

## THE HIGH COURT

## JUDICIAL REVIEW

[2010/1242/JR]

BETWEEN

H. M. I.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM,

OLIVE BRENNAN SITTING AS THE REFUGEE APPEALS TRIBUNAL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

**JUDGMENT of Ms. Justice Faherty delivered on the 6th day of September, 2016.**

1. This is the substantive hearing of the application for an order of *certiorari* to quash the decision of the Refugee Appeals Tribunal which affirmed the recommendation of the Refugee Applications Commissioner that the applicant should not be granted refugee status.

2. By order of this court dated 2nd December, 2015, the applicant obtained leave from this court to challenge the validity of the Tribunal's decision on the following grounds:

d The decision lacked clarity. The applicant is entitled to a decision from which it can be clearly discerned what the reasons or rationale behind the refusal of the applicant's appeal are. Numerous crucial matters relevant to the applicant's claim have not been dealt with. It is unclear whether the Tribunal accepted that the applicant was who he said he was or came from the claimed country of origin. In circumstances where the decision of the Tribunal will be utilised by the first named respondent for other purposes (e.g. whether to grant refugee status, subsidiary protection/leave to remain on humanitarian grounds) it is of crucial importance that the decision is coherent and clear. The lack of clarity renders the decision invalid.

g No proper forward-looking test was carried out

h Insufficient analysis of the applicant's claim.

**Background**

3. The applicant's claim is that he is a Sudanese national of the Bergid Tribe and claims to have been born in a small village in north Darfur on 15th August, 1981. He had approximately four years of schooling. According to his asylum questionnaire, he and his family left his native village because of the "waging wars" and headed to Omdurman. The applicant claims to have lived in Omdurman since in or about the year 2000, that being his last place of residence in Sudan. In Omdurman he worked as a market trader at the Libya Souk. He asserts that his difficulties began on 10th May, 2008 when there was a clash between the Sudanese government and JEM Forces in the area. While the applicant sympathised with JEM, he was not a supporter, unlike the other market traders. He stated that while going to work on 13th May, 2008 he was stopped by security forces and arrested along with two other people. He was accused of supporting JEM and coming from Darfur to engage in attacks on government forces. He was questioned about the leadership of JEM. Whilst detained he was beaten and tortured. The applicant claims that after five days he managed to escape and went firstly to his mother's house and was told by his mother that his four brothers were missing. He then went to Moulah to his uncle's house where he remained for some days. His uncle learnt from the applicant's mother that the security forces had come looking for the applicant. The situation remained the same after ten days causing him to be fearful. With money he had saved and money from his mother and uncle the applicant was able to leave Sudan. He went to Libya where he was informed that if he did not have residency there he would be returned to Sudan. He then took a ship from a place unknown to a port unknown and arrived in another place unknown to him. He was taken to a house in a rural area and told not to go out. After some two to three days he was taken by car to an airport where he was given a passport and told to follow the agent who was assisting him. The applicant arrived in this State on 14th August, 2008.

**Procedural history**

4. The applicant was interviewed on arrival at Shannon airport on 14th August, 2008 and an ASY1 form was completed on 18th August, 2008. He completed a questionnaire on 25th August, 2008.

5. The applicant was interviewed on two occasions by ORAC. The first s. 11 interview was conducted on 5th January, 2009 following which a s. 13 report, dated 22nd January, 2009 issued.

6. In summary, the report found:

- The applicant had not submitted any documentation in support of his claim. He had however submitted a "Maltese travel document" which he claimed to have used for his travel and in respect of which he claimed the name and details on the document were not his.

- While the applicant had not submitted any documentation to support his claim of Sudanese nationality, he demonstrated a level of knowledge of Omdurman where he claimed to be from that would be expected of a native of the area. For the purposes of the report, it was accepted the applicant was from Sudan.

- Subject to the well foundedness of his fear, the applicant's claim could be considered as constituting a severe violation of basic human rights of a persecutory nature and as such could satisfy the persecution element of the refugee definition.

- For the purposes of establishing the well foundedness of his fear, the applicant had not established his credibility and aspects of his testimony were not considered plausible when examined in light of country of origin information available.

- It was difficult to accept as credible the manner of the applicant's escape (namely his claim that he was left unguarded prior to being transferred to a detention centre and his claim of being able to travel to his mother's house and then to his uncle's house) given that country of origin information stated that there was a major military crack down in Omdurman and Khartoum at the relevant time. Further, it was difficult to accept that a security guard would have left a suspected member of JEM unguarded.

- The applicant's lack of knowledge at the s. 11 interview of which countries he transited was not accepted as credible given that the note of the applicant's s. 8 interview signed by him stated that he came to the State via Libya, Malta and Brussels.

7. Following communication by ORAC with the Maltese authorities regarding the applicant's travel document, the Maltese authorities confirmed on 13th April, 2009 that the person named on the document was known to them and that this individual had been issued with the Convention Travel Document which had been found in the applicant's possession. On foot of this information, the applicant was returned to Malta on 21st April, 2009 in accordance with Article 13 of Council Regulation (EC) 343-2003 ("the Dublin11 Regulation"). However, the Maltese authorities subsequently informed the Irish authorities that the Convention Travel Document had officially issued to the individual who was named on the document and not to "the third country national [the applicant]" who was transferred by the Irish authorities to Malta. Accordingly, the applicant was duly returned from Malta to this jurisdiction on 23rd April, 2009.

8. A second s.11 interview took place on 5th August, 2009, following which a second s. 13 report issued on 31st August, 2009.

9. The salient findings were as follows:

- With reference to a letter from "Darfur Solidarity Ireland" stating that the applicant was from the Bergid Tribe and a native of Darfur, Sudan, it was found that "this document in itself, cannot obviously be accepted as proof as the applicant's nationality or ethnic group" and in the absence of "any genuine photographic identity document, such as a passport, it [was] not possible to say if the person named in this document [was] in fact the applicant". For the purposes of the report, it was "assumed" that the applicant was a Sudanese national.

- While it was accepted as within the bounds of plausibility that a person of the applicant's ethnicity could have been detained and abused in custody and while it was accepted that his claims if well founded could constitute persecution on the grounds of race and imputed political opinion, the cumulative credibility issues precluded the applicant from being given the benefit of the doubt with regard to his account.

- The applicant's account of his escape from custody at a time of heightened security activity was not accepted as credible. In the course of his second interview, the applicant had added to his earlier account by stating that he had in fact escaped from custody when an armed group which he believed were JEM attacked the police station where he was being held. It was considered that the applicant's explanation (mainly his uncertainty as to whether the interpreter had translated everything he had said) for why this information did not appear in the note of the first s.11 interview was not plausible given that at the first interview the information he provided had been read back to him and he had confirmed during the interview that he understood the interpreter.

- There were discrepancies between the information which the applicant had given about his travel route on arrival at Shannon Airport and his subsequent accounts regarding to his travel. The record of the Shannon interview showed the applicant as travelling from Sudan to Ireland via Libya, Malta and Brussels, whereas in his questionnaire and later interviews the applicant stated that the only country he transited which he was able to name was Libya. The applicant's explanation for the information contained in the record taken at Shannon, namely that the immigration officer had consulted a map when told by the applicant that he travelled to Ireland from Libya, was not accepted as credible.

- A communication from the Maltese authorities to ORAC indicated that when being questioned following his transfer to Malta, the applicant had advised that he obtained the travel document from an Egyptian man whom he met in Brussels and for which he paid €1,500.00. That communication also advised that the applicant's explanation to the Maltese authorities for having travelled to Ireland was that his pregnant wife was living illegally in Ireland. The fact that the applicant "would appear to have given differing accounts to the Maltese and the Irish authorities with regard to his travel details (and indeed his marital status) raises credibility issues with regard to his truthfulness."

- The applicant's account of how he obtained the \$1,000 he claimed to have paid the agent was not plausible as "it would seem reasonable to assume that a member of a discriminated minority group, such as the Bergid, would earn significantly less than the national average income."

- While acknowledging that the applicant provided information at the first s. 11 interview regarding the culture of the Bergid tribe, the cumulative credibility points were such that the applicant's testimony fell "far short of what would be required in terms of credibility for him to be given the benefit of the doubt".

10. Following an appeal, the Tribunal's decision issued on 27th July, 2010.

#### **The Section 6 analysis**

The Tribunal Member commenced her analysis by accepting *"that the situation in Sudan is indeed dire" and that "the ongoing situation in and around Darfur is a cause of great concern to the international community. Government forces have been complicit with Janjaweed militia in carrying out a war of attrition on native Africans. Terrible atrocities have been carried out and as a result the situation has been monitored very closely by the international community accordingly there is up to date and accurate information available regarding the on going situation. It is against this background that the Applicant's claim falls to be assessed."*

She noted that the applicant's *"core claim that as a result of his ethnicity and his imputed political opinion, he claims to be a member of the Bergid tribe and to have been a sympathiser but not a supporter of JEM, he has suffered persecution at the hands of State agents."*

She went on to state:

*"The Applicant claimed not to have experienced any difficulties until following on the fighting between government and JEM forces on 10 May 2008. Some three days later when going to work the Applicant claimed that he was arrested, detained and tortured by the authorities and to have spent some five days in prison. Country of origin information supports the Applicant's claim that there was indeed an attack in Omdurman at this time. Further a number of those arrested were reportedly tortured in custody and death sentences were imposed on some detainees."*

The decision-maker next dealt with the account of his escape which the applicant had given at his first s. 11 interview and the questions put to him at that interview querying as implausible his account of being able to walk out of a prison gate undetected and of how he was able to travel by bus without a bus fare. The analysis then noted the account of his escape which the applicant gave at the second s.11 interview, namely that he had added that he effected his escape when an armed group who he believed were JEM attacked the police station where he was been held. This was the account which the applicant also gave in the course of his oral hearing before the Tribunal. The Tribunal Member noted the applicant's explanation for the discrepancy, as follows:

*"When the discrepancy in the two accounts was put to the Applicant he claimed that he had provided the latter information in his first interview but that he could not be sure if the interpreter had translated everything he had said. The Applicant was asked by the Tribunal if each page of his two interviews had been read back to him page by page and if he had signed each page attesting to the correctness of the accounts given. The applicant made no reply."*

11. The applicant's account of his travel from Sudan to Ireland was then addressed:

*"The Applicant was asked when he arrived in Libya and when he left there. It was noted by the Tribunal that the Applicant did not answer the questions directly and he was evasive to say the least. The Applicant was asked very simple questions requiring very simple answers. The Applicant in the view of the Tribunal was deliberately non cooperative in this regard. Eventually the Applicant told the Tribunal he took a ship from a place unknown on 30th July, 2008, arriving at a destination unknown on 8th August, 2008. He was then taken to a house in a rural area and was told not to go out. There he spent some three-four days and was told that he would be taken to a safe place. He travelled through Belgium and simply followed the agent arriving in Shannon on a Maltese passport. The Applicant at his hearing before the Tribunal claimed the country he left to travel to Ireland from was Belgium. He did not know this prior coming to Ireland but knew it after his arrival in the jurisdiction. However in the applicant's Section 8 interview which he conducted at the airport following his arrival in the jurisdiction the applicant claimed he had travelled to Ireland from Sudan via Libya, Malta and Brussels. In his Section 11 interview the applicant stated that the only country which he transited in which he is able to name is Libya. The applicant when asked at his Section 11 interview if he could explain why he had stated in his original Section 8 interview that he had travelled via Malta and Brussels the applicant denied that he had provided this information to the immigration officers at the airport. The Applicant claimed that the officer had consulted a map before writing down that the applicant had travelled through Malta and Brussels. The applicant signed the bottom of the pages and further he had been given an opportunity to amend any inaccuracies."*

12. The Maltese travel document and the applicant's transfer to Malta were considered in the following terms:

*"The Applicant was transferred to Malta from this jurisdiction and told the Maltese Authorities that he had obtained the passport that he used to travel to Ireland from an Egyptian man he had met in Brussels and that he had paid €1,500.00 for this document. According to the Maltese Authorities the Applicant further stated that he wished to come to Ireland as his wife was pregnant in this country and was living here illegally. He denied ever having said this. Given that the Applicant has given so many varying, different and contradictory accounts in relation to his travel this casts and raises the most serious credibility issues regarding his truthfulness."*

13. The Tribunal Member next considered the issue of an arrest warrant, claimed by the applicant to have been issued by the Sudanese authorities. She stated:

*"The Applicant submitted to the Tribunal an arrest warrant which was issued on 19th May, 2008 and which the Applicant claimed was given to his mother at the applicant's home. The Applicant was unable to tell the Tribunal when his mother received the arrest warrant. The Applicant told the Tribunal that he had been in receipt of this warrant since 14th December, 2009 however it was only submitted by him at his hearing today before the Tribunal. With the agreement of the Presenting Officer translated this document which was stamped 14th October, 2008, and issued from Omdurman Court-Judges Division in (the applicant's absenteeism), (the applicant) was involved in the war against Sudan, was giving information to another country to terrorists and criminal persons, and sentenced to 20 years in prison. The Tribunal is not in any position to verify the authenticity or the provenance of this document."*

14. It was noted the applicant had requested leave to submit a SPIRASI report but that "despite been written to no correspondence has been received by the Tribunal."

15. The decision-maker went on to conclude that throughout the hearing the applicant "was evasive, contradictory, and deliberately misleading and unhelpful on the most part" his "varying accounts in relation to the varying instances of his alleged escape from prison, his travel details and the account given by him to the Maltese authorities" had been put to him in great detail and "notwithstanding the applicant being offered every opportunity to explain the manifest inconsistencies in the various accounts given by him at different parts of the asylum process, the applicant failed to explain satisfactorily or at all to the Tribunal how these discrepancies came about." Noting again that he had made no reply when asked if each page of his various interviews had been read to him page by page and if he had signed each page, the Tribunal Member then stated:

*"He then at a later stage of his hearing went on to state that when this matter was raised with him yet again that he mention as before that he sometimes signed documents without knowing. When asked if he was happy with the answers the applicant went on to say that he was not happy. The applicant did not raise any of these issues heretofore with any of his legal advisers. There is an onus on every applicant to be truthful throughout the asylum seeking process. The applicant in the view of the Tribunal has failed in this regard. Nothing this applicant has told me has convinced me that he has a well founded fear of persecution on any convention grounds. That been so the applicant is not a refugee and accordingly the decision of the Commissioner is upheld."*

## **Considerations**

16. Essentially, two issues arise for consideration in this case. The first is whether the Tribunal Member addressed what the applicant claims was a core issue in his case, namely whether it was accepted that he was who he said he was and came from where he said

he came from. The second issue concerns the necessity for a forward looking assessment.

**Ground d: Was there a finding made by the decision maker as to the applicant's nationality and/or ethnicity?**

The applicant's submissions, in summary

17. On behalf of the applicant it is contended that he was entitled to have his core claim dealt with and for it to be clear from the decision the basis upon which the rejection of his claim came about. It is submitted that it is not clear from the decision as to whether the credibility findings made by the decision maker, and the view expressed as to the applicant's truthfulness, encompassed a rejection of the applicant's claimed ethnicity and of the events which he claimed led to his decision to flee Sudan. The applicant asserts that the Tribunal Member failed to make a finding on the core issue of whether the applicant was targeted in a particular place (Omdurman) because of his Darfuri/ Bergid ethnicity.

18. In aid of his contention that the Tribunal Member did not address an important aspect of the core claim, counsel for the applicant emphasises the manner in which the first s. 13 report addressed the issue of the applicant's nationality. The Commissioner stated:

"The applicant claims that he is a Sudanese national. The applicant has not submitted any documentation in support of this. The applicant demonstrated a level of knowledge of the Omdurman where he claims he is from that would be expected of a native of the area. For the purpose of this report it is accepted that he is from Sudan."

Later in the report, the author states:

"The applicant claims he is from the Bergid tribe. The applicant has not produced any documentation in support of his identification but was able to give details about Bergid culture... The applicant claims he is from Omdurman and was able to demonstrate knowledge of the area that would be expected from a local person."

In the course of his first s. 11 interview which preceded this report, the applicant had been asked a lot of questions about Sudan and where he lived. These were important questions as they constituted part of the available evidence such as would corroborate the applicant's core claim, namely that as a member of an ethnic group (the Bergid tribe of Darfuri origin) he had been targeted by Sudanese government forces as a suspected supporter of the Justice and Equality Movement (JEM) at a time when that group was launching an attack on Omdurman. Counsel also makes the case that the available country of origin information regarding the events of 10th to 13th May, 2008 in Omdurman supported the applicant's account of events and his claim to be who he said he was.

19. As acknowledged by the applicant, the findings of the second s. 13 report are less clear cut as regard the applicant's nationality and background. In that report, the issue of the applicant's identity and background are dealt with as follows:

"The convention travel document, which the Maltese authorities confirmed was issued to a [named third party], is contained in the pouch on file.

The applicant states this document was given to him by an agent, and while the photograph on this document is his, the name and date of birth are not. The applicant submitted a letter from Darfur Solidarity (darfur community)

Ireland which states that the applicant is from the Bergued tribe and a native of Darfur, Sudan. This document, in itself, cannot obviously be accepted as proof of the applicant's nationality or ethnic group.

Furthermore, as the applicant has not provided any genuine photographic identity document, such as a passport, it is not possible to say if the person named in this document is in fact the applicant.

Nevertheless, for the purposes of this report, it will be assumed that the applicant is a Sudanese national."

20. Counsel for the applicant contends however that nothing in the second s. 13 report contradicted the earlier report save that no specific finding was made on the applicant's nationality. However, it was "assumed" that he was a Sudanese national.

21. It is further asserted on behalf of the applicant that the manner in which the Tribunal Member commenced her analysis of the applicant's claim was egregious in that the decision maker's first observations were effectively a "cut and paste" exercise from an earlier decision and bore no connection to the claim advanced by the applicant. Thus, while the applicant's claim for international protection related to his account of events in Omdurman between 10th and 13th May, 2008 by reason of which he was targeted because of his ethnicity and imputed political opinion, the Tribunal Member's immediate focus was on "*the ongoing situation in and around Darfur*" being "*a cause of great concern to the international community*" because "*government forces have been complicit with Janjaweed militia in carrying out a war of attrition on native Africans*". She proceeds to state that it is against this background that the applicant's claim "*falls to be assessed*". Counsel submits that this approach to the applicant's claim was not acceptable in circumstances where the applicant had cited particular events and a particular location as the trigger for his claim for refugee status.

22. It is accepted that the Tribunal Member, in the course of her analysis, twice reprises the actual claim being made by the applicant, namely that as a result of his ethnicity as a member of the Bergid tribe of Darfuri origin and his imputed political opinion (as a sympathiser but not a supporter of JEM) he has suffered persecution at the hands of state agents. The applicant also acknowledges that there was an acceptance by the decision-maker that there was an attack on Omdurman on the relevant dates which led to reprisals by Sudanese government forces. It is the applicant's case however that the Tribunal Member did not go on to make a finding as to whether the applicant was a member of the Bergid tribe from Sudan. Nor did she make a finding as to whether the applicant was from Omdurman, as he claimed. Essentially, nothing favourable to the applicant can be taken from the decision, not even whether he was a Sudanese national. It is contended that it is manifestly unclear from the decision whether the Tribunal Member's rejection of the asylum claim on the basis of discrete credibility findings encompassed findings on the applicant's ethnicity and background. It is submitted that this lack of clarity renders the decision unlawful. Moreover, the provisions of Regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006 rendered it imperative that a finding was made on the applicant's core contention. It is further submitted that the jurisprudence of the Irish courts have stressed the necessity for clear findings to be made on core issues. In this regard, counsel relies on the *dictum* of Mac Eochaidh J. in *P.D. v. Minister for Justice* [2015] IEHC 111 and on other case law as recited in that decision.

23. Counsel contends that on foot of *PD v. Minister for Justice, Equality and Law Reform* a clear finding on the applicant's nationality and ethnicity and a place of residence was required.

24. It is also applicant's contention that the Tribunal Member's focus centred only peripheral matters relating to the applicant's

method of escape from detention and the mode and route of his travel to Ireland.

The respondents' submissions, in summary

25. On behalf of the respondents it is contended that the applicant's claim has two essential components, namely his ethnicity and his past mistreatment at the hands of his captors, as described by the applicant. Proceeding from this basis, it is submitted that the rationale for the Tribunal's rejection of the latter claim was perfectly clear. The applicant's claim relates certain events which took place between 10th and 13th May 2008 in Omdurman as a result of fighting between JEM and Sudanese government forces. It is in this context that the applicant's claim was assessed and determined. The core question is whether the applicant was able to discharge the burden of proof on him under Irish and International law that he was worthy of refugee status. He was found by the Tribunal not to be able to do so. Country of origin information available to the decision-maker showed that in May 2008, following the JEM attack, there was a major military crackdown on rebel forces in Khartoum/Omdurman. This is the backdrop against which the applicant asserted he was arrested and detained by government forces and from which detention the applicant claimed to have escaped. This was the narrative which fell to be assessed by the Tribunal Member.

Because of the specific findings which are referenced in the decision, the Tribunal Member was compelled to disbelieve the applicant's account and therefore she had no evidence to support his claim. The joint and several bases for the Tribunal's fundamentally adverse credibility findings were:

- The differing accounts which the applicant gave of the manner in which he made his escape from captivity;
- The manner of his travel to Ireland, delivered partially and without consistency, in addition to the unexplained fact concerning the large sum of money he was able to pay "an Egyptian man" for false documents when he was in Brussels, albeit the applicant denied that he said he obtained the document in Brussels;
- The account that he gave the Maltese authorities of wishing to come to Ireland to rendezvous with his pregnant wife rather than for any convention reasons, albeit the applicant subsequently denied that he said this to the Maltese authorities; and
- The self serving manner in which interpretation issues were raised by the applicant by way of explanation for inconsistencies and contradictions in his evidence, notwithstanding that at all relevant times during his s. 11 interviews he had indicated his understanding of the questions being asked of him.

26. It is further submitted on behalf of the respondents that there was a clear acceptance by the Tribunal Member of the applicant's Sudanese nationality and ethnicity. Counsel takes issue with the emphasis placed by the applicant on the Tribunal Member's failure to specifically state whether it was accepted that the applicant hailed from Omdurman. It is contended that being from that region did not confer any specific status on the applicant. Furthermore, the applicant's emphasis on the Tribunal Member's failure to make a finding with regard to the applicant's residence in Omdurman did not accord with the applicant's own claims as regards his origin and ethnicity, as set out in his Questionnaire. In his response to q. 21 thereof he specifically connects his claim of persecution to being a member of "Darfur tribes". Again, in response to q. 29, he relates his fear of persecution upon return to Sudan to his "Darfur race". Counsel for the respondent contends that it is these details which represent the racial and ethnic context of the applicant's claim. Thus, his claim to come from Omdurman cannot be said, of itself, to be a basis for international protection.

27. That the Tribunal Member clearly accepted the applicant was Sudanese is evident from the commencement of the s.6 analysis and the reference to the "dire" situation in Sudan, and by reason of the decision-maker's reference to country of origin information which related to the events in Khartoum/Omdurman in May 2008. Thus, there was no requirement on the Tribunal Member to spell out her acceptance that the applicant was from Sudan. Contrary to the applicant's characterization of the Tribunal Member's initial reference to the situation in Darfur, it is submitted that the Tribunal Member was perfectly entitled to do so given the context of the applicant's own claimed background, as set out in his questionnaire. While the applicant placed himself geographically in Omdurman, he placed himself racially as a Darfuri Berigid.

28. The applicant's claims were assessed in the context of objective information relating to both to Darfur and Omdurman. The decision-maker clearly accepted that the situation in Sudan was dire and that there was a major JEM assault in Omdurman in May 2008 and a major government response thereto.

29. While the Tribunal Member did not dispute the applicant's nationality or ethnicity or indeed his claimed place of residence, it fell to her to assess the subjective narrative provided by the applicant. The decision-maker found that she could not accept that narrative for the reasons clearly expressed in the decision. It is submitted that the country of origin information upon which the Tribunal Member relied supported her findings of incredulity with regard to the applicant's account of his escape from detention, particularly in circumstances where the conflict said by the applicant to have triggered his arrest and detention, centred on the major seat of power in Sudan. Given the scale of the ensuing military crackdown, a major issue for the Tribunal Member was whether the applicant was involved in these events and whether he could credibly have escaped from detention. A further major credibility factor was the applicant's varying accounts of his escape. Thus, when the decision-maker assessed the applicant's claim in the context of the major military crackdown which was going on in Omdurman between 10th and 13th May 2008, the issue was not whether the applicant came from that place but rather whether the Tribunal Member could accept his narrative. Equally, the applicant's varying, different and contradictory accounts of his travel raised the "most serious credibility issues regarding his truthfulness".

30. Counsel for the respondent also points to the strong language used by the Tribunal Member in rejecting applicant's subjective narrative which, counsel submits, of itself is telling, not only in the context of the challenge which the applicant's narrative (including his account of his escape and travel) presented to the Tribunal Member in terms of credibility, but also in the context of the mechanisms employed by the applicant, in the course of the oral hearing, to explain the various inconsistencies and contradictions in his account.

Decision

31. The first matter which I will address is the criticism levelled by the applicant at the manner in which the decision-maker commenced her analysis. Much was made by counsel for the applicant of the Tribunal Member's reference to the situation in Darfur as "dire" and the subsequent reference to the "Janjaweed militia .. carrying out a war of attrition on native Africans". I agree with the respondent's submission that too much emphasis has been placed on this particular issue by counsel for the applicant. Even if the reference is a "cut and paste" from an earlier decision, as suggested by counsel for the applicant, the reference can be taken, in part at least, as an acknowledgment by the Tribunal Member of the general situation in Sudan as of 2010.

32. The real issue for determination is whether the applicant as the addressee of the decision and the court on judicial review can be satisfied that the decision maker had due regard to the applicant's claim to be a Sudanese national of Bergid/Darfuri ethnicity. One of the arguments canvassed on behalf of the applicant was that there was no finding as to whether the applicant hailed from Omdurman and the comparison was made between the Tribunal's analysis and the first s. 13 report in their respective treatment of the issue. It could however be argued that the decision-maker was not necessarily obliged to expressly decide if the applicant was in Omdurman in the period 10th to 13th May 2008, or indeed whether he was normally resident there. There were other substantial factors upon which the Tribunal Member could rationally and reasonably determine the credibility of the applicant's account of events of May 2008. Indeed, this was done in this case by reason of the various credibility findings which were made by the Tribunal Member and which are not before this court for review.

33. That being said, there remains the issue of the applicant's claimed ethnicity. Notwithstanding the rejection of the applicant's narrative *vis a vis* the events of 10th to 13th May 2008, I find that there was an obligation on the decision-maker to make a clear finding on the applicant's claimed Bergid/Darfuri ethnicity given the particular situation that presented in Sudan in 2010, as acknowledged by the decision-maker herself, and, in particular, by reason of the information contained in the country of information reports as to the category of persons who were being targeted by Sudanese government forces in May 2008. I note for example that the report of "SAVEDARFOUR" states that the Sudanese government forces were targeting "the Darfuri community at large in Khartoum" and not only JEM forces. The question is therefore whether it can be reasonably discerned from the decision whether the Tribunal Member made a finding on the applicant's ethnicity.

34. The first observation the court would make is that the Tribunal Member made extremely clear and unambiguous adverse credibility findings with regard to a number of discrete issues. Moreover, the rationale for each of the credibility findings is clearly set out in the decision. These findings are not the subject of this judicial review. I make the observation solely by way of comparison to the manner in which the applicant's ethnicity has been addressed in the decision. While the applicant's claim to be of Bergid/Darfuri ethnicity is twice recited in the s. 6 analysis, there is no clear sense from the decision as to whether the Tribunal Member accepted or rejected his claims in this regard. I note that at pages 16 and 17 of the decision, after reference to the applicant's claim of suffering discrimination and oppression because of his Bergid ethnicity the decision-maker goes on to find that the applicant was "evasive, contradictory, and deliberately misleading and unhelpful for the most part." In this regard, she instances the applicant's varying accounts of his escape from prison, his travel details and the account given by him to the Maltese authorities. I find however that there is nothing in that assessment which assists the applicant or indeed the court in deducing whether it was believed that he was of Bergid ethnicity and/or whether he was a member of the Bergid tribe who was living in Omdurman at the time of the events of May, 2008. I accept however that there is sufficient clarity in the decision on the issue of the applicant's nationality. In this regard, I agree with counsel for the respondents' submission that had the applicant's Sudanese nationality not been accepted, the Tribunal Member's own references to the state of affairs in Sudan, be that in Darfur or Omdurman, would have been a futile exercise. I also note that at the very outset of the decision the applicant's nationality is listed as "Sudanese".

35. However, as I have said, the objective circumstances which presented in Sudan in 2010 rendered it imperative that a clear finding on the applicant's ethnicity be made.

In *P.D. v. Minister for Justice* [2015] IEHC 111, Mac Eochaidh J. addressed the necessity to deal with an applicant's core claim, or indeed aspects of the core claim. He states:

*"44. A number of decisions of this court have addressed complaints relating to inadequate consideration of an applicant's core claim. In E.P.A. v. Refugee Appeals Tribunal [2013] IEHC 85 the court said:*

*"9. The Tribunal Member refers to the fact that he believes the applicant is a happily married man - not language indicative of an acceptance that the applicant is gay. It seems to me that the Tribunal Member does not accept that the applicant is gay. A clear and reasoned finding on this central issue was required of the Tribunal and a failure by the Tribunal Member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision is unlawful and leave to pursue this complaint is granted."*

He goes on to opine:

*"45. It seems only fair to point out that the decision of this court in E.P.A. is a decision on a leave application. The court expressed the desirability for clear decision making on core claims. I have no hesitation in repeating that here.*

...

*46. In B.O.B. v. Refugee Appeals Tribunal [2013] IEHC 187 further dicta on core claim decision making is to be found as follows:*

*"7. Having set out how the Tribunal Member approached the claim, I now examine the first complaint in respect thereof. Was the applicant's core claim actually decided by the Tribunal Member? A number of authorities are cited by the applicant in support of the proposition that a core claim should be decided (see E.P.A. v. The Refugee Appeals Tribunal, (Unreported, Mac Eochaidh J., 27th February 2013) [2013] IEHC 85), where the court said, as to the core claim:*

*"A clear and reasoned finding on this central issue was required of the Tribunal and a failure by the Tribunal Member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision is unlawful ... (see paragraph 9 of the decision)."*

*8. Reference is also made to Voga v. The Refugee Appeals Tribunal (Unreported, High Court, Ryan J. 3rd October, 2010), and S.R. [Pakistan] v. The Refugee Appeals Tribunal (Unreported, High Court, Clark J. 29th January, 2013, at paragraphs 18 to 23). In Meadows v. The Minister for Justice, Equality and Law Reform, Murray J. said as follows:*

*"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced."*

*9. In view of that statement, it seems to me that a Tribunal Member should express conclusions on an applicant's claim clearly.*

47. My view is that the analysis in this case is in line with what was said in *E.P.A.* The emphasis in the quoted passage above is on the need for clearly expressed decisions. This approach is also apparent in *A.A.S. v. Refugee Appeals Tribunal* [2013] IEHC 144 where the court said:

*"As indicated earlier, it was of central importance to the applicant that he establish his Bajuni ethnicity and Somali nationality. It is the first matter in respect of which the applicant makes complaint in these proceedings i.e. that the Tribunal failed to make a finding on this issue of ethnicity."*

36. Contrary to the respondent's submissions, I find that there was no clear determination as to whether the applicant was of Bergid/Darfuri ethnicity. In the context of what was known to the Tribunal Member about the country of origin and bearing in mind the forward looking nature of the Convention, to my mind, such a finding was necessary. It was not made. Thus, in those circumstances, I find that the challenge set out in ground d. of the statement of grounds has been made out.

#### **Ground g: The need for a forward looking assessment**

Counsel for the applicant contends that there was a failure by the decision-maker to carry out any forward looking assessment and argues that such an assessment was necessitated by the applicant's circumstances. It is further asserted that even on the Tribunal Member's own reference at the outset of the s. 6 analysis to the situation in Sudan as "dire", such an assessment was merited. Counsel submits that it should be manifest from the decision that a forward looking assessment was carried out, which is not the case as far as the impugned decision is concerned.

37. The applicant also makes the case given the respondents' contentions in the course of the within judicial review proceedings, namely that there was a finding on the applicant's nationality and ethnicity, that the Tribunal Member was obliged to conduct a forward looking assessment.

38. The necessity for a forward looking assessment in circumstances where a claim of past persecution has been rejected was the subject of consideration by Cooke J. in *M.A.M.A. v. Refugee Appeals Tribunal* [2011] IEHC 147. It is instructive for the purposes of the present case to set out the learned Judge's views in some detail. He stated, *inter alia*,:

*"[7] Counsel for the applicant points out that while the member of the first respondent may have wholly discounted the story of a past persecution, there is no finding in the decision nor in the s. 13 report that the applicant is not of the Berti tribe and not from Darfur and Sudan. The member of the first respondent acknowledges at the very outset of the analysis that "the situation in Sudan is indeed dire" and that "the ongoing situation in and around Darfur is a cause of great concern in the international community" because "government forces have been complicit with Janjaweed militia in carrying out a war of attrition on native Africans". This, it is argued, made it imperative that the appeal decision should address the issue as to a forward looking risk of persecution should the applicant be returned to Sudan even if it is to Khartoum rather than Darfur.*

...

*[17] ...The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant.*

*[18] It must be borne in mind that in making an asylum claim there is a basic onus of establishing the fundamental elements of a claim which rests with the applicant even if the examination of the claim is strongly investigative in character on the part of the asylum authority and is to be carried out in cooperation with the applicant. Furthermore, one of the crucial elements in the definition of "refugee" as stated in s. 2 of the Act of 1996 based upon article 1A of the Geneva Convention, is that the asylum seeker "is outside the country of his or her nationality" owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality, for example) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment.*

*[19] The issue in the present case, accordingly, turns upon a consideration of the extent of the rejection of the applicant's story as incredible in the appeal decision. As already indicated above, there can be no doubt but that both the authorised officer of the Commissioner and the Tribunal member have squarely rejected all of the factual elements relating to the attacks, violence, interrogation and imprisonment claimed to have been suffered by the applicant as well as his version of his escape and travel to this country. Counsel for the applicant argues that there is no express finding however, in the appeal decision that the applicant is not from Sudan and not of the Berti tribe in Darfur. It is pointed out that he had handed in to the Tribunal a letter purporting to have been written by the chairman of the "Darfur Solidarity - Ireland" organisation confirming that the applicant is a native of Darfur and belongs to the Berti tribe. This is adverted to in the Tribunal decision which says that "a letter was handed in to the Tribunal from the Darfur Solidarity Community in Ireland to the effect that the applicant is a member of that organisation and is a native of Darfur, Sudan and that letter was issued upon the applicant's own request". The chairman in question was not apparently invited to give evidence to the Tribunal which might presumably have substantiated the authenticity of the applicant's knowledge of and background in Darfur.*

[20] More importantly, perhaps, counsel for the applicant points to the extensive familiarity with the geography of North Darfur exhibited by the applicant during the s. 11 interview. The notes of that interview include a page upon which the applicant was apparently requested to draw a rough map of the area in north Darfur from which he came and it is submitted that when compared to an official map, it exhibits a familiarity on his part with the names of various towns and other places and of the approximate geographic relationships between them.

[21] On behalf of the respondents however, it is contended that on its face, the appeal decision rejects the applicant's credibility in its entirety including his claims of nationality and ethnicity. Counsel points to the following passage in the decision:-

"The applicant has no evidence of his identity or of his country of origin. The applicant told the Tribunal that all his documentation was destroyed in the attack in 2004. The applicant has no travel documentation and the Tribunal does not know when or how the applicant actually arrived in Ireland. It is the core of the applicant's claim that as a result of his ethnicity he has suffered persecution in Sudan."

[22] In the judgment of the court this passage in the decision is insufficient to remove doubt as to the extent to which the member of the first respondent intended to reject the credibility of the applicant's claim. In particular, the fact that the member of the first respondent considered it appropriate to refer to *AH(Sudan) v. Home Secretary* [2007] UKHL 49, [2008] 1 A.C. 678 because she was "mindful that every case has to be determined on its own facts" suggests she felt it relevant to seek support in the facts of that case for the proposition that it was safe to return a Darfuri asylum seeker to Khartoum. This implies that she was at least alive to the possibility that the applicant was Sudanese and might well be from Darfur.

[23] Having regard to the arguable familiarity of the applicant with the geography of part of that region and the absence of any element suggesting where else the applicant might be from apart from Sudan, the court is satisfied that this is an instance in which the obligation to consider the possible risk of future persecution on repatriation arose. The ground for which leave was granted must therefore be taken as made out."

39. According to the respondents, the findings made by the Tribunal Member vis a vis the applicant's narrative clearly put the applicant into the category of protection seeker who, as described by Cooke J. in *M.A.M.A., "opportunistically [seeks] to place himself in the context of verifiable events in a particular case"*, but is found not to be involved in them. Counsel for the respondents however concedes that if the decision-maker concludes that such events did occur but that the asylum seeker was not involved in them, "the risk of future persecution may still require to be examined if there are elements ... which established a connection with that place." Thus, the respondents accept that the Tribunal Member's conclusion that the applicant could not place himself in the events of 10th to 13th May 2008 did not foreclose on the necessity for the decision-maker to do a forward looking assessment in respect of the applicant, albeit, counsel submits, the decision of Cooke J. is very nuanced as to when such an assessment has to be done.

40. The respondents maintain that the applicant's complaints with regard to a forward looking assessment are undermined by two factors. Firstly, the fact that the Tribunal Member actually considered country of origin information concerning Omdurman but could not place the applicant there by reason of the adverse credibility findings which were made. Accordingly, the respondents contend that the Tribunal Member complied with the requirement to conduct a forward looking assessment. The respondents say that the second difficulty with the applicant's contention that a forward looking assessment was merited relates not just to the adverse credibility findings with regard to the claimed events, but also to the decision-maker's overall assessment of the applicant, in particular her findings on his propensity to blame others when confronted with the various inconsistencies and contradictions in his narrative and, furthermore, his lack of response when certain other inconsistencies and contradictions were pointed out to him.

41. Undoubtedly, serious credibility issues attached to aspects of the applicant's narrative. However, it is the court's view that the arguments put forward on behalf of the respondent cannot be regarded as sufficient justification to negate the obligation which was on the decision-maker to conduct a forward looking assessment. The case put forward on behalf of the respondent itself, from the outset of the proceedings, is that there were clear findings made as to the applicant's nationality and ethnicity. As set out earlier in this judgment, the court has agreed with the respondent that the applicant's nationality was accepted by the decision maker, although the court has found that the Tribunal Member did not make a clear finding on the question of the applicant's ethnicity. Even if I am wrong in finding that no clear determination on the applicant's ethnicity was made and that the Tribunal Member did in fact accept the applicant as a Sudanese national of Bergid/Darfuri origin, then it was all the more imperative that the Tribunal Member, in the words of Cooke J. "engage in 'reasonable speculation' as to the risk of repatriation". As I have already alluded to, given the decision-maker's acknowledgement of the "dire" circumstances in Sudan, once it was accepted that the applicant was Sudanese, the Tribunal Member was obliged to clearly consider the implications of sending him back to Sudan. Thus, the acceptance of his nationality, of itself, required an assessment of what, if any, aspects of the applicant's particular characteristics might put him in fear of persecution. Again, this issue revolves around the necessity to make a clear determination on his ethnicity which, as I have already found, was not done. The applicant's asserted nationality and ethnicity was the springboard from which the forward looking assessment should have been commenced. There is no sense from the decision that such an assessment was embarked upon or concluded. I agree with the applicant's counsel's submission that nothing in the decision was posited on a forward looking test in respect of the applicant.

42. Given the failure of the Tribunal Member to address the consequences for the applicant if returned to Sudan, I am satisfied that the challenge in ground g. of the statement of grounds has been made out.

43. Having regard to the findings which the court has made under grounds d. and g., I do not perceive any necessity to pronounce as to whether or not the challenge inherent in ground h. has been made out as I find that the salient issues regarding the applicant's nationality and ethnicity and the requirement for a forward looking test are sufficiently subsumed in the findings which the court has made.

## Summary

44. For the reasons outlined in this judgment, I am satisfied that an order of *certiorari* is merited and the matter is hereby remanded to the second named respondent for *de novo* consideration.