Neutral Citation Number: [2008] IEHC 294

**THE HIGH COURT**

**2006 No. 861 JR**

**BETWEEN**

**M. K.**

**APPLICANT**

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

**RESPONDENTS**

**Judgment of Mr. Justice McCarthy delivered the 31st day of July 2008.**

1. These proceedings were commenced by originating notice of motion dated 18th July, 2006, whereby the applicant seeks leave to apply for *inter alia* an order of *certiorari* quashing the decision of the first named respondent ("the Tribunal") made on 19th June, 2006, whereby it held that the applicant was not a refugee and affirmed the recommendation of the Refugee Applications Commissioner refusing him a declaration to that effect. The Statement required to ground the application and the applicant's grounding affidavit are dated the 18th July, 2006. In the event that the decision of the Tribunal is quashed further relief is sought. That decision was sent to the applicant under cover of a letter of the 27th June, 2006, received the following day. The time within which the present application ought to have been made expired on 6th July, 2006, but I am satisfied that the time for it should be extended up to and including the 18th July, 2006, on the grounds that the decision was not given to the applicant's present solicitors, he having changed solicitors in the interim period and thereafter time was needed to decide how the applicant could best proceed in the light of the Tribunal's decision, including consideration with the benefit of the advice of counsel and, of course, it having been determined to make the present application, time was needed to prepare it. The delay, in any event, is extremely modest. The grounds relied upon by the applicant are as follows:-

> "i. The decision of the first named respondent at page 2 states, *inter alia*, that "the applicant said that before they left the police station, they had signed a paper which undertook that they would present themselves again if they were so requested. The Tribunal notes that this account is inconsistent with the account which he gave of these events in his application questionnaire…He was asked to account for this inconsistency and did not do so. He was both evasive and denied that there was any difference in the account." The details of the arrest and detention and torture given by the applicant in his written questionnaire are entirely consistent with the account given by him at both interviews with the Refugee Application Commissioner and in evidence to the first named respondent. Accordingly, the first named respondent has no basis upon which to make the above contention and same is illogical and flies in the face of all the evidence and the said decision is made in breach of fair procedures thereby.
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> ii. The conclusion numbered 3 of the first named respondent at page 5 of the said decision states, *inter alia*, that the applicant purportedly gave two accounts of how he and his brother were released after three days in custody. The applicant's account in his written questionnaire was that both he and his brother had to sign a document to be released and the detail as to his father's friend paying a bribe was included in both of his interviews with the Refugee Applications Commissioner and at the oral hearing before the first named respondent and there is no discrepancy between any of the material or evidence before the first named respondent in this respect. Accordingly, the first named respondent took irrelevant material into consideration in breach of fair procedures and the applicant's right to have his said appeal determined in accordance with the precepts of natural and constitutional justice. Moreover, the said decision is irrational.
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> iii. The conclusion number 4 of the first named respondent at page 5 of the said decisions states, *inter alia*, that there is no evidence to support the applicant's express fear that he will be killed because of his imputed political opinion. There was ample evidence before the first named respondent to support the applicant's fears in this respect. For example, the applicant gave evidence that both he and his brother were arrested because the police wished to find his father, who was a member of the Oromo Liberation Front for that reason. There was ample evidence before the first named respondent that when the applicant's father was arrested on the 25th December, 2004, the police parked outside the family shop and a plainclothes policeman "intimidated us and told us that we would share the same fate as our father", the applicant's own personal experience of incarceration and torture, the threats which advisers to be first named respondent which contains numerous incidences of Oromo Liberation Front sympathisers being arrested and detained for years without charge (see for example, UK Home Office Report 2005 at paras. 5.46 and 5.51) all of which supports the applicant's fears in this respect. Accordingly, the first named failed to take all relevant material into account in breach of fair procedures and the applicant's right to have his said appeal determined in accordance with natural and constitutional justice.
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> iv. The first named respondent had regard to the purported "absence of any proper road system in this area [around the border between Ethiopia and Kenya]", despite there being no evidence to support such a finding before the first named respondent and his conclusion in this respect amounts to conjecture. In this respect, the first named respondent had no evidence to support his findings and had regard to irrelevant material in breach of fair procedures and the applicant's right to have his said appeal determined in accordance with the principles of natural and constitutional justice.
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> v. The first named respondent impugned the applicant's credibility on the basis, *inter alia*, that he was unable to proffer accurate details concerning his flight from Ethiopia when tested against the first named respondent's purported personal knowledge of the area. In this respect, the first named respondent at the said oral hearing stated that Nairobi is the only international airport in Kenya and therefore implied that that could be the only possible means of egress from that country. There is also an international airport in Mombassa in Kenya and that it is probable that the applicant could have flown from that airport. Accordingly, the first named respondent breached the principles of fair procedures, failed to take all relevant material into account and took irrelevant material into account when making the said decision. Moreover, the decision of the first named respondent displays an error of fact on its face which deprives the first named respondent of lawful jurisdiction to make the said findings adverse to the applicant.
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> vi. Moreover, the first named respondent failed to take into account the fact that the applicant could only understand the Anharic language and that he had never been outside his immediate tribal area in Ethiopia prior to fleeing his home. The first named respondent made a conclusion that the applicant's purported inability to recount the details of the air journey gave serious grounds for concern yet fails to consider that the only detail which the applicant could not answer was the name of the airports through which he travelled. Accordingly, the said decision was made in breach of fair procedures and the applicant's right to have the said appeal determined in accordance with the precepts of natural and constitutional

justice.

vii. The conclusion numbered 6 of the first named respondent at page 6 of the said decision contends that the arrest of the applicant's father does not give rise to any inference of impropriety on behalf of the Ethiopian authorities and did not have any significant implications for the applicant. The said decision accordingly displays an error of law on its face as, *inter alia*, the said arrest did have significant implications for the applicant in that, *inter alia*, he was a child at the time and was deprived of his only parent by police who tortured him and his brother. Furthermore, the applicant was told by the arresting police that the same fate would await him as his father. Accordingly, the applicant was deprived of material and emotional support from his father by the State and he was also subjected to inhuman and degrading treatment and was told unequivocally by the police that he would be subject to more inhuman and degrading treatment in the future should he remain in Ethiopia and same amounted to a breach of his fundamental human rights as protected under, *inter alia*, the European Convention on Human Rights, which the first named respondent failed to consider in breach of fair procedures and the applicant's right to have the said appeal determined in accordance with law, including but not limited to the Constitution, the European Convention on Human Rights and the European Convention on Human Rights Act 2003."

2. I need hardly say that leave to seek judicial review may only be granted in cases of this kind where there are substantial grounds for contending that the decision of the Tribunal is invalid or ought to be quashed and, obviously in order to decide whether or not such substantial grounds exist, one applies the test applicable to all judicial review applications where the intervention of the court is sought in respect of an inferior tribunal. The traditional test or threshold is that stated by Finlay C.J. in *O'Keeffe v. An Bord Pleanála*, approving Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal*, [1986] I.R. 642 as follows:-

"(a) It is fundamentally at variance with reason and common sense,

(b) It is indefensible for being in the teeth of plain reason and common sense,

(c) The court is satisfied that the decision-maker has breached his obligation whereby he must not 'flagrantly reject or disregard fundamental reason or commonsense in reaching his decision."

3. A different test is advanced here with special reliance upon the decision of my colleague, McGovern J. of the 2nd March, 2007 in *C.O.I. v. The Minister for Justice, Equality and Law Reform*. In that case McGovern J., having regard to the obligation of the State to give effect to the Geneva Convention of the 28th July, 1951, its protocol and the subsequent Dublin Convention, considered the application of the test laid down by Bingham M.R. in *R. v. Home Secretary, (ex-parte) Boonibyo*, [1996], Q.B. 768. This was an issue which I also addressed in my judgment in *B.J.N. v. Minister for Justice and Others*, [18th January, 2008]. McGovern J.'s judgment was not cited to me and I was not aware of it at the time of my decision. Mr. Chirstle on behalf of the applicant relies on McGovern's J. decision in support of the proposition that a different and lower bar and/or threshold applies in decisions as to whether or not judicial review ought to be granted in cases of this kind and in particular a test variously described as being "anxious scrutiny" or "careful scrutiny" or, the further alternative, "heightened scrutiny", being the standard set in England in *Boonibiyo*. It is perhaps not strictly correct to say that McGovern J. held that the "anxious scrutiny" test (as it is most commonly known) should be substituted for what are known as the *O'Keeffe* principles, but rather that such a test is "one which the courts should use as well as the *O'Keeffe* principles, when considering matters of this kind" p. 9 McC. otherwise then in cases where a decision is susceptible to challenge on the grounds of irrationality

"there may be cases which might not come within the *O'Keeffe* definitions of irrationality but might legitimately fall to be reviewed by the courts. It seems to me that this could arise in circumstances of manifest error disclosing a reasonable possibility on the facts that the original decision was wrong."

4. The issue of whether or not the "anxious scrutiny" test is relevant has been addressed, in a number of cases apart from McGovern's J.'s decision. In particular, as I pointed out in my judgment in *B.J.N.*, Clarke J. in *Gashi v. The Minister for Justice and Others,* [Unreported, 3rd December, 2004], held that for the purpose of a leave application, it was arguable that the "anxious scrutiny" test was appropriate, a view repeated, as I further pointed out, in *Idiakhua v. The Minister for Justice, Equality and Law Reform*, [Unreported, 10th May, 2005] by him, although he did not explicitly say that he was applying that test.

5. I also referred to *A.O. and D.L. v. The Minister for Justice*, [2003] 1 I.R. 124 and to *Z. v. The Minister for Justice*, [2002], 2 I.L.R.M. 215. In the latter (at p. 236), McGuinness J. pointed out:-

"The court is committed to submitting the decision making process in all cases to careful scrutiny. In the instant case the learned High Court judge delivered two lengthy, careful and detailed reserved judgments. It cannot be argued that he did not subject the appellant's claim to the most careful scrutiny."

As I further pointed out, she went on to say that she found it difficult to interpret the phrases 'anxious scrutiny' or, 'heightened scrutiny" and similar phrases and also, in effect, that in point of law it was difficult to define the difference between mere 'scrutiny' and those supposedly different tests. She also said that pending full argument in another case, she considered it sufficient that the applicant's judicial review application there received careful scrutiny under the established standards relating to unreasonableness and she further stated (with the concurrence of Fennelly J.) in *A.O. and D.L.*, (although the test was not argued there) that she concurred with Fennelly J. in:-

"believing that where constitutional rights are at stake, as in this case, the standard of judicial scrutiny as set out in particular in *O'Keeffe*… may fall short of what is likely to be required for their protection."

6. Moreover, in *Laurentiu v. The Minister for Justice*, [1999] 4 I.R. 26 (at p. 262), Denham J. was of the view that reviews of deportation orders were to be conducted in accordance with the *O'Keeffe* principles – something which it seems to me must similarly apply to consideration of cases such as the present. Hamilton C.J. agreed with that view but Fennelly J., in *A.O. and D.L.*, stated that such a standard of judicial scrutiny "must necessarily fall short of what is likely to be required for their protection", (i.e. Protection of Refugees) and he referred to the consideration of the test in such cases in England, and in particular *R. (Mahmood) v. Secretary of State for the Home Department*, [2001] 1 W.L.R. 840. It appears that the "anxious scrutiny" test is such that judicial review should be granted if the court were satisfied:-

(a) That on the facts as found, it would have raised different inferences and conclusions, or

(b) That the case against the decision was stronger than the case for them.

I have to confess that I find it difficult to see how, if those principles were applied, one would not, as a matter of substance, be at risk of entering upon the merits since it would appear to be open to a court of review to grant judicial review merely if different inferences of secondary fact, (on the primary facts found) could be drawn or, merely the evidence in favour of the applicant was stronger than that against. Unless and until a different view as to the law is elaborated by the Supreme Court, I believe that I am bound by the decision in *O'Keeffe*, which is settled law.

7. In *C.O.I.*, McGovern J. took the view that *O'Keeffe* was relevant but, also, that having regard to the stated purpose of the 1996 Act, the test of "anxious scrutiny" should also apply. In principle I am entitled, I think, to depart from my own previous decision in a case where insufficient authority was not opened to me, (e.g. in circumstances where a decision governing the point was not referred to). However, it seems to follow from McGovern J.'s conclusion that *O'Keeffe* was relevant, without reference to the fact that *O'Keeffe* is binding, that the latter proposition was not advanced to him, and similarly, the judgments of Fennelly and McGuiness JJ. aforesaid. In that sense it seems to me, also, that insufficient authority was opened to him, especially having regard to McGuinness J.'s observations to the effect that, whether or not one uses the term "anxious scrutiny" as one of art, anxious scrutiny in the case then before her had taken place, (even if not used in the sense of the English test). Those observations (and discussion) of the matter by McGuinness J. are of particular importance in analysing the principle involved. I accordingly will apply my own previous decision and I do so in accordance with principles elaborated by Parke J. in *Irish Trust Bank Limited v. Central Bank of Ireland*, [1976] I.L.R.M. 50 as to the circumstances in which a court of co-ordinate jurisdiction is at liberty not to follow or apply a previous decision.

8. In the first instance it is submitted on behalf of the applicant that a number of significant errors in the assessment of credibility arose and, in particular, manifest errors of fact. It is submitted that each of these, taken alone, or (especially) cumulatively render the decision fundamentally flawed. The applicant relies on a number of decisions in this regard. That which is most helpful (in much as it summarises the principles applicable where a complaint of this kind is made) is the decision of Clarke J. in *Imafu v. The Minister for Justice* [Unreported 27th May, 2005]. There, he set them out as follows:-

> "(i) The assessment by the Refugee Appeals Tribunal of the credibility of an appellant and his/her story forms part of the decision making power conferred by the Refugee Act 1996 and therefore, in accordance with the principles set out in *East Donegal Co-operative Limited v. Attorney-General* [1970] I.R. 317 such assessment must also be carried out in accordance with the principles of constitutional justice: *AMT v. Refugee Appeals Tribunal* [2004] 2 I.R. 607.
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> (ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a manner adverse to the applicant such error renders the decision invalid: *AMT v. Refugee Appeals Tribunal* [2004] 2 I.R. 607.
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> (iii) While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance 'on what one firmly believes is a correct instinct or gut feeling that the truth is not being told'. Such process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact. *DS v. Refugee Appeals Tribunal* (High Court, Peart J., July 9, 2004).
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> (iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding. (*NK v. Refugee Appeals Tribunal* [2004] 2 I.L.R.M. 550 placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v. INS 914 F.* 2d 1375 (9th Cir. 1990)).
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> (v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told. *Z v. Minister for Justice, Equality and Law Reform* (High Court, Clarke J., November 26, 2004)".

9. In this context the applicant quotes an extract from *Carciu v. Refugee Appeals Tribunal and Another,* (Unreported, Finally Geoghegan J., 4th July, 2003), where she said that:-

> "It seems to me that whether one puts it as a matter of fair procedures or a failure to take into account relevant material, or indeed as being an allegation that it is an unreasonable decision, if a decision maker is assessing the credibility of an applicant and that decision is based on an incorrect, undisputed fact, that unless it can be established that that incorrect fact is clearly so insignificant that it was not material to the decision maker, there is a potential breach of an obligation to observe fair procedures, or it may be asserted that the decision is unreasonable or irrational as based upon erroneous fact."

In this instance it is contended that the incorrect fact did not fall into the category of insignificance, a proposition which I would reject, and, with which I will deal in somewhat greater detail below.

10. Here, I might refer also to the decision of O'Leary J. in *Bisong v. Refugee Appeals Tribunal,* , [Unreported, 25th April, 2005] and in particular to the extract quoted from it in the applicant's submissions as follows:-

> "Each of the three matters played a part (probably a minor part) in the assessment of the applicant's credibility. The crucial and in the view of the court the deciding matter is that each of these three errors relate to a single issue i.e. credibility of the applicant rather than, for example, some relating to credibility and some to some other issue such as the assessment of the internal conditions in the country of origin. If the errors each related to separate areas of assessment they would not necessarily have a cumulative effect. However, in this case, each of the errors was part of the one process i.e. assessment of credibility. In the judgment of the court, when taken together, they could have cumulative effect on the assessment of credibility. The effect of that accumulation could be to convert what is in each case a simple and insubstantial ground of complaint into the substantial ground needed to succeed in this application".

11. I also refer to *Imafu v. Refugee Appeals Tribunal* (Unreported, High Court, 9th December, 2005) Peart J., who, in this connection said:-

> "(The) Court must have regard to the decision in the round, to the real capacity of the alleged error to have affected the correctness of the process by which the decision was reached, and also due to the discretionary nature of judicial review. In respect of the latter it seems to follow that even where the court may be satisfied that there was some error in the process, it can refuse relief where it is also satisfied that such error as did occur did not go to the heart of the decision, such as would render the decision unlawful. This in my view is such a case."

and also in *Tabi v. Refugee Appeals Tribunal* (Unreported, High Court, 27th July, 2007) Peart J., said:-

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

Further, and this is of considerable significance in this case, in *Kikumbi v. Refugee Applications Commissioner* (Unreported, High Court, 7th February, 2007) Herbert J., said:-

> "In my judgment the fact that the authorised officer partly misinterpreted the country of origin information available to… does not invalidate her conclusion that it was questionable that the second named applicant and her family moved to Fataki from Bunia, because that conclusion was also based upon this other entirely separate and severable consideration, which was not demonstrated to be also incorrect. In these circumstances I find that the mistake of fact on the part of the authorised officer was not material to or of significant importance to her conclusion so as to invalidate that conclusion."

12. *K. v. Refugee Appeals Tribunal*, [2005] 4 I.R. 321, was relied upon by Clarke J. in *Imafu*, and hence I need not address it on a freestanding basis. I am referred also *to Memshi v. The Refugee Appeals Tribunal* (Unreported, High Court, 25th June, 2003) Peart J., and *N.K. v. Refugee Appeals Tribunal* [2005] 4 I.R. 321. The relevant principles in both are subsumed in *Imafu*, Clarke J.'s decision.

13. It is submitted that there was what I might term wrongful reliance by the Tribunal on matters within its own knowledge, and further, that the Tribunal did not afford a proper opportunity to the applicant to comment upon matters which the decision maker might take into account. In respect of the former position, the applicant quotes from the decision of Newman J. in *R. v. Immigration Appellate Authority, ex-parte Mohammed*, [1999], EWHC Admin, 823 [14th October, 1999]. He approbates the general principle that (in that case) a "Special Adjudicator" but, of course, any expert inferior tribunal, may build up a stock of knowledge which can be drawn upon. However, he rightly expressed caution about "personally acquired material". He made a distinction between "objective material", "the content of which, if challenged, could be resorted to in order to facilitate representations to the contrary" and "personally stored" material:-

> "It is another thing to resort to a source of knowledge, which, is essence; personally stored…reliance therefore on such personally acquired information gives rise to a significant risk of unfairness to an appellant, who will be in no position to test the reliability of the matters being held against him. It should invariably, in my judgment, be avoided. (Quoted at para. 1.09) of the appellant's submission)"

14. A situation where reliance is placed on material 'personally stored' must be rare, but if it were to arise I would not go so far as Newman J. It is perfectly possible for a Tribunal to refer to the information in question, intimating that the tribunal in question thinks it relevant and inviting the parties to address it. Of course nobody could take issue with the principle that constitutional justice requires that 'an adjudicator should give the parties a chance to make submissions upon any researches they themselves might enter upon, and upon their own accumulated specialist knowledge of a particular country's history', (partial quotation from that in para. 1.10 of the applicant's submissions); *Re D.* [1995] 4 ALL E.R. is referred to in that context and there is no need to repeat it here. It seems to me that the test is whether or not relevant matters (or matters which, are reasonably potentially relevant) are brought to the attention of the parties such that they can be addressed whatever the emanation of such matters, (including 'personally stored material'); it seems to be right to say that this is 'golden thread' running through this particular aspect (or should I say application) of the principles of constitutional justice. In any event so far as any material here was "personally stored" in Newman's definition, it was susceptible at objective tests.

15. Of course, in this connection, it is well to remember that only primary facts will be placed in evidence and from them secondary facts may be inferred and relied upon. In any event, it is alleged that the first named respondent had regard to the "absence of any proper road system in this area (around the border between Ethiopia and Kenya) without evidence in that regard and, further that there was no evidence at the hearing that the only international airport in Kenya was at Nairobi and that therefore this was the only possible means of egress from the country, whereby the credibility of the applicant as to his journey from Ethiopia to Kenya and his departure from that country was undermined". On perusal of pages 2, 3 and 4 of the note of the hearing it is quite plain therefrom, especially at page 3 ("What airport,…I don't know…I find that hard to believe…I have never been abroad before…") and further at page 4 ("It's a 1,000 miles and 3 hour flight, no good road, personal experience,… Nairobi only airport in Kenya…") (but these examples are not exhaustive) that this aspect was brought to the attention of the applicant.

16. With respect to the first of the errors of fact or erroneous inferences drawn without any or any adequate evidence (if I might put the matter thus) it is pointed out by the applicant that a summary is given at p. 2 of the first named respondents decision of the applicant's evidence before him, pertaining to the circumstances in which the applicant was permitted to leave a certain police station (in which he had been detained) and the first named respondent noted that his account was inconsistent with that given by him in his application questionnaire, that he did not give an account for such (supposed) inconsistency and was "both evasive and denied that there was any difference in the accounts". It is submitted that there was in fact no inconsistency whereby there was no basis upon which a finding of this kind could be made (as being illogical and in the face of all the evidence) whereby there was a breach of fair procedures. Associated with this alleged error is the conclusion at para. 3 of the decision whereby the first respondent refers to the "claims" of the applicant that he and his brother were released from such police station after three days "either on their own recognisance or as a result of a bribe paid to the police": it is submitted that in the questionnaire the applicant had stated that both he and his brother had to sign a document and that a bribe was paid, such evidence being repeated at interview before the Refugee Applications Commissioner and at oral hearing before the first named respondent. It is submitted that in as much as there is no basis for the view expressed in the body of the decision by the first named respondent that there was an inconsistency between the questionnaire and the version of events before the Tribunal there was, by implication, no basis for a conclusion that he was "evasive" or that he could legitimately deny that there was any difference in the accounts: it must, as a matter of substance, be part of the applicant's case that the erroneous understanding and adverse views expressed in the body of the decision gave rise to the conclusion at paragraph 3.

17. In the first instance I think that there is no sound basis for criticism of the first named respondents view that the account given to the Tribunal of the sequence of events from the time of the applicant's arrest (in the absence of his father) and his release was inconsistent with the account which he gave of this sequence of events in his initial application for asylum at question 21 and the addendum thereto. In particular, he made no reference therein to the payment of a bribe by a friend of their father and further stated that he had received no food (something which was corrected later). Very properly the first named respondent noted that there was no inconsistency in the account given to the Tribunal and that given in the course of his interview by the Office of the Refugee Applications Commissioner. More significantly, however, the first named respondent drew the apparent inconsistency (as he saw it) to

the applicant's attention who was afforded the opportunity of dealing with it. The first named respondent is described as having been evasive and denying any difference. The trier of fact in this instance was entitled to be influenced by what he conceived to be evasion or illegitimate denial, inconsistency (which can rationally be supported on the information before him) and in those circumstances could reach a conclusion adverse to the applicant (even if there was no other material) as to credibility, especially when he gave full credit to the applicant for consistency of the version of events given to him and made before the ORAC.

18. I am of the view that whether or not the information as to the journey time from Dilla in Ethiopia to Kenya was found by the first named respondent to be difficult to accept *inter alia* because of the state of the roads, the distance, the length of time which, for example, it might take to fly, emanated from the specialist or personal knowledge of the applicant (it would appear to be the latter) or otherwise these were matters which were, anyway, geographical facts which might be the subject of judicial notice. The issue of the state of the roads is the sole area in this context where it might be argued that judicial notice should not be taken (even though I have concluded that it can be so taken). However, the applicant was afforded ample opportunity to address the second respondent's conception in the course of the hearing and I do not think that one can complain subsequent to a hearing, in the case of a specialist adjudicator who has relied upon materials within his own knowledge, or facts of which judicial notice may be taken if one does not seek to correct the material at the time, or indeed does not succeed in doing so. One would have thought that there could be no question but that the applicant himself could have dealt with the state of the roads, whatever else – and indeed his failure to do so might properly go to his credibility. It seems clear that the Tribunal Member stated (in the course of questioning – and accordingly for the purpose of affording the applicant the opportunity to address the issue) that there was merely one airport in Kenya – giving rise to the inference that the distance travelled was from Dilla to an area near Nairobi and, of course, giving rise to the inference, also, that for this reason alone the applicant should have known from where he was flying. Plainly the Tribunal Member was wrong in this connection. It seems proper to infer that it was one of a number of issues which influenced him as to issues of credibility. However, in this regard I am of the view that it was severable from the others and that there was ample evidence upon which he might have formed an adverse view as to the credibility of the applicant and I place particular reliance upon the decisions of *Imafu* and *Tabi* (both per Peart J.) and *Kikumbi* (per Herbert J.). I do not think that this is in conflict with the decision of O'Leary J. in *Bisong* in as much as there is no suggestion there that the errors might have been severable. We know that the Tribunal Member referred to the journey time as being in the order of 1,000 miles and it seems to have been substantially less: I do not place this in the same category, however, as the error pertaining to Nairobi Airport since distances are matters of judicial notice and constitute evidence without proof or when such evidence is unchallenged (we know that it can be challenged because it is challenged now in these proceedings) at the hearing, whatever else, I do not believe that this can be addressed afterwards by way of challenge. To permit a challenge to this now would be to re-enter the merits.

19. If I am wrong in everything which I have said it seems to me that it could not be plainer that the want of credibility was not a factor upon which the Tribunal Member relied in coming to his conclusions. The key conclusion, here, is at para. 7

> "While I am also satisfied that the applicant has, in some aspects, as set out above, not given a truthful account of the facts related to his application, I am not satisfied that the untrue than inconsistencies are material and/or significant to his claim for asylum."
>
> What could be clearer? Where these factors are expressly stated not to be material or significant it must follow that the decision cannot be impugned on any one of these grounds.

20. Reference is also made to the fact that the applicant can only understand the Amharic language. In this connection it is said that the first named respondent (effectively) considered inadequately the fact that the only apparent difficulty of the applicant was that he could not name the airports through which he had travelled. I think that I can safely dispose of this point here: that is classically the type of issue which must almost always fall within the ambit of a decision maker and of course, as a matter of principle, a decision maker is entitled to take into account lacunae in an applicant's version of events without, indeed, in his decision explicitly referring to the language difficulties of the applicant, which must have been apparent and, indeed, it is not clear why this language difficulty should undermine a persons capacity to detail airports through which he passed.

21. The final ground raised pertains to the issue of the conclusion by the first named respondent that the applicant, contrary to his assertions, is at risk of being killed, if returned to Ethiopia. The appropriate approach, here, of course, is that stated by Gilligan J. in *Rostas v. Refugee Appeals Tribunal* (Unreported, High Court, 31st July, 2003) where he said that:-

> "The test for persecution is a forward looking one, but past persecution may indicate a reasonable likelihood of present or prospective persecution unless there has been a major change in circumstances in the country of origin."

and he quoted with approval Hathaway's statement that:-

> "Persecution exists where there is a fear of serious harm which the Government cannot or will not prevent, including specific hostile acts or an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear."

As pointed out in the applicant's submissions Gilligan J. also restated:-

> "The proposition is that such persecution will arise where the violation is on grounds, *inter alia*, of race, religion, nationality, membership of a particular social group of political opinion."

22. In this connection, the applicant has opened to me an extract from the United Nations Human Rights Commissioner's Handbook (paras. 51-53) as to the meaning of persecution, as well as an extract from Goodwin and Gill "The Refugee in International Law" (Clarendon Press, 1996) as follows:-

> "[t]he core meaning of persecution readily includes the threat of deprivation of life or physical freedom. In its broader sense, however, it remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship or freedom of movement. Whether such restrictions amount to persecution within the 1951 Convention will again turn on an assessment of a complex of factors, including (1) the nature of the freedom threatened, (2) the nature and severity of the restriction, and (3) the likelihood of the restriction eventuating in the individual case."

Whilst I do not doubt the correctness of that proposition, the first respondent refers to Hathaway, with particular reference to the Canadian formulation of what constitutes persecution, with special reference to the existence of persistent or "constant infliction of

some mental or physical cruelty" and refers to the fact that "the equation of persecution with harassment, highlights the need to show a sustained or systematic risk, rather than just an isolated incident of harm" and, further, by reference to authority, that "the criterion to establish persecution is harassment, harassment that is so constant and unrelenting that the victim feels deprived of all hope of recourse short of flight from government by oppression". It seems to me that of most significance is the fact that, accepting the applicant's version of events, one has, at most, a once-off incident and that element of persistence or constant wrongdoing does not exist. This appears to be the primary basis of the conclusion. It appears from para. 6:

> ". . . the incidences of past persecution are not, to the mind of this Tribunal, so serious or systematic as to give rise to any inference of a reasonable degree of likelihood that his fear of future persecution will come to pass . . ."

23. It seems to me that there is no basis for saying that the first named respondent was erroneous in point of law as to the principles to be applied to the facts and, on his finding of fact, his decision was not such as to invite intervention in accordance with what I might shortly term the *O'Keeffe* principles.

24. Reference has been made to the legitimacy of the actions of the Ethiopian police, on behalf of the first named respondent, and having regard to the nature of the Oromo Liberation Front, and in particular, the legitimacy of the arrest of the applicant in and about an investigation for the purpose, apparently, of apprehending his father due to his membership of that organisation, something which it is contended could never be persecution. The country of origin information indicates that the Oromo Liberation Front (as one might suppose from its name) is an organisation in armed opposition to the government which, *inter alia*, campaigns for boycotts of elections. The first named respondent did not address this issue and accordingly I do not propose to consider it in adjudicating upon this matter.