of his domestic situation, and was supported by his testimony.

• Given all the relevant circumstances, and relying on the relevant COI, it was submitted that neither the option of state protection nor the internal flight alternative are available to the applicant.

• The burden of proof is a shared burden between the applicant and the tribunal. The standard of proof is less than the civil standard, 'on the balance of probabilities', and is whether there is a reasonable possibility, or a real chance that the applicant will be persecuted. Applying this burden of proof, it was submitted that the applicant had clearly proven this might happen, if he returned to Sudan. Given the wealth of COI available and presented in the case, there was a real likelihood that the applicant's life would be in danger.

• There were compelling reasons for the application of Reg. 5(2) of the European Communities (Eligibility for Protection) Regulations, 2006.

• The Tribunal should adjudicate the appeal having regard to the applicant's fear of persecution in the context of the genocidal, ethnic, religious, and racially based motivated violence in Sudan.

• The applicant has produced a birth certificate and medical certificates evidencing epilepsy which is consistent with brain trauma and torture.

The Tribunal decision
13. Oral hearings before the Tribunal took place on 4th August, 2009 and 10th December, 2010 and the Tribunal rendered its decision on 10th May, 2011.

14. In summary, the Tribunal found as follows:

• The applicant claimed he was tortured during the 20 days he was allegedly detained. He did not at any stage during the asylum process claim that he had sustained a head injury in Sudan; he merely stated that he was treated in Sudan for injuries allegedly sustained. No medical report was submitted from Sudan. These medical reports submitted to the Tribunal referred to the applicant suffering from epilepsy for which the applicant was referred to Dr. Khalid Ahmed for a dietary recommendation, and from gallstones and that he required a fat free diet. A medical report from Dr. Khalid was not furnished to the Tribunal. Dr. Hardiman's report of 16th July 2009 stated that the applicant was an inpatient in hospital for treatment for severe constipation. The first mention of a head injury was in an undated report of Dr Hardiman which stated that an MRI scan reported everything as normal.

• The applicant's legal representative in submissions filed on 31 July, 2009 stated that the applicant sustained brain damage as a result of torture endured during his detention, which manifested itself in the form of epilepsy and which requires ongoing medical treatment. The Tribunal Member noted that the applicant was not asked any questions at the Tribunal hearing by his legal representative about a head injury.

• The applicant did not inform Dr. Trueick on 22 August, 2008 or 28 August, 2008 that he sustained a head injury while allegedly detained, nor was there a medical report from an expert which would substantiate the applicant's legal representative's submission that the applicant sustained brain damage. Accordingly. The Tribunal member concluded that the applicant's legal representative's submission was based on speculation and conjecture and that the medical reports submitted were of no probative value in establishing the credibility of the account given by the applicant.

• If the applicant was severely tortured for 20 days a medical examination would have revealed the extent of the injuries and perhaps given credence to the allegation of torture, but an examination did not appear to have been carried out.

• The Tribunal Member did not believe that the applicant was detained and tortured as he alleged and believed that his story was concocted to enhance his refugee claim.

• With regard to the applicant's claim that he was accused of selling goods to rebels, he did not elaborate about his alleged activities with the movement in his long narrative in reply to q.21 of the questionnaire or at interview, nor at his appeal, despite the submission that the applicant presented a consistent account with respect to this political activity. In the ASY1 form, the applicant stated that he was entitled to asylum on the grounds of his race and that the government and Janjaweed were persecuting people in his community. He claimed asylum on grounds of race also in his questionnaire. At interview the applicant did not claim persecution on the grounds of his alleged political activity but stated he was accused of collaborating with some movement. This further undermined the applicant's allegation that he was detained.

• If the applicant was in fear of being arrested it was not credible that he would flee to Port Sudan, a considerable distance from Darfur, rather than take the safer option of fleeing to Chad. Therefore, the Tribunal Member believed that the applicant was not persecuted or detained as he alleged.

• The applicant first stated that the Janjaweed arrived on horseback at his appeal which contradicted the account given in his questionnaire and at interview. The Tribunal Member found the applicant's explanation, namely that his answer had been wrongly translated at interview, to be disingenuous and wholly lacking in credibility.

• While the applicant's account of the events in his village was confirmed by COI, this did not confirm that the applicant was present during the bombardment. Additionally, it was found that the applicant was not personally targeted by the bombardment.

• With regard to the applicant's account of his travel, it was found not plausible that a ship would stop in mid-ocean and transfer a container, in which the applicant was allegedly concealed, onto another ship without arousing the curiosity of the captain or a senior officer. The applicant did not state in his questionnaire that he was in a container when he was transferred and his testimony that he was not asked the question at his interview was wholly lacking in credibility. It was also not plausible that he boarded the first ship in the manner alleged by him without attracting the attention of the captain of the ship or a senior officer.

• The applicant's claim that he did not see land when he was transferred from one ship to another was in direct contradiction with his account of events in his ASY1 form and his questionnaire where he stated that he traveled to Ireland via an unknown country.

• It was not plausible that the truck the applicant was allegedly on was not checked by custom officials in the port area in Ireland before being allowed to proceed.

• It was reasonable to expect a person would seek help at the first safe venue if they were in the grip of fear and thereby eradicate that fear when the opportunity first arises. The applicant's reasons for not doing so was disingenuous and wholly lacking in credibility. The decision-maker had regard to Section 11B (b) if the Refugee Act. It was not accepted that the applicant has provided a full and true explanation of how he traveled and arrived in the State.

• The Tribunal Member found the applicant's tendency to blame the interpreter for not allegedly interpreting his replies at the interview in the correct manner to be disingenuous and wholly lacking in credibility. The apportioning of blame only arose when discrepancies in his answers at his appeal to his answers at the interview were put to him in cross-examination. The interpreter's failure to translate some of his replies correctly did not form part of his appeal and, therefore, further undermined his credibility. The applicant had the opportunity to correct his answers when the questions and answers were read back to him.

• The cumulative effect of the observations in relation to the applicant's credibility materially detrimentally affected the veracity of what he purported to state and the substantive thrust of his claim. The applicant could not be afforded the benefit of the doubt and

was found to have contrived a story for the tribunal, which was rejected, and his failure to tell the truth during his appeal had been exposed in cross-examination.

• The applicant was found *"to be evasive and disingenuous as to its contents and presentation… his story to be inconsistent, contradictory, implausible, contrived and wholly lacking in credibility."*

Grounds of Challenge
15. The grounds pursued are:

Grounds 5

(a) The first named respondent breached the constitutional principle of Audi Alteram Partem by failing and omitting to put to the applicant those matters of his evidence which he did not accept;

(b) The first named respondent failed to consider the applicant's case by reference to relevant country of origin information and particularly the laws and regulations of the country of origin and the manner in which they are applied;

(c) The first named respondent failed and omitted to address the analysis of the application made by the Office of the Refugee Applications Commissioner;

(d) The first named respondent failed and omitted to identify that evidence of the applicant which was accepted and that which was not;

(f) The first named respondent fails to state adequately or at all his reasons for rejecting the submissions made in the Grounds of Appeal

(g) The first named respondent's finding that the cross-examination of the applicant exposed that he failed to tell the truth during his appeal was false with reference to the first named respondent's own record of the hearing;

The submissions advanced on behalf of the applicant

Ground 5(a)
16. Counsel submitted that the Tribunal Member breached the requirement of *audi alteram partem* in a number of respects. Firstly, a number of medical reports submitted by the applicant were dismissed as of no probative value. This was in circumstances where the applicant, in the course of the oral hearing, had not been asked any questions regarding the reports or where no right of reply was given to the applicant or his legal advisor. While the decision maker appeared to accept that the applicant appeared to suffer from epilepsy, he rejected the applicant's legal representative's description of the applicant's injury as brain damage and rejected the connection between the epilepsy and the applicant's evidence of beatings while detained in Sudan.

17. Furthermore, the Tribunal Member criticised the applicant for failing to provide a medical report from Sudan. If he considered this significant, it was incumbent on him to put it to the applicant as to why he had not furnished a medical report from Sudan. The applicant had not been asked in the course of the oral hearing as to whether a medical examination had been carried out in Sudan.

18. On the basis of such summary disparagement of the medical evidence which the applicant had produced, the Tribunal Member proceeded to dismiss the applicant's evidence in being detained and tortured as a concoction.

19. Secondly, the Tribunal Member disparaged the applicant's reference to his association with persons opposed to the government regime in Sudan by stating that the applicant had not elaborated on his claimed association either in his questionnaire, or in the s. 11 interview or at the oral hearing. The Tribunal Member recorded the applicant as having stated that "he gave the rebel government whatever he had" but it was contended this was not in the evidence and furthermore the Tribunal Member had not put this to the applicant in the course of the oral hearing.

20. Thirdly, the Tribunal Member found it not credible that if the applicant was in fear as he claimed that he would not have travelled to Chad where several thousand people were in refugee camps, instead of fleeing to Port Sudan which was a considerable distance from Darfur. It was submitted that the applicant was not afforded an opportunity to address this issue, yet the very issue was noted in the record of the applicant's evidence where he gave his explanation as to why he did not go to Chad, namely that he could not find protection in Chad and the lack of security at the Chad border. Counsel submitted that before finding against the applicant on this point, it should have been put to him that Chad was safe.

21. Fourthly, the applicant's accounts of the events in his village were confirmed by country of origin information. It was contended that if the Tribunal Member did not accept that the applicant was present in the village at the time of the alleged events and that the applicant was making up a story, that should have been put to the applicant, but this was not done, in breach of fair procedures.

22. Fifthly, the Tribunal Member found it not plausible that if the applicant left the Irish port area in the manner described by him, that the truck in which he was travelling was not stopped by customs officials before it was allowed to proceed. Counsel submitted that there was no basis for this finding, given that the applicant stated that the truck was not stopped. Thus, the finding was conjecture on the decision-maker's part. Moreover, if he was going to rely on the type of judicial knowledge as reflected in the decision, it should have been put to the applicant for him to comment on given his evidence that the truck was not stopped by custom officials.

23. Sixthly, the Tribunal member was satisfied that the Applicant's failure to seek asylum in any other country other than Ireland was not consistent with a person fleeing persecution and that the applicant had not provided a full and true explanation of how he travelled and arrived in this state. Counsel submitted that the only enquiry made of the applicant was regarding his journey by ship, the transfer from one ship to another and questions pertaining to the container the applicant was in. There was no evidence given by the applicant of the ship having pulled into another harbour or any details given by him to suggest another country was transited by him, albeit there were some bare references to such matters in the applicant's ASY1 Form and Questionnaire. There was however no evidence or information of any named country. Insofar as the questionnaire addressed this issue, the answer given by the applicant to the question *"which countries did you travel through?"* was "Sudan, unknown destination, Ireland". Counsel submitted that that answer was a long way from the obligation on the applicant to seek asylum elsewhere. In any event, the applicant's evidence at oral

hearing suggested that he did not leave the ship on route to Ireland save to transfer from one ship to another.

24. It was in breach of the principle of *audi alteram partem* for the Tribunal Member to arrive at the conclusion he did regarding the obligation on the applicant to seek asylum elsewhere in circumstances where he had not put it to the applicant that he could do so.

Ground 5 (b)
25. Counsel submitted that there was a failure to consider the applicant's case by reference to the considerable detailed country of origin information which he had furnished with his Notice of Appeal. There were only bare references to country of origin information in the decision, contrary to the requirement set out in Regulation 5 (1) (a) of the European Communities (Eligibility for Protection) Regulations 2006.

26. It was submitted that insofar as the country of origin information was referred to by the decision maker, it was used against the applicant. For the Tribunal Member to perversely employ the fact that the country of origin information actually closely corroborated the applicant's testimony in order to dismiss its evidential value, by a vague reference to jurisprudence which finds that consistency of a personal account with country of origin information could be crafted, was an incredible and a wholly unfair approach to evidence.

27. Counsel relied on the dictum of Finley Geoghegan J. in *A.M.T. v. RAT* [2004] 2 IR 267, as authority to the proposition that an adjudicator is bound to make some finding about the general situation in the country of origin and to assess the credibility of an applicant in that context. The finding is not based on an objective appraisal of all relevant evidence and information. The applicant gave a full and detailed account including a vivid experience of the horrific war in Sudan. All of this was corroborated by COI. As Finlay-Geoghan J. found in *N.K. v. Refugee Appeals Tribunal (Paul McGarry) and Others* [2005] 4 IR 321 and in A.*M.T. v. Refugee Appeals Tribunal and Anor.* [2004] 2 IR 607, an adjudicator is bound to make some finding about the general situation in the country of origin, and to assess the credibility of an applicant's concern in that context.

Ground 5 (c)
28. It was submitted that despite the Tribunal Member's statutory mandate, his decision contained no substantial reference to the recommendation made by the Commissioner and he had made no evaluation of that recommendation. Counsel submitted that it was the duty of the Tribunal Member to establish whether the right decision had been made in the s.13 report and then affirm or not the Commissioner's findings. In the present case, however, the Tribunal Member ignored the contents of the s. 13 report and otherwise sought to avail of alleged significant disparities between the contents of the applicant's questionnaire, the s. 11 interview and the evidence given by him at hearing. A concrete example of the Tribunal Member's approach can be gleaned from an analysis of the s. 13 report. At para. 1 of the said report the Commissioner stated:-

> *"The following documentation was submitted by the applicant in support of his application: 1. Citizen Certificate (on file) 2. Resident's Certificate (on file). 3. Residency Permit Certificate (on file). These "forms" are clearly photocopies and written and stamped over. They are of no probative value."*

29. Counsel submitted that that was a significant finding by the Commissioner. The Tribunal Member went on to adopt the same stance as the Commissioner in rejecting the applicant's credibility but yet appeared to accept that the applicant was from Sudan, a finding never made by the Commissioner. If the Tribunal Member was carrying out his role correctly, he should have said if the s.13 finding on the issue of the residency documents submitted by the applicant was correct or not and whether further enquiries were necessary with regard to the said documents. Instead, the Tribunal Member omitted any consideration of the documents from his reasoning.

In any event, counsel submitted that the s. 13 report was absent of any statutory approach. The findings ignored the scale and type of genocide then occurring throughout Sudan and effectively relied on the interviewer's personal opinion.

Ground 5 (d)
30. The Tribunal Member found, variously, the applicant to be *"evasive"* and *"disingenuous"* and that his story was *"inconsistent, contradictory, implausible, contrived and wholly lacking in credibility"* yet, counsel submitted, over four pages in the decision the decision-maker set out a detailed summary of the applicant's testimony. That summary showed the applicant as having given a coherent, graphic and plausible account. It was thus disingenuous for the Tribunal Member to recite the applicant's evidence in the manner he did and then to fail to address it in his analysis, other than select a few inconsistencies and then use them as a basis for a finding of a total lack of credibility. This was done without affording any opportunity to afford the applicant *audi alteram partem*. The applicant had provided the Tribunal with documentation from Darfur yet they were never referenced in the context of his rejection of the applicant's credibility.

Ground 5 (f)
31. The applicant had submitted detailed appeal submissions which contained a detailed analysis of the Commissioner's decision, legal authorities and relevant country of origin information. Other than remark that it had been considered, the Tribunal Member ignored the Notice of Appeal. Pursuant to the provisions of s. 16 of the Refugee Act 1996, as amended, it was not open to the decision-maker to fail to address its contents.

Ground 5 (g)
32. In the course of his total irrational disparagement of the applicant's evidence, the Tribunal Member stated that the applicant had *"contrived a story for the Tribunal, which I reject, and his failure to tell the truth during his appeal has been exposed in cross-examination."*

33. Counsel submitted however that the early part of the decision, under the heading *"The Applicant's Claim"* recounts the applicant's experiences from his arrest through to his eventual fleeing from Sudan. Both the Presenting Officer and the Tribunal Member had examined the applicant on his account. The cross-examination largely comprised clarifications and some minor purported inconsistencies but had revealed no substantial evidence that the account given by the applicant was false. The applicant's answers had underlined the coherency and veracity of his testimony and were consistent with what he had set out in his questionnaire and at the s. 11 interview. Yet the Tribunal Member sought to create some vague inference of the applicant having lied by leaving various matters hanging in his decision, and then by categorically rejecting the applicant's credibility. That rejection however was unsustainable by virtue of the Tribunal Member's own record of the applicant's evidence.

The submissions advanced on behalf of the respondents
34. By way of general statement, counsel submitted that the Courts function was to review the Tribunal decision for any significant error of law or procedure or sufficient factual error or irrationality in the sense outlined in Meadows v. R.A.T.

35. This threshold however was not met in any of the grounds set out in the statement of grounds. A key point of the decision related to the applicant's credibility, not just in relation to his transit to this state but also to his claimed subjective fear of persecution. That was disbelieved by the Tribunal Member and that finding was arrived at within jurisdiction.

36. With regard to ground 5(a), as advanced by the applicant, counsel submitted that this ground was without foundation. The application of *audi alteram partem* and constitutional justice encompasses the right to a fair hearing (including an oral hearing in certain circumstances) but not the right of a party to receive *"..those matters of his evidence which the first named respondent did not accept"*. This would involve a predetermination by the decision-maker or a contemporaneous determination which is inconsistent with a proper consideration of the issues in determining the claim. Notwithstanding this basic point, the decision at issue contains clear references to questioning by the Tribunal Member on issues of pertinence to the ultimate decision (for example, the query made of the applicant of his account of the changing ships while at sea). Furthermore, in respect of the medical evidence, the Tribunal Member engaged in a clear examination of this issue in his analysis where it is stated *inter alia* that the applicant did not inform Dr. Trueick on 22nd August, 2008 or 28th August, 2008 that he suffered a head injury during the period he was allegedly detained and the observation of the lack of a medical report from an expert to substantiate the applicant's claim that he suffered brain injuries during the period of alleged torture. The Tribunal Member properly reached his decision *ex post facto* as he was required to do, after hearing all of the evidence. The applicant was legally represented at the hearing. The applicant was the person best placed to put forward the evidence believed favourable to his case. His legal representative led him in evidence in this regard, in addition the cross examination by the Presenting Officer and examination by the Tribunal Member. It is only after such an exercise is it appropriate to determine the issues at hand. No issue of absence of constitutional justice arises. There is no obligation on the Tribunal Member at the time of the hearing to put the matters of evidence he accepted or not to the applicant as the decision-maker would not have made up his mind until hearing all of the evidence and until all of the relevant issues were addressed. Nor was it incumbent on the Tribunal Member to call back the parties and put to the applicant the medical evidence he accepted or rejected. Counsel submitted that it is trite law that all the *audi alteram partem* is an enshrined constitutional concept but that the principle does not extend to the procedure contended for by the applicant's counsel in aid of ground 5(a). Accordingly, there was no breach of the principle of *audi alteram partem.*

37. With regard to ground 5 (b), counsel submitted that there was no merit to this particular challenge. A perusal of the decision showed that the Tribunal Member accepted that there had been a bombardment of Mahajirya, Darfur on 8th October, 2007: thus, the Tribunal Member carried out an analysis of the objective situation in Sudan, contrary to the applicant's assertion. This analysis was peppered throughout the decision.

38. In any event, as the decision turned on the issue of credibility, there was no onus on the Tribunal Member to conduct a detailed examination of country of origin information. In *Imafu v. R.A.T.* [2005] IEHC 416, Peart J. held that the tribunal should not engage in a "pointless exercise" of engaging in analysing country of origin information in circumstances where same could not add any real relevance to the overall assessment of credibility. In this regard Peart J. stated:

> *"But in the present case the applicant was not believed as to her personal tale, and it is reasonable to conclude therefore that no matter how much evidence or material may have been available as to the state of things in Nigeria from an objective viewpoint, this could not have persuaded the Member to believe the personal story. In this way the case is different from many other cases where the country of origin information may have the capacity to corroborate the actual story of the applicant."*

Peart J. went on to state:

> *"This Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal Member. The latter, just as a trial judge is at trial rather than the appellate court, in the best position to assess credibility based on the observation and demeanour of the applicant when she gives her evidence. These are essential tools in the assessment of credibility, and it is always essential to remember that what appears as the spoken word in a transcript or in a summary of evidence contained in any written decision cannot possibly convey the necessary elements for the assessment of credibility. That is what a Court will be reluctant to interfere in a credibility finding by an inferior tribunal, other than for the reason that the process by which the assessment of credibility has been made is legally flawed."*

39. A key element of the decision is rejection of the applicant's credibility on a number of grounds. A stark finding is set out at para. (G) of the s. 6 analysis where the Tribunal Member states:-

> *"It is not plausible that a ship would stop mid ocean and transfer a container, which the applicant was allegedly concealed, onto another ship without arousing the curiosity of the captain or a senior officer. The applicant did not state in his questionnaire that he was in a container when he was transferred and his testimony that he was not asked the question at his interview is wholly lacking in credibility. It is also not plausible that he boarded the first ship in the manner alleged by him without attracting the attention of the ship or a senior officer."*

40. Other findings contrary to the applicant's credibility include, at para. (E) of the analysis, the long distance travelled by the applicant to Port Sudan, rather than taking the safer option of crossing the border to Chad. Counsel submitted that s.11 (B) of the Refugee Act, 1996, as amended, requires the Tribunal Member, in assessing credibility, to have regard to whether an applicant has provided a reasonable explanation to substantiate their claim that the state is the first safe country in which they have arrived since departing their country of origin or habitual residence. This was the ground relied upon in respect of the decision at issue. Moreover, the substance of the applicant's claim was rejected as not credible. The Tribunal Member clearly states at para. 6 (C) of his analysis that *"I do not believe that the applicant was detained and tortured as he alleges and I further believe he has concocted a story to enhance his claim for refugee status".* Notwithstanding that country of origin information was duly assessed by the decision-maker here, the above quoted jurisprudence confirms the futility of a decision-maker embarking on an analysis of country of origin information when this subjective element of the persecution claim is disbelieved.

41. With regard to the arguments advanced in aid of ground 5 (c), the applicant's counsel was in error in contending that the Tribunal Member failed to affirm the Commissioner's recommendation. He had specifically done so, as set out in the decision where he states:

> *"Accordingly, pursuant to s.16 (2) of the Act, I affirm the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of the Act."*

However, the decision-maker did so after considering de novo the applicant's appeal, as he was required to do.

42. Counsel submitted that this ground was thus without foundation. The Tribunal Member's role was to consider the applicant's

appeal afresh without any prejudgment of the issues. Furthermore, the Tribunal Member stated that he evaluated *"the applicants statement in his questionnaire, the interview, his testimony to the tribunal.."*. He also recognised the differing facts presented by the applicant to ORAC, and to the Tribunal. By way of example, at para. 6(0) of the analysis, it was noted that in his questionnaire the applicant stated that he was not a member of any political party and that the only ground for claiming asylum was due to race, whereas at interview, the applicant stated that he was accused of collaborating with *"some movement"*.

43. In answer to the applicant's counsel's submissions in aid of ground 5 (d), it was submitted that there was no basis in law for any of the arguments advanced. The decision at issue was clear as to its finding on credibility and those findings were factually based. In response to the applicant's contention that the finding of credibility is unlawful as it did not accord with the findings of ORAC and was not based on an objective appraisal of all relevant evidence, counsel cited *NK v. RAT* [2005] 4 IR 321, where Finlay Geoghegan J. held that findings of credibility must be assessed by reference to the specific factual issues raised. It is submitted that this threshold was met in the within proceedings and the objective analysis of the applicant's credibility was factually reasoned.

44. In the circumstances, there was no obligation on the Tribunal Member to engage on an atomised basis with each and every piece of evidence. In this regard, counsel cited the dictum of Clarke J. in *N v. R.A.T*. [2009] IEHC 434.

45. While a decision maker must give clear grounds as to why the decision was arrived at was to enable the party receiving the decision to understand it for the purpose of any appeal or review, there was however no constitutional imperative on a decision-maker to state every reason as to why a claim was accepted or rejected. This is clear from the decision of Clarke J. in *Rawson v. Minister for Defence* [2012] IESC 26.

46. Insofar as in aid of ground 5 (f), it is asserted that the Tribunal Member failed to state adequately or at all his reasons for rejecting the submissions made in the Notice of Appeal, counsel submitted that this assertion was without legal foundation. There was no obligation on the decision-maker to exhaustively accept or reject all submissions made by an applicant or a party to a case. While the Supreme Court in *Rawson v. Minister for Defence* held that there was a duty to give reasons upon which its decision was based, this principle could not be stretched to obligate a decision- maker to categorically state all submissions accepted and rejected.

47. With regard to the applicant's submissions on ground 5 (g), there was no factual basis upon which such arguments could be advanced. The applicant's legal submissions wholly failed to advance this ground. In any event, the Tribunal Member was entitled to find whether the applicant gave a truthful account or otherwise and that was entirely within his jurisdictional remit.

48. It was submitted that none of the grounds relied upon by the applicant had a basis in fact, nor were they in accordance with any established legal principle. In some of his grounds, the applicant's counsel sought to push established legal principles to another level by seeking to extend the principle of audi alteram partem where the procedure available to the applicant at appeal fully complied with that principle. Moreover, the applicant sought to place an unfair onus on the Tribunal Member to follow, wily nily, the Commissioners findings when the purpose of the Tribunal adjudication was to afford a *de novo* hearing to the applicant based on an independent assessment of the facts.

The applicant's response to the respondents' submissions

49. In response to the arguments put forward by the respondents on the issue *audi alteram partem*, counsel contended that it was not tenable to submit that a decision- maker could be considered legitimately incapable of applying the principle of *audi alteram partem* during the hearing process and accordingly somehow therefore be excused from adhering to constitutional fair procedures. While the respondents referred to the applicant having been legally represented at the hearing, no opportunity was giving to his legal representatives to address conclusions which purported to prove that the applicant had concocted a story.

50. This process of arriving at determinative conclusions, which had not been opened to submission, included deciding that any medical evidence produced by the applicant was of no probative value (although the reports showed at a minimum the outset of epilepsy and the reporting of a head injury); that no medical examination was carried out in Sudan (for which conclusion there was no evidence); that the applicant's fears in respect of fleeing to Chad were (again without reference to evidence) unfounded; that a person boarding a ship would have been to be seen by an officer of the ship (even if in a container); that the applicant had failed to apply for asylum in another country (were there was little or no evidence of any such country or opportunity); and that expressing dissatisfaction with the interpretation (which, contrary to what the decision maker-stated, did form part of the appeal) *"further undermined [the applicant's] credibility"*. Counsel relied on the dictum of McCarthy J. in the state *Irish Pharmaceutical Union v Employment Appeals Tribunal* [1987] ILRM 36.

51. While the respondent relied on two decisions, *Imafu v RAT and Ojalabi v RAT*, to support the proposition that if there is a finding of lack of credibility then there is no requirement to consider the objective evidence, both of those decisions pre- dated the passing into law of the 2006 Regulations Regulation 5(1) (a) of which mandates a decision-maker to take into account all relevant facts as they relate to a country of origin. Counsel referred N.K. v RAT & Others [2004] 4IR 321, as authority for the proposition that an assessment of credibility should be carried out in the context of an evaluation of the conditions in the applicant's country of origin. This was particularly applicable in the applicant's case where country of origin information closely corroborated his testimony.

52. In so far as the respondents submitted that the appeal hearing is a *de novo* hearing and that there is no requirement on the Tribunal to address the findings of ORAC, it is submitted that it is not open to the respondents to rewrite the relevant legislative provision which provides that the Tribunal is required to affirm or otherwise the recommendation made by ORAC. An applicant on receiving a decision from ORAC must instruct his or her legal advisors as to the content of the s. 13 report. He or she must, on their advice, decide whether to appeal that decision and if such a course of action is decided upon his solicitors must prepare a notice of appeal. Contrary to the respondents' contention, the Tribunal was not at large (as occurred in the applicant's case) to initiate a new enquiry, or ignore the findings made by ORAC and not subject those findings to critical review. Furthermore, counsel rejected the respondents' contention that the Tribunal should also apparently be free, in adopting this course, to revisit the questionnaire and the interview, which were generated for the purposes of an application to ORAC, for the purpose of cross examination.

53. Contrary to what the respondents argued, the applicant has not contended that there is an application on the Tribunal to engage on "an atomised basis" with each and every piece of evidence. What is contended for on behalf of the applicant is that the Tribunal elicited from the applicant in the course of the hearing a full account of his experiences but then proceeded, in reaching its conclusions, to ignore the applicant's evidence, an approach which was disingenuous to the point of being unreasonable and/or irrational. Furthermore, the respondents' own contentions did not meet the standard cited in the authority upon which they relied, i.e. the dicta in *Pamba v RAT and Other*, as approved in N v RAT, namely *"… the duty is satisfied if the addressee can ascertain from the decision why the appeal failed and if the court is placed in a position to exercise its function of judicial review"*.

54. Section 16(16) of the Refugee Act 1996 requires the Tribunal to consider the Notice of Appeal submitted by the applicant. Where,

as here, a decision maker does not firstly address the decision appealed, nor the grounds upon which it is appealed, it effectively ignores the questions posed for it by the legislator and thus it cannot be said that any decision emanating from a decision-maker in such circumstances could be said to be answering the right question, in accordance with the decision of the Supreme Court in Rawson v Minister for Defence.

55. Contrary to the respondents' submission that there was no basis in law or in fact for the assertion that the Tribunal's finding that the applicant failed to tell the truth was incorrect by reference to the Tribunal's own record, a fair reading of the decision shows that the applicant, although answering what was in effect a new and adversarial cross examination of his testimony, was not contradicted on it, other than in some minor inconsistencies, which could be expected of someone who was recalling traumatic events of more than three years prior. As a matter of simple natural justice, where a decision maker completely rejects a testimony and where he condemns the applicant as a liar, as a minimum, that would require to be supported by the decision-maker's own record of the hearing.

Considerations

Alleged breach of audi alteram partem

56. The first issue to be addressed under the fair procedures challenge is the applicant's complaint that the Tribunal Member did not give the applicant or his legal representative an opportunity to reply to the finding that the medical reports submitted were of no probative value. It is also argued that since the applicant had not been asked as to whether a medical examination had been carried out in Sudan, it was incumbent on the decision-maker to put it to the applicant as to why he had not furnished a report from Sudan.

57. As he was required to do, the decision maker expressly considered the medical evidence which was before him. There are express references to some of the medical reports submitted on behalf of the applicant including a medical report dated the 16th July, 2009 (which is attributed to Dr. Hardiman but which may be an earlier report of another doctor in that practice, Dr. Rogers. (I find nothing turns on this particularly).

58. The Tribunal Member records the 16th July, 2009 report as referring to the applicant's in-treatment in hospital for severe constipation and that he suffers from epilepsy. The He then refers to another undated report, again attributed to Dr. Hardiman, which may however be a report from his practice partner Dr. Rogers (nothing turns on this), which refers to the applicant having *"recently being diagnosed with epilepsy"* and which states that the applicant *"reports having had a head injury in 2007, which continues to give him severe pain. MRI reported as normal however."*

59. The Tribunal Member also refers to another report, again perhaps from Dr. Rogers, dated the 13th March, 2009, insofar as he notes that the doctor refers to the applicant suffering from epilepsy and that he was referred to *"Dr. [ ] Ahmed".* The Tribunal Member then notes that *"[a]medical report from "Dr. Ahmed" was not furnished to the Tribunal".*

60. It is the view of the court that the decision-maker would appear to have misinterpreted the report of 13th March, 2009 as a referral from the author of the report to a "Dr.Ahmed" at a named address on the report. I note that the named address which is recited in the report appears that to be of the applicant since this address is given as his address in all the other medical reports which emanated from the medical practice of Dr. Hardiman and Dr. Rogers. Thus, insofar as the Tribunal Member records that a medical report from "Dr. Ahmed" was not furnished to the Tribunal, it is unlikely that this could have ever materialised since it would appear that the author of the medical report merely misspelt the applicant's name, but was understood by the Tribunal Member as having referred the applicant to a "Dr. Ahmed" when in fact the name appearing in the medical report was in all likelihood a reference to the applicant. I should add that this is an observation made only by the court, following my analysis of the medical evidence which was before the Tribunal.

61. In his s. 6 analysis, the decision-maker next addresses the applicant's legal representative's written submissions of 31st July, 2009 wherein it is recorded, inter alia, that *"the applicant sustained brain damage as a result of the torture endured during his detention and exhibited symptoms for the first time which were later diagnosed as epilepsy. He now requires ongoing medical treatment for epilepsy".*

62. With reference to two medical reports from Dr. Trueick, the Tribunal Member then notes that the applicant did not inform Dr. Trueick on either 22nd or 28th August, 2008 that he sustained a head injury during the period he was allegedly detained. The reports of Dr. Trueick, each addressed *"To whom it concerns"* record that the applicant suffers from epilepsy *"and would benefit from not having a TV in his room".*

63. The Tribunal Member goes on to note *"nor has a medical report from an expert been submitted which would substantiate [the applicant's legal representatives] submission that the applicant sustained brain damage"*. He goes on to conclude that the applicant's legal representative's submission *"is based on speculation and conjecture. The medical reports submitted are not of probative value as such in establishing the credibility of the account given by the applicant"* and he states *"if the applicant was severely tortured for 20 days as he alleges a medical examination would have revealed the extent of the injuries caused to his person and perhaps would have given credence to the applicant's allegation that he was tortured. However, an examination does not appear to have been carried out."*

64. I am satisfied that the above reference refers to the absence of any evidence of a medical examination having been done in this jurisdiction vis a vis the applicant's claim to have sustained a head injury.

65. On their face at least, the medical reports which were before the Tribunal Member do not appear to be diagnostic in the sense that, although they record the applicant as suffering from epilepsy and at least one report refers to a head injury in 2007, none of the medical reports in fact makes a specific diagnosis as to how the applicant's epilepsy came about.

66. In any event, the weight to be given to the medical evidence was a matter entirely for the decision maker and it is not the function of this court to make findings with regard to the contents of the medical reports. What falls to be determined is whether the Tribunal Member's finding that the medical evidence was of no probative value in establishing the credibility of the applicant was rationally and reasonably arrived at and whether this assessment was fairly arrived at.

67. The complaint advanced here on behalf of the applicant is that the finding was unfair because it was not put to the applicant or his legal representative. I find no merit in that submission. The Tribunal Member's function was to consider the reports in the context of whether they constituted objective corroboration of the account given by the applicant of the events claimed by him. That assessment was carried out and I agree with the respondents' counsels' submission that no issue of absence of constitutional justice arises. There was no obligation on the Tribunal Member at the time of the hearing to put to the applicant whether he accepted or not

the medical evidence which was before him. Nor was it incumbent on the decision-maker to call back the parties and put to the applicant the medical evidence he accepted or rejected.

68. It is well established jurisprudence that a decision-maker is not required to debate with the person who is to receive the decision every one of the conclusions on credibility that might be made or that a decision maker has to warn an applicant that his or her appeal might fail on a particular point. Clearly, the applicant was aware of the medical reports since they were furnished to the Tribunal Member on his behalf presumably as independent evidence being put before the Tribunal. I see no basis in the applicant's counsel's argument that the Tribunal Member was obliged to debate the contents of the medical expert evidence with the applicant or with the applicant's legal representative. Moreover, there was opportunity for the applicant's legal representative to elicit whatever information he wished from the applicant concerning the head injury alleged to have been sustained while the applicant was in detention but it was specifically noted in the decision that this was not done.

69. An argument of absence of fair procedures was also made with regard to the Tribunal Member's failure to question the applicant as to whether a medical examination was carried out in Sudan, a complaint which emanates from the observation in the decision that the applicant had not put in a medical report from Sudan. In this case the applicant's testimony was that he was treated in Sudan for the injuries he claims to have sustained while in detention. I accept as a general principle that it may not always be feasible for a protection applicant to arrive in a receiving state with medical evidence or medical reports. Thus, it could be said that the approach of the decision-maker here was unreasonable but I find that it is not such that the overall finding on the medical evidence should be impugned, given that the court finds no fault with the treatment of the medical evidence which was before the Tribunal Member and noting that his observation was made against the backdrop whereby the applicant, although claiming to have been beaten and tortured in Sudan, *"did not at any stage during the asylum process claim he suffered a head injury".*

70. The question arises whether the fact that the Tribunal Member, in assessing whether the applicant's account of events was credible, appears to have factored in the non production of a report from "Dr. Ahmed" (which I believe may be a factual error on the part of the decision-maker) is such as to vitiate the decision. I do not believe that to be the case however, in light of the fact that I have found the approach of the decision-maker to the medical reports that were actually before him not to be unfair.

71. In all the circumstances I do not find any unfairness in the manner in which the medical reports were dealt with.

72. The second complaint of unfair procedure advanced on behalf of the applicant is that the Tribunal Member, in disparaging the applicant's references to his association with persons opposed to the regime in Sudan, ignored the applicant's statements that his admissions were made under torture, and that it was never put to the applicant that his involvement with rebel groups was any more than the supplying of basic equipment, which he had recounted to the Tribunal Member. The Tribunal Member noted that the applicant had only claimed on the ASY1 form that he sought asylum because of race; that in his questionnaire he had claimed asylum also only on the grounds of race and that he had not elaborated about his alleged political activities at q.21 of the questionnaire and that at the s. 11 interview, the applicant did not claim persecution on grounds of alleged political activity other than he *"stated that he was accused of collaborating with some movement".*

73. It is common case that there is no reference to political activities in the ASYI form.

74. However, in his reply to q. 21 of the Questionnaire, (as translated in December 2007 from Arabic) the applicant stated, inter alia, *"..I was asked if I knew why I was brought to that place and that was the only question I heard during my detention period and my answer was 'I do not know' and he told me that they have intelligence showing that I was helping the insurgents in Muhajiria and selling them batteries. I told him that I am a salesman and that many people buy of my shop and I deal with everybody then he stood up and told me that they want me to stop cooperating with the insurgents then I asked him about what will happen to me if I refused these demands, and I said that people were paying for the goods they take and that they were armed and if I refused to sell them anything I would be killed. Then the Officer asked me to sign a document in which I stated that I would ill (sic) not cooperate with these people and he told me that I am finished, if they saw me in that place again, so I was forced to sign that document, then they took me to the hall where I waited until they finished questioning everybody"*

75. The applicant's Q. 21 narrative was again translated from Arabic in January 2011 following a request made by the Tribunal Member during the resumed hearing. The relevant equivalent recounts the applicant's claim in more or less similar terms.

76. The s.11 interview documents, inter alia,

> *"Q. 15 Why are you seeking asylum*
>
> *A. I'm facing many problems with the Sudanese government.*
>
> *On 26 June 2007 I was detained by Sudanese gov't forces assisted by SLM-led by [T].*
>
> *I was in the m,arket. Gov't forces assisted by SLA information, drove into the Souk (Market) & they took me and one other person in the came vehicle. They brought another 7 people into that detention centre……*
>
> *They started beating us & they put us under the sun for hours & beating us at the same time. They didn't ask us anything. In the end I knew they suspected I had been collaborating with small movements which were against Minnawi.*
>
> *…….*
>
> *One day an Officer came to the centre and they took 3 from our cell & after that one-by-one.*
>
> *They told us that they had executed the three.*
>
> *The Officer asked me why I was there. He told me that he had information about me, that I had collaborated with some Movement in the area which was against the gov't and Minnawi faction.*
>
> *He asked me to sign a paper that I will never cooperate with other Movements against the gov't & SLA-Minnawi, or I will never supply those groups with goods, & also to report immediately if I got any information from those movements.*
>
> *I signed it. That night they took three of us & left us, not far from Labado…."*

In the Tribunal decision, the applicant's evidence, inter alia, was recorded as follows:-

> *"The applicant is from Mahajiria, Darfur. On 26th June 2007 the government forces with the support of the SLA arrested the applicant in his shop and several other people in the market place without being given a reason.*
>
> *They were immediately beaten and tortured when they arrived at a prison and they were accused of supporting JEM. When asked were they told how thet rendered support to the rebels the applicant replied there were several movements(sic) in the marketplace and they were accused of supplying JEM free items, like flashlights from his shop. The applicant sold mostly batteries and flashlights…..*
>
> *The applicant sold flashlights to customers and he gave the rebel movement whatever he had. He did not support the government who were trying to replace people of African ethnicity with Arabs in Darfur which to him was ethnic cleansing….*
>
> *The applicant …was told he was dealing with the movement which they wanted him to cease doing if he was asked by the rebels to collaborate he could report it to someone in the market…*
>
> *During the 20 days he was in prison the applicant claims he was not questioned, an investigation was not carried out but he was told he was supporting rebels…"*

77. Counsel argues that the Tribunal Member breached the requirements of *audi alteram partem* in failing effectively to put to the applicant that he had claimed that his involvement was more than the supplying of basic equipment to the rebels.

78. It is clear that in the Questionnaire and the s. 11 interview, the height of the applicant's case was that he was perceived by government forces as being involved with rebel groups by reason of his having sold or supplied goods to such groups. The case made in the appeal submissions of 31st July 2009 was that the Tribunal should consider the applicant's fear of persecution in the context of the " *genocidal, ethnic, religiously, and racially motivated violence in the Sudan and the manner in which such violence is directed against persons of a particular group defined by their social grouping, political activity"(*emphasis added), that the applicant *"presented a consistent account with respect to his political activity"* and that the applicant *"should benefit from a presumption that he is in need of protection having regard to Sudan's gross human rights record and continuing pattern of persecution and the genocidal actions of the government-sponsored forces against political dissent".*

79. The Tribunal Member effectively finds that the applicant's accounts as given in the Questionnaire, at interview and at hearing did not live up to the submission made in the appeal submissions and notes that despite the appeal submissions, the applicant's legal representative had not asked the applicant *"about his involvement despite [the] submission that the applicant presented a persistent account with respect to this political activity".*

80. I am not satisfied that that was an unfair observation where the Tribunal's record of the oral hearing suggests that the matter was pursued at hearing on the applicant's behalf on the basis of what he claimed in the Questionnaire and at interview, and in circumstances where it was the case that a more elaborate political activity on the part of the applicant was hinted at in the appeal submissions, which was then not pursued. Given that the decision-maker adjudicated on matters known to the applicant, there was no breach of *audi alteram partem.*

81. Moreover, the applicant's counsel's argument that the Tribunal Member misconstrued a statement made by the applicant's evidence is without merit. In written and oral submissions, the applicant's counsel asserted that the Tribunal Member wrongly recorded the applicant by recording that the applicant stated that *"..he gave the rebel government whatever he had".* In fact what is recorded in the decision (p. 3 thereof) under the heading *"The Applicant's Claim"* is:

> *"The applicant sold flash lights to customers and he gave the rebel movement (emphasis added) whatever he had."*

82. Issue was also taken with the finding that the applicant's credibility was undermined by his not having sought protection in Chad where several thousand people were in refugee camps, as opposed to the applicant having fled to Port Sudan which was a considerable distance from Darfur and where he ran the risk of being arrested while on route.

83. As the record demonstrates, this issue was canvassed with the applicant at hearing and specifically the decision records:

> *"The applicant was told according to the RAC there are thousands of refugees in Chad which is 250kms from Nyala and he was asked why he did not go there. He replied he could never find protection in Chad, he will face the same problems, there was no way he could escape to Chad, there is no security at the border and it is well known that lots of people are killed and raped. He could not relocate to Khartoum because ethnic cleansing is endemic in Sudan and the authorities would know he is not from Khartoum if he was stopped and questioned."*

84. Thus, the fact that the issue was addressed in the decision could not come as a surprise to the applicant. The question is whether the Tribunal Member's conclusion should have been debated with the applicant prior to it being reached. I am not persuaded by the applicant's counsel's arguments in this regard for the same reason the court has rejected similar arguments advanced in respect of the issue of the medical reports. The Tribunal Member's conclusion was open to him on the evidence and absent irrationality or unreasonableness, which I do not find, it is not the function of the court to substitute its own assessment of the applicant's account for the view advanced by the decision-maker.

85. Counsel also submitted that the Tribunal Member's finding that it was not plausible that the truck the applicant claimed to be in upon arrival at the Irish port would not have been stopped by custom officials before being allowed to proceed on its journey should have been put to the applicant. I note however that the issue of a customs inspection was raised in the Tribunal Member's questioning of the applicant and thus there can be no basis for any argument that a finding on this issue could have come as a surprise to the applicant or that it was in breach of fair procedures. Counsel for the applicant also argued that the finding amounted to conjecture. I am not inclined to accept that argument as I am satisfied that the decision-maker rationally and reasonably put it to the applicant that if he entered the truck, the seal would be broken and would be noticed by custom officials.

86. It was also argued that the *audi alteram partem* rule was breached in finding that there was an obligation on the applicant to seek asylum elsewhere other than in Ireland, in circumstances where the Tribunal Member had not put it to the applicant that he could have sought asylum elsewhere.

87. The finding made in this regard was as follows:

> *"The applicant claims he did not see land when he was transferred to the second ship which contradicts his account in his ASY1 form that he travelled to Ireland via an unknown country and in his questionnaire that he was at an unknown destination on dates he did not know….*
>
> *I am satisfied from the facts before me that the applicant's failure to seek asylum in any other country than Ireland, is not consistent with a person seeking to flee his pursuer and, therefore, it is imperative to seek asylum wherever one can. It is reasonable to expect a person to seek help at the first state venue if one is in the grip of fear thereby eradicate his fear when the opportunity first arises, and his reasons for not doing so is disingenuous wholly lacking in credibility. I have had regard to s. 11 B (b) of the Act which is relevant to this application. On the evidence before me I do not accept that the applicant has provided a full and true explanation of how he travelled and arrived in the state."*

88. I note that the Tribunal Member does not specify the country of safe haven he had in mind, although I note that he queried the applicant as to why he had not sought asylum in Chad. However, insofar as the finding that was made purportedly in compliance of 11 B (b) of the Act was intended to take account of the applicant's admission on the ASY1 form and in the questionnaire that he transited through an unknown country, those admissions of themselves could not reasonably or fairly lead the decision maker to conclude that the applicant could have sought asylum in the *"unknown country",* given the dearth of detail before the Tribunal Member relating to the "unknown country". I am satisfied that the specific reference to s. 11 B (b) of the Act was erroneous sends, to my mind, the asylum record available to the court in this case does not indicate that the applicant, albeit having arrived in Ireland, specifically claimed it was the first safe country he arrived in. Therefore, s. 11 B (b) of the 1996 Act should not have been applied to the assessment of the applicant's credibility. However, this impugned finding relates to a peripheral matter (the applicant's travel route) and would not of itself vitiate the decision if there are other tenable factors to sustain the decision.

89. I note the finding made by the Tribunal Member that the applicant had not provided *"a full and true explanation of how he travelled and arrived in the state".* I am satisfied that the Tribunal Member, in assessing the applicant's credibility, was entitled to take account of the inconsistencies as between what the applicant stated on his ASY1 form and on the questionnaire, namely that he arrived in Ireland via an unknown country, and his later contention at the section 11 interview and at the oral hearing that he did not see land on route and that he was transferred from ship to ship while at sea.

90. Insofar as counsel for the applicant in his supplemental submissions argued that the finding that it was not plausible that the container in which the applicant was allegedly in could be transferred from ship to ship at sea without arousing the curiosity of the captain or of a senior officer should have been put to the applicant, I find no merit in that argument, again on the basis that once this matter was canvassed with him at the hearing, it did not fall to the Tribunal Member to debate with the applicant any conclusion that might be reached with regard to his account. There is no basis to impugn the finding made by the Tribunal Member in all of the circumstances of this case.

Country of origin information

91. At paragraph F (ii) of the analysis, the Tribunal Member states:-

> *"The Human Rights situation in Darfur is extensively documented in country of origin information (COI). Substantial COI has been submitted on behalf of the applicant."*

Later, he states:

> *"The applicant's account of the events in his village are confirmed by COI (see section 13 report). However, this does not indicate that the applicant is from Darfur or if he is that he was present during the bombardment. Furthermore, the applicant was not personally targeted by the bombardment.*
>
> *Cooke J. , 16th March 2010, stated,*
>
> *"The mere consistency of a story told in circumstances or conditions described in country of origin information does not make the story true. A carefully crafted personal history which is largely invented can always be made consistent with known country of origin information. This is the classic dilemma frequently faced by decision makers in making an appraisal of an applicant for asylum."*

92. Other than the foregoing and a general reference at the end of the decision that country of origin information was considered, the Tribunal Member does not refer to any specific country of origin information. It is clear from the Notice of Appeal that a substantial volume of country information was put before the decision-maker, as indeed is acknowledged in the decision. I note that at the same time as stating that the information was considered, the Tribunal Member also quotes from the decisions of Peart J. in *Ojelabi v. RAT* [2005] IEHC 42 and *Imafu v. Min. for Justice* [2005] IEHC 416 as authorities for the proposition that where the lack of credibility fundamentally affects the subjective element of a well-founded fear, the objective element of the well founded fear assessment does not require to be made. While I find the approach of the decision-maker somewhat contradictory, that is neither here nor there in light of the acknowledgement in the decision that the applicant's account of events in his village was confirmed by country of origin information. In the circumstances, the requirement on the decision-maker under the 2006 Regulations, and indeed under s.16 (16) of the Refugee Act, 1996, as amended, was met. Furthermore, other than the general assertion that the country information which attached to the Notice of Appeal should have been more fulsomely addressed in the context of the assessment of the applicant's personal story, counsel did not point to what portion of the information listed in the Notice of Appeal was excluded or ignored by the decision-maker, or how such information would have assisted in a different outcome for the applicant. Indeed such information was not put before this court on affidavit, save that attached to the s. 13 report, and insofar as country reports were listed in the appeal submissions.

93. It was also suggested that the coming into force of the 2006 Regulations somehow diluted the authoritative force of the decisions of Peart J. in *Imafu* and *Olajelabi* but I find that suggestion to be without merit. The referred-to jurisprudence makes the perfectly valid point that where a protection applicant's personal tale is found to be so fundamentally unbelievable, there is no requirement on a decision-maker to engage in the *"pointless"* exercise of ascertaining whether the account could be objectively verified. However, I make these remarks in passing because the applicant's account of events in his village in October 2007 was found by the Tribunal Member to be corroborated by country of origin information.

94. I am equally not persuaded by the argument that the decision-maker's reference to the dictum of Cooke J. (quoted in the decision) was employed as a mechanism to transform the potential of the accepted objective situation in Darfur to corroborate the

applicant's claim, into a negative factor to be used against the applicant. It seems to me that in quoting Cooke J., the decision-maker did no more than point out that accepted events in a country of origin cannot be the sole determining factor in a refugee application and that a protection applicant's subjective tale will have to be assessed as part of the consideration of whether the right to be recognised as a refugee is well-founded.

95. In the instant case however, the decision goes on to effectively state that the corroborative effect of the country of origin information did not indicate that the applicant was from Darfur, or even if he was, that he was there during the bombardment of his village.

96. In aid of grounds 5 (c), (d) and to an extent ground 5 (f), one of the arguments made in the course of these proceedings is that the applicant provided the Tribunal with documentation, which was not considered as to whether it was accepted or rejected. In this context, counsel referred to citizen and residency certificates said to confirm the applicant as a resident of Muhajiriya. These documents were rejected by the Commissioner as of no probative value. The question to be decided is whether they were required to be addressed by the Tribunal Member. Counsel for the respondents has submitted that a decision-maker is not required to deal with every piece of evidence on an atomised basis and I agree with that general proposition but that has to be subservient to the obligation on the Tribunal to engage with the arguments set out in the Notice of Appeal, pursuant to the statutory mandates on the Tribunal. Section16 (16) of the Act makes it clear that in deciding an appeal regard, inter alia, must be had to the Notice of Appeal, the Commissioner's report, any observations made by the Commissioner, the evidence adduced and representations made at oral hearing, if any, and any documents, representations in writing or other information furnished to the Commissioner pursuant to s. 11 of the Act.

97. Regulation 5(1)(b) of the 2006 Regulations states that, inter alia, *"documentation presented by the protection applicant" "shall be taken into account".*

98. At para. 9 of the appeal submissions of 6th August 2008, it was asserted that the Commissioner *"wrongly relied on the fact that the applicant provided little or no identification or supporting documentation of his story and that is contrary to proper policy".* In the s. 13 report, these observations were made under the heading *"Nationality"* and *"Well Founded Fear".* The appeal submissions go on to state that " Dr. Hathaway says that it is common case that persons applying for refugee status can sometimes find it difficulty to obtain documentary proof and in this case it is a problem but should not be fatal to [the applicant's] application. While I note the 2008 appeal submission as arguing that the applicant should not be prejudiced by the absence of documentation, the 31st July 2009 submissions stated that the applicant *"has submitted a body of documentation to which the Tribunal should have regard in accordance with Reg. 5(1)(b) of SI 518 of 2006".*

99. At his s.11 interview, the applicant presented three documents which he claimed established his residency in Muhajiria.

100. In his response to q.21 of his Questionnaire as to why he left Sudan, the applicant stated, inter alia, *"I left my country seeking protection and looking for a safe place away from Al Janjaweed Militias and the Government, which is persecuting the people in Darfur. Because the government and Al Janjaweed started an eviction campaign, I was forced to leave my country…"* Similar sentiments are contained in the retranslation of this reply in January 2011.

101. The decision records the applicant as stating, inter alia,

> *"The applicant is seeking asylum because he was almost killed by government forces and during the fighting in Muhajiria.*
>
> *The applicant claims that prior to 26th June 2007 his village was bombed indiscriminately and government forces and its allies, the SLA, and the Janjaweed were trying to occupy his village. They were opposed by JEM and other democratic groups….*
>
> *The applicant was told that according to the RAC….the second attack was indiscriminate and not against him personally and he had therefore, nothing to fear because it affected everyone. He replied before 2004, when the problems began, lots of people of his ethnic group were killed in his village. When [the applicant's legal representative] repeated the question the applicant replied that from 2004 to 2007 members of his ethnic group was facing death at the hands of the government forces, it could have been his time to be killed and one of the reasons he is concerned is because his neighbours had been killed.*
>
> *The applicant's opinion is that the government's attitude will only change if they cease displacing people in Darfur of African origin and replacing them with people of Arab origin. There is no democracy and the police and army are doing a good job for the government, namely killing, ethnic cleansing and rape. In 2009 and 2010 people were killed in refugee camps in Nyala….*
>
> *The applicant's village was not attacked or bombarded because of his dealings with the rebels but because the government wanted the villagers evacuated and replaced by people of Arab origin. His village was attacked on prior occasions and the raiders stole goods and raped women."*

102. It seems to me that when the decision-maker states *"The applicant's account of the events in his village are confirmed by COI (see section 13 report). However, this does not indicate that the applicant is from Darfur or if he is that he was present during the bombardment. Furthermore, the applicant was not personally targeted by the bombardment",* he is addressing the applicant's claim of persecution, as set out above. While, as this court has found, the Tribunal Member was entitled to find that the mere corroborative potential of country of origin information would not be sufficient to sustain the applicant's claim to have been persecuted because of his race or ethnicity, the Tribunal Member was not, in my view, entitled to stop at that particular juncture in light of the fact that the applicant had presented documentation which he claimed evidenced his residency in Muhajiria/ Darfur., particularly when the decision-maker himself appears to place some weight on the issue of whether the applicant was a resident of Darfur. These documents were required to be assessed, in accordance with the statutory mandates on a protection decision-maker pursuant to s.16 (16) of the 1996 Act and Reg.5(1) (b) of the 2006 Regulations. The weight to be afforded them was for the Tribunal Member. It is not the function of the court to assess the probative value of the material submitted by the applicant, in the absence of any evidence on the face of the record that their probative value was assessed. Given the decision-maker's finding that corroborative country of origin information was not, of itself, of assistance in placing the applicant in Darfur, it was all the more imperative that the documentation presented by the applicant should have been considered. If accepted, it had the potential to perhaps inform the Tribunal Member, in weighing all the factors in the claim, as to whether the benefit of the doubt should be applied to the applicant, in the context of the second limb of his asylum claim, namely that his village was subjected to attack by government forces and Janjaweed.

103. Counsel for the respondents relied on the dictum of Clark J. in N v. RAT [2009] IEHC 434:-

"23. The respondents relied on Pamba v. The Refugee Appeals Tribunal & Anor (Unreported, High Court, Cooke J., 19th May, 2009), where Cooke J. reiterated the well-established principle that decision-makers have an obligation to state the reasons on which their decisions are based "in such a way as to make the person concerned aware of the reasons for the measure and thus enable them to defend their rights and the court to exercise its supervisory jurisdiction". Cooke J. found that there is no duty either at common law or under the Refugee Act 1996 for a Tribunal Member to provide a detailed response to every single argument raised on appeal or to explain how or why each item of evidence running counter to the decision has been rejected. He further stated as follows:-

"If the test in Irish law as to the extent of the duty in this regard is a test akin to that articulated in Community law, as the case law seems to suggest it is, that duty is satisfied if the addressee can ascertain from the decision why the appeal failed and if the court is placed in a position to exercise its function of judicial review. In that regard, the decision must be read and considered in conjunction with any documentary evidence or information to which the report reports and which was available to the applicant."

24. That is a correct statement of the law. The Court accepts the respondents' submissions that the applicant in this case cannot be in any doubt as to why the Tribunal Member had doubts about the authenticity of the documents, nor is the Court in any way impaired in exercising its supervisory jurisdiction in relation to the documents…."

104. However, I am satisfied that the respondents' reliance on the decision of the learned judge is misplaced in circumstances where the weight, if any, attributed to the applicant's documents is not addressed on the face of the record, notwithstanding that at the outset of the decision, the Tribunal Member states:- *"Documents-It is the case with all documentation that they are secondary evidence used to support the applicant's claim. I will, therefore, weigh such evidence in line with my general evaluation of the Applicant's testimony."*

105. In light of the failure to specifically address the documents thereafter, the challenge on grounds 5(c), (d) and (f), insofar as this particular aspect is concerned, has been made out.

106. In reviewing an assessment of credibility the court is guided by the principles set out in the seminal decision of Cooke J. in *IR v. Min. for Justice* [2009] IEHC 353. In the instant case, I find the relevant guiding principles to be principles 2, 4 and 9, as follows:-

" (2) 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…..

(4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told…..

(9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.

107. In all the circumstances, I find that there was a breach of process of sufficient materiality to warrant the granting of leave in this case. In view of the claims being made by the applicant as to a fear of persecution by reason of being resident in Muhajiria, Darfur, the applicant was entitled, as part of his claim that Muhajiria, his place of residence, was subjected to attack by government forces and Janjaweed, to have the documents he submitted in aid of the claim considered. While it was not argued by the parties before this court in any great detail (although it was criticized by the applicant's counsel as absurd), I should add that I take the view that the statement in the decision that the applicant was not personally targeted by the bombardment cannot supplant the procedural deficit in this case, in light of the Tribunal Member's own acknowledgement that the applicant's account of events in his village was confirmed by country of origin information and his acceptance of the human rights situation in Darfur in referencing the country of origin information which attached to the s. 13 report. Part of that information was a 2006 report which referred to 200,000 people having died in Darfur over a four year period, with more than two million people displaced.

108. The court has also taken into account that it has upheld the findings made by the Tribunal Member, particularly those with regard to the applicant's alleged mode of travel and the medical reports. However, I am of the view the fact that those findings have been upheld cannot trump the due process infringement, which has been made out.

109. The Tribunal Member found that *"the applicant's tendency to blame the interpreter for not allegedly interpreting his replies at interview in the correct manner to be disingenuous and wholly lacking in credibility. …"* and found that *"the interpreter's failure to translate some of his replies correctly does not form part of his appeal and, therefore, further undermines his credibility"* and noted that the applicant *"had the opportunity to correct his answers when the questions and answers were read back to him."*

110. I am of the view that the Tribunal Member's observation, which was made in the context that the applicant's complaint about the ethnicity of the interpreter was not told to his legal representative, was somewhat unfairly weighted against the applicant, given that the appeal submissions did refer to a claim by the applicant *"that the interpreter did not know or understand about his part of Sudan…"*, hence *"his story being misunderstood."* Thus, insofar as the suggestion was that the issue of misinterpretation arose only at the oral hearing, that was not the case. However, had the decision been free of the other error which the court has found, this would not, of itself, be sufficient to warrant the granting of leave.

Summary

111. For the reason 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.