

**THE HIGH COURT
JUDICIAL REVIEW**

[2011 No. 794 J.R.]

BETWEEN/

U.P.

APPLICANT

AND

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE
ATTORNEY GENERAL**

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered the 26th day of November, 2014

1. This is a telescoped application by way of judicial review seeking, *inter alia*, an order of *certiorari* quashing the recommendation of the Office of the Refugee Applications Commissioner ("ORAC"), dated 13th July, 2011, that the applicant not be declared a refugee; or, alternatively, an order of *certiorari* quashing ORAC's recommendation, only insofar as it makes a finding pursuant to s. 13(6)(c) of the Refugee Act 1996, as amended, in respect of the applicant.

2. Section 13(5) of the Act of 1996 provides:

Where a report under subsection (1) includes a recommendation that the applicant should not be declared a refugee and includes among the findings of the Commissioner any of the findings specified in subsection (6), then the following shall, subject to subsection (8) apply:

(a) the notice under paragraph (b) of subsection (4) shall, notwithstanding that subsection, state that the applicant may appeal to the Tribunal under section 16 against the recommendation within ten working days from the sending of the notice, and that any such appeal will be determined without an oral hearing.

3. Section 13(6)(c) provides:

The findings referred to in subsection (5) are –

[...]

(c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State.

4. Thus the effect of ORAC's s. 13(6)(c) finding is that the applicant will not have the opportunity to have an oral appeal before the RAT; it will be a papers only appeal.

Background

5. The applicant was born on 23rd October, 1986, and is a national of Pakistan. He arrived in Ireland in 2005 on a student visa, which was subsequently extended until 30th March, 2011. Following the expiration of his visa, the applicant applied for asylum in the State on 7th April, 2011.

6. The basis of his asylum claim is that he fears persecution at the hands of religious extremists due to his conversion in 2008 from the Sunni faith to the Shia faith. The applicant claimed that when he returned to Pakistan in July 2009, his conversion was discovered. He stated that his family reacted badly. He claims that they took his passport, beat him, and locked him in a room. He stated that he was assaulted and warned by religious extremists that he would be killed if he did not convert back to the Sunni faith. The applicant claims that his aunt retrieved his passport and helped him to escape back to Ireland in September 2009, where he continued his studies.

7. Following his asylum application on 7th April, 2011, the applicant had a s. 11 interview with ORAC. In its s. 13(1) report, ORAC recommended that the applicant not be declared a refugee. The Commissioner did not find the applicant's subjective testimony to be credible and considered that the applicant's delay of almost a year and a half in applying for asylum, after the occurrence of the alleged persecution in the summer of 2009, undermined his credibility. The Commissioner therefore made a finding under s. 13(6)(c), as a result of which the applicant's appeal will be on papers only.

8. The applicant instituted these proceedings seeking leave to challenge the Commissioner's recommendation by way of judicial review on 31st August, 2011. The respondents brought a motion to dismiss the applicant's case, which was heard by Mac Eochaidh J. on 24th January, 2014. While most of the applicant's grounds were either abandoned or dismissed at that stage, he was permitted to proceed on the two grounds set out below:

(i) The exercise by the second named respondent of his discretion under s. 13(5) of the Refugee Act 1996 as amended to include a finding in respect of the applicant pursuant to s. 13(6)(c) was disproportionate and therefore wrong in law in that it deprives the applicant of an oral hearing on appeal under s. 16.

(ii) No consideration was given to the explanation offered by the applicant for his failure to apply for asylum immediately upon his arrival in the State and the applicant was given an inadequate opportunity to address this issue. No reason is given for the second respondent's failure to accept the reasonableness of the applicant's cause for making the application for asylum when he did and his failure to make the application earlier.

Extension of time

9. The applicant was issued with ORAC's decision by letter dated 5th August, 2011, which he received on 8th August, 2011. However, he did not institute these proceedings until 31st August, 2011. This was outside the statutory time limit laid down by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, which provided that proceedings had to be instituted,

"within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made..."

10. The applicant now seeks the necessary extension of time and, to this end, at para. 7 of his affidavit, he provided the following explanation for his delay in issuing these proceedings:

When I received the decision on the 8th day of August I telephoned my solicitor and sought an appointment. I met with my solicitor on the 17th August 2011 which, I am advised, was his earliest available date due to pressures of work caused by shortages of staff due to the vacation period. On that day I instructed my solicitor to challenge the second respondent's decision before this Honourable Court. On the 19th August 2011 my solicitor briefed Counsel. I am informed by my solicitor that as it was during the vacation period Counsel was not immediately available. I say and am so advised that draft pleadings were received on 29th August 2011 and on the date of swearing hereof I was requested to attend at the offices of my solicitor in order that the proceedings could be instituted. I have acted with all due expedition in this matter and any delay in the issuing of the within proceedings is not of my doing.

11. The respondent did not oppose the applicant's application for an extension of time.

12. The Court is satisfied that the applicant acted promptly when he received ORAC's recommendation on 8th August, 2011. Given that this was during the vacation period, it is entirely understandable that it would take longer for the applicant's legal representatives to have the necessary papers drafted. Indeed, in this case, the applicant's lawyers acted promptly in having the papers drafted by 29th August, 2011; and the applicant attended at the offices of his solicitor the following day for the purpose of swearing the required affidavit.

13. In the circumstances, I am satisfied that there is good and sufficient reason for extending the time for the institution of these proceedings up to and including 2nd September, 2011, being the date on which the Notice of Motion was lodged in the Central Office of the High Court.

The ORAC decision

14. Before turning to consider the grounds upon which the applicant is seeking to challenge ORAC's decision, it is necessary to set out the relevant portion of the decision. It is expressed in the following terms:

The applicant was asked why he was not killed when the people he fears were allegedly afforded the opportunity to do so when he was imprisoned to which he replied "they gave me a warning and that time, my mam was crying so they said we will leave you this time, we will give you a chance for a few days, otherwise we will kill you." (Page 5, Question 72). The applicant's claim that he has a forward looking fear that he will be killed by these extremists if he returned to Pakistan is difficult to accept, because he further claims that the extremists have already had the opportunity to kill him or even harm him and did not. The fact that these extremists had an opportunity to kill him and did not do so because his mother was crying casts serious doubt over the alleged incident and undermines his claim that he is in genuine fear for his life as a result of his alleged conversion.

The applicant failed to apply for asylum in Ireland on his return in September 2009 and only applied in April 2011, over a year and a half later. The applicant's permission to remain in Ireland expired on 30th March, 2011, just a week before the applicant applied for asylum. (See passport). A genuine refugee would be expected to apply for asylum at the earliest opportunity. The applicant did not. When asked why he delayed in applying, the applicant replied "actually, I was making my mind up about the asylum process. I wanted to make up my mind and find out about the asylum process." (Page 14, Question 68). The applicant added at read-back "it was me making up my mind. I want to say, there is a friend told me that my family and extremists are still looking for me. He came back in the middle of March. Then it took one week and I made up my mind and got some information. He told me after a week of arriving back in Ireland." (Clarification Sheet, Question 68). However, considering the applicant claims to have fled Pakistan in fear of his life after being imprisoned, beat, threatened and having to escape in 2009, his claim as to why he delayed in applying for protection is not credible. This further undermines the applicant's credibility and the reliability of his evidence.

Taking the above discussion into account, the applicant's account of having the troubles he claims in Pakistan as a result of converting from Sunni to Shia are not credible.

15. ORAC also found that even if the applicant's claim were credible, there was no objective evidence that the applicant could not pursue a complaint to the police in Pakistan and that, given his personal circumstances, internal relocation was an option that was open to the applicant.

16. ORAC additionally made a finding pursuant to s. 13(6)(c) in respect of the applicant. The Commissioner's reasons for so doing are stated as follows:

The applicant claims his problems in Pakistan occurred when he was last in Pakistan in September 2009 and claims he escaped, at that time, with the help of his aunt back to Ireland. The applicant applied for asylum in April 2011, almost a

year and a half later. As discussed above, the applicant's reason for delaying in applying for asylum is not considered reasonable. Having regard to the above, Section 13(6)(c) of the Refugee Act, 1996 (as amended) applies to this application.

17. I now turn to consider the grounds upon which the applicant seeks to challenge ORAC's decision.

Ground I: The Section 13(6)(c) finding is disproportionate in depriving the applicant of an oral appeal

18. The applicant submitted that the exercise by the second named respondent of his discretion under s. 13(5) of the Refugee Act 1996, as amended, to include a finding in respect of the applicant pursuant to s. 13(6)(c), was disproportionate and therefore wrong in law, in that it deprived the applicant of an oral hearing on appeal to the RAT.

19. The applicant submitted that this finding is irreversible unless quashed. The applicant further submitted that the making of a s. 13(6) finding on the part of ORAC is discretionary and that ORAC was not obliged make such a finding. The applicant contended that in cases that revolve around the personal credibility of the applicant it is disproportionate, unreasonable, and irrational to deny an applicant the opportunity of personally convincing the Tribunal member that he is credible.

20. The applicant submitted that ORAC found against him for two reasons. The first reason is that, in ORAC's view, if the applicant's account of the persecution he claims to have suffered in Pakistan in the summer of 2009, when his religious conversion became known, were true, then he would have been killed. Counsel for the applicant stated that this reason can only relate to the applicant's personal credibility.

21. The applicant submitted that the second reason ORAC rejected his case is that, in the view of the Commissioner, if he had been a genuine refugee he would have applied for asylum sooner. The applicant submitted that his explanation about the timing of his asylum application was not accepted by ORAC as being reasonable. The applicant argued that this is again an issue of truthfulness or credibility.

22. The applicant submitted that case law demonstrates that where ORAC's recommendation relies upon findings as to the personal credibility or truthfulness of the applicant, then a recommendation disentitling him to an oral hearing on appeal can be set aside. The applicant submitted that since the recommendation in this case is one which has as its foundation an assessment of his personal credibility, this can only be effectively appealed against by the opportunity of having that personal credibility tested again by way of an oral hearing. The applicant further points out that his claim is not one which has been deemed to be "manifestly unfounded" or one which "showed either no basis or a minimal basis for the contention that the applicant is a refugee" as per s. 13(6)(a) of the Act of 1996.

23. The applicant submitted that there is already a statutory presumption in place to the effect that the applicant is not a refugee, and the combination of this presumption, together with the credibility findings made by ORAC and the non-oral hearing, will render him effectively unable to achieve a positive result on a papers only appeal to the RAT. In this regard the applicant drew the court's attention to statistics, which he says are indicative of his limited chance of success on appeal without an oral hearing. In 2010, 99% of non-oral appeals resulted in refusals; 98% were refused in 2011; and 100% of non-oral appeals were rejected by the RAT in 2012. The applicant notes that, in contrast, the refusal rate in 2012 for appeals with oral hearings was 90%. He therefore submitted that the availability of an oral hearing will greatly increase his chances of success.

24. The applicant accepted that the availability of judicial review in respect of decisions of ORAC is strictly limited. In *B.N.N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 308, Hedigan J. had the following to say on this issue, at paras. 45-48 of his judgment:

[45] It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an Office of the Refugee Applications Commissioner decision. The investigative procedure with which the Office of the Refugee Applications Commissioner is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an Office of the Refugee Applications Commissioner decision must be so fundamental as to deprive the Office of the Refugee Applications Commissioner of jurisdiction. The courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the Refugee Appeals Tribunal.

[...]

*[46] By way of example, I would note that a clear and compelling case that an injustice at the Office of the Refugee Applications Commissioner is incapable of being remedied on appeal to the Refugee Appeals Tribunal might be demonstrated where the Office of the Refugee Applications Commissioner officer's findings include one or more of the findings specified in s. 13(6) of the Refugee Act 1996... [...] As noted by Clarke J. in *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218, (Unreported, High Court, Clarke J., 23rd June, 2005) at p. 6, "[t]he combined effect of s. 13(5) and 13(6) is to impose significant limitations on the extent of the appeal that will be available to an applicant to the Refugee Appeals Tribunal". For that reason, an injustice complained of may be incapable of being remedied on appeal and this may constitute one of the rare and limited circumstances where the applicant may be entitled to judicial review of an Office of the Refugee Applications Commissioner decision.*

[48] The court is of the view that the existence of a statutory right of appeal to the Refugee Appeals Tribunal - with the exception of cases where s. 13(5) and 13(6) of the Act of 1996 apply - is a fundamental reason not to grant judicial review. This court should not intervene until the statutory asylum process has been completed. To do otherwise would be to usurp the authority that has been granted to the Refugee Appeals Tribunal by the Oireachtas. The Oireachtas has put in place a process that aims to ensure that asylum applications are decided upon with all due expedition. The purpose of this process will necessarily be defeated if each and every applicant can issue judicial review proceedings before the process has been exhausted.

25. Relying on the above dictum of Hedigan J., the applicant submitted that his application is capable of constituting an exception to the general rule concerning judicial review of ORAC decisions because he has been deprived of an oral hearing before the RAT. The applicant submitted that ORAC was not obliged to deny him an oral hearing and that the Commissioner acted unreasonably and disproportionately in doing so.

26. In support of this contention, the applicant opened the Supreme Court's decision in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 1 IR 139. The applicant in that case, Mr. Z., claimed that if returned to Russia he would face persecution on account of his Jewish origins and former membership of a Communist party. ORAC found his asylum application to be manifestly unfounded; on appeal, this decision was affirmed by the RAT. Mr. Z. then sought to bring judicial review proceedings in respect of the failure of the respondents to allow him an oral appeal before the RAT, which he said infringed his constitutional right to fair procedures.

27. In the High Court, Finnegan J. refused the reliefs sought and his decision was appealed to the Supreme Court. There were two main issues on appeal: (a) whether the finding that the applicant's asylum claim was manifestly unfounded was unreasonable; and (b) whether natural and constitutional justice required an opportunity for an oral hearing on appeal. While the Supreme Court accepted that the finding that the applicant had not shown "any grounds" for his claim for asylum was unreasonable, his case nevertheless failed because it was not related to a "fear of persecution" and because there was insufficient evidence to support his claim. The Supreme Court further held that the applicant had already had an oral hearing at first instance before ORAC, and this, coupled with his paper based appeal to the RAT, was sufficient to vindicate his constitutional right to be heard.

28. The applicant in the instant case argued that his case is different to that of Mr. Z in that ORAC did not find that his claim was manifestly unfounded. The applicant submitted that, in circumstances where he had demonstrated a claim which had merit, and where the rationale behind the recommendation to refuse the applicant refugee status was one which had, at its heart, the Commissioner's assessment of the applicant's credibility, the Commissioner's decision to deny the applicant an oral hearing was disproportionate.

29. In this regard, the applicant referred to *Chen v. Minister for Justice, Equality and Law Reform* [2010] IEHC 148, where Cooke J. stated at para. 37:

The exclusion of an oral hearing does not preclude the applicant giving evidence. He is entitled to require the Tribunal to consider such testimony as he wishes to have taken into account by way of a written statement. The absence of an oral hearing is only a disadvantage where the contested issues of fact depend upon an appreciation of the personal truthfulness of the applicant.

30. The applicant submitted that he is in such a position because ORAC's recommendation was based solely on an assessment of the applicant's personal credibility, particularly in respect of whether he had a reasonable explanation for not applying for refugee status earlier, in circumstances where he had been lawfully resident in the State on foot of a student visa. The applicant argued that following this assessment of personal credibility, the Commissioner recommended that the applicant's claim be refused, and then exercised his discretion pursuant to s. 13(5) to ensure that his finding that the applicant was not personally credible could not be revisited by the RAT.

31. The applicant also referred to *S(P)(a minor) v. ORAC* [2009] IEHC 295 where Cooke J. held:

This is an issue which can and ought to be dealt with in the first instance by appeal rather than by judicial review. This is so notwithstanding the absence of an oral hearing because it is an issue which turns upon the assessment of written material in the form of country of origin information and is in no way dependent upon the personal testimony, demeanour, or credibility of the applicant."

32. The applicant submitted that his case is distinguishable as it revolves solely around credibility. He stated that there can be no basis for ORAC's recommendation other than the assessment of truthfulness or credibility and that in his case, therefore, judicial review was the appropriate remedy.

33. In reply, the respondent referred to the ex tempore judgment of Birmingham J. in *Konadu v. Refugee Applications Commissioner* (Unreported, High Court, 11th April, 2008) where the learned judge stated at para 1.18:

I think it is worthwhile reflecting on the context in which a section 11 interview takes place. The statutory scheme contemplates a two-stage process. An initial fact finding phase which culminates in the section 11 interview and which follows on a completion of a lengthy questionnaire and then at a later stage an exercise involving an analysis of the information that has been assembled. In my view a clear distinction arises between the situation where a decision is based on the manner in which evidence is given and the situation where the finding is reached on the basis of an assessment of the recorded contents of the interview.

34. The respondent submitted that these comments are applicable in the present case where the decision made did not depend on the manner in which the evidence was given but rather the record of the applicant's testimony at the s.11 interview. The respondent referred to *A. W. v. The Refugee Applications Commissioner & Ors.* [2013] where Mac Eochaidh J., having reviewed the authorities, stated at para. 26:

The principle I discern from the authorities is that there is no right to an oral hearing at the RAT but where demeanour-type or personal credibility findings underpin the first instance decision, then the applicant may require the opportunity to give oral evidence on appeal.

35. In *S.U.N. (South Africa) v. Refugee Applications Commissioner & Ors.* [2012] IEHC 338, Cooke J. held that the inclusion of a s. 13(6) finding by the Commissioner was discretionary and a finding pursuant to s. 13(6)(c) ought not to be included when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon a lack of personal credibility. The respondent submitted that Cooke J. did not, however, make a blanket determination that wherever an adverse credibility finding was made against an applicant that a s. 13(6) finding could not be made. In support of this submission, the respondent, referring to the applicant's significant delay in seeking asylum, opened para. 42 of Cooke J's judgment in *S.U.N.*, where the learned judge stated:

It might be said that there is some logical connection between the removal of the oral hearing on appeal and some of the other findings covered by s.13 (6). Thus, for example, if an applicant's claim has been based upon false and misleading information there may be some logic and justification for considering that he has forfeited an entitlement to be heard once again. Similarly, a significant delay in making an application for asylum may give rise to the inference that the applicant is not genuinely a refugee and justify a presumption to that effect.

36. The respondent also relied upon Hogan J.'s decision in *Sen He v. Minister for Justice, Equality and Law Reform and the Refugee Applications Commissioner* (Unreported, High Court, 7th October, 2011). The applicant in that case argued that ORAC had acted disproportionately in drawing a negative credibility inference for the purposes of s. 13(6)(c) of the Refugee Act 1996, as amended.

The applicant was a Chinese national who had not applied for asylum until he was arrested when attempting to travel to Northern Ireland. He had at that time been in the State for over three years.

37. Hogan J. held that in assessing whether the Commissioner's decision was disproportionate, it was necessary to ask whether the applicant's case would be unfairly hindered on appeal without an oral hearing. The learned judge observed that while oral argument undoubtedly forms the backbone of the common law system of advocacy, it cannot be said that a purely papers based appeal in itself is necessarily unfair. Having quoted from the judgment of McGuinness J. in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 1 IR 139 at p. 161, Hogan J. held at para. 10:

The key point is that the applicant must be given a fair opportunity to make his case on appeal. In the present case, the critical questions are whether the applicant's credibility is, first, undermined by a failure to make a claim for asylum several years after his arrival in the State and, second, whether the applicant has exhibited sufficient commitment to Catholicism such as might be said to give rise to a well founded fear that the applicant would suffer persecution if returned to China. It has to be said that these are relatively straightforward issues, at least so far as the undisputed facts of the case are concerned. In this regard it is important to stress that the applicant has already had the opportunity of giving oral evidence before the Commissioner in respect of the delay question and that the appeal will be against the Commissioner's adjudication on respect of that question. I find it hard to say that merely because there will be no oral appeal in a case such as the present one, that the procedures adopted are thereby necessarily unfair.

38. Hogan J. went on to hold, having noted that the constitutionality of the section was not in question, that the challenge reduced itself to the question whether, judged by reference to a statutory context which expressly permits an inference of this kind to be drawn for this particular reason, it was fair and rational for the Commissioner to draw the inference which he did in the circumstances of this case. The learned judge observed that human experience shows that those who genuinely seek refuge from persecution make asylum applications at the earliest available opportunity, at least absent some compelling justification for tardiness on their part. Hogan J. therefore held:

Analysed thus, can it be said that the Commissioner had no rational basis for this conclusion? I find it impossible to say that he did not. The applicant, after all, had waited over three years before making an application for asylum. Even then, it might be said that as the application was made only once the applicant had been arrested, there must remain a lingering suspicion that, but for such arrest, no such application would have been made. In some respects, therefore, given the significant delay in making the application which the Commissioner considered had not been credibly explained, this would seem a straightforward case calling for the application of this statutory inference. This is perhaps especially so when the Commissioner in any event robustly rejected the arguments advanced on behalf of the applicant as to why he had actually delayed in making the asylum application.

39. The respondent reiterated the fact that the applicant had waited for approximately 18 months following the persecution he claims to have suffered in Pakistan in September 2009, before applying for asylum in the State on 7th April, 2011 and submitted that in such circumstances it was entirely reasonable and proportionate for ORAC to exercise its discretion under s. 13(6).

40. Finally, the respondent took issue with what she characterised as the applicant's cherry picking of statistics relating to chances of success on a papers only appeal to the RAT. The respondent further submitted that in citing those statistics, the applicant mistook the function of this court which, in the respondent's submission, is not to second guess the applicant's chances of succeeding before the RAT based on selective statistics, but rather to review the impugned decision for illegality.

41. The court is satisfied that this is a case where it is appropriate to permit the applicant to seek *certiorari* of ORAC's decision, rather than pursue the statutory appeal to the RAT. This is due to the fact that the finding made pursuant to s. 13(6)(c) of the Refugee Act 1996, as amended, has the effect of denying the applicant an oral hearing before the RAT. Where there negative credibility findings made against the applicant, the loss of the right to an oral hearing is a serious matter and would put the applicant in a very disadvantageous position in relation to his appeal. In these circumstances, it is appropriate to permit the applicant to proceed with his application seeking *certiorari* of ORAC's decision.

42. In this case, ORAC found against the applicant primarily for two reasons: first, on the ground that if the applicant's account were true, then he would have been killed when the extremists came to him in August 2009; and secondly, on the ground that if he were genuinely in fear when he fled from Pakistan, he would have sought asylum on arrival in Ireland, rather than continue with his studies and apply for asylum a year and a half later in April 2011. Both of these grounds turn on the credibility of the applicant, rather than on some other freestanding evidence, such as country of origin information.

43. The applicant has submitted that when the rationale behind the recommendation to refuse the applicant refugee status had at its heart the Commissioner's assessment of the applicant's credibility, the Commissioner's decision to make a finding pursuant to s. 13(6)(c) so as to deny the applicant an oral hearing, was unreasonable and disproportionate.

44. The applicant submitted that there was already a statutory presumption in place to the effect that the applicant was not a refugee, and it was asserted that the combination of this presumption together with the credibility findings made by ORAC and the non-oral hearing on appeal, will render him effectively unable to achieve a positive result on his appeal to the RAT.

45. The court is satisfied that given the entirety of the case made by the applicant, in circumstances where the applicant's personal credibility was in issue, it was disproportionate and unreasonable to make a finding under s. 13(6)(c). ORAC did not consider whether the applicant – without reasonable cause – failed to make an application as soon as reasonably practicable after arrival in the State. For reasons that are set out later in this judgment, I am of the view that ORAC failed to properly analyse the applicant's explanation for not seeking asylum sooner. In these circumstances, ORAC acted unreasonably and disproportionately in making the findings which led to his losing the right to an oral hearing on appeal. On this ground, the decision of ORAC will have to be quashed.

Ground II – that ORAC failed to consider the applicant's explanation for his failure to apply for asylum when he returned from Pakistan in September 2009.

46. The applicant submitted that no consideration was given to his explanation for his failure to apply for asylum immediately upon his arrival in the State following the persecution he claims to have suffered in Pakistan during the summer of 2009. The applicant stated that he was given an inadequate opportunity to address this issue. The applicant further submitted that no reason was given for ORAC's failure to accept the reasonableness of his explanation for making the application for asylum when he did, and his failure to make the application sooner.

47. In determining whether ORAC properly considered the applicant's explanation for his delay in seeking asylum, it is necessary to

have regard to the applicant's testimony on this matter during his s. 11 interview. It is recorded as follows:

Q. 60. You claim you fled Pakistan in 2009. A genuine refugee would be expected to apply for asylum at the earliest opportunity. You did not apply until April 2011. Why did you delay in applying for asylum?

A. At that time, my family was also involved in these clashes. I don't want to be separate from them. I wanted to go back to them. I wanted them to accept me. I thought this issue would resolve itself. One of my friends visited Pakistan saying your family are still there and have the same thinking about you and want to kill you. That is why I made up my mind now.

48. ORAC revisited this issue at question 68:

Q. 68. I notice you only applied for asylum a few days after your permission to stay ran out. Why did you wait until this time to apply?

A. Actually, I was making up my mind about the asylum process. I wanted to make up my mind and find out about the asylum process.

49. To this the applicant added, by way of clarification:

It was me making up my mind. I want to say, there is a friend told me that my family and extremists are still looking for me. He came back in the middle of March. Then it took one week and I made up my mind and got some information. He told me after a week of arriving back in Ireland.

50. ORAC addressed this matter in the following terms in its decision:

The applicant failed to apply for asylum in Ireland on his return in September 2009 and only applied in April 2011, over a year and a half later. The applicant's permission to remain in Ireland expired on 30th March, 2011, just a week before the applicant applied for asylum. (See passport). A genuine refugee would be expected to apply for asylum at the earliest opportunity. The applicant did not. When asked why he delayed in applying, the applicant replied "actually, I was making my mind up about the asylum process. I wanted to make up my mind and find out about the asylum process." (Page 14, Question 68). The applicant added at read-back "it was me making up my mind. I want to say, there is a friend told me that my family and extremists are still looking for me. He came back in the middle of March. Then it took one week and I made up my mind and got some information. He told me after a week of arriving back in Ireland." (Clarification Sheet, Question 68). However, considering the applicant claims to have fled Pakistan in fear of his life after being imprisoned, beat, threatened and having to escape in 2009, his claim as to why he delayed in applying for protection is not credible. This further undermines the applicant's credibility and the reliability of his evidence.

51. The respondent submitted that it is clear from the terms of the decision that ORAC considered the reasons proffered by the applicant for his delay in seeking asylum and that the Commissioner rejected the applicant's explanation for reasons that are expressly stated.

52. In his affidavit submitted to the court in the present proceedings, the applicant sought to add to his explanation for not seeking asylum in Ireland sooner. He stated, at para. 5:

My permission to remain in Ireland as a student expired on the 30th day of March, 2011 and on the 7th day of April, 2011, I made an application for asylum. Prior to that period I was not in fear of refoulement to Pakistan and as I was lawfully in the Irish State. I benefitted from the protection of the State. I was at that time studying in the State and I was considering my options in respect of my potential application for asylum. A motivating factor for me in lodging the application for asylum was the fact that a friend told me in March, 2011 that he had become aware that these religious extremists were still looking for me in Pakistan and therefore, at that time the potential threat was still in existence. I was not aware that my failure to apply for asylum immediately upon realising that I was in danger would affect my claim in the manner in which it has. I am further unaware as to why the cause of my making a late application was not accepted as being reasonable by the RAC and I am informed by my Solicitor that the failure by the RAC to give reasons for the conclusion in this regard is unlawful.

53. The respondent submitted that this account constitutes a rationalisation by the applicant of his failure to apply for asylum in the 18 months or so following the past persecution he claimed, and was not put before ORAC prior to the making of its decision.

54. Because the affidavit was sworn on 30th August, 2011, which was subsequent to the making of the ORAC decision, it did not form part of the material before ORAC. Accordingly, the Court is of the view that it cannot now be relied upon as a means of attacking the Commissioner's decision.

55. In its decision, ORAC found that the applicant's explanation as to why he delayed seeking asylum in the State was not credible. ORAC did not engage with the reason given by the applicant in his s. 11 interview. ORAC quoted the reason given by the applicant in answer to Q. 68 and the clarification thereto in the interview, which were to the effect that he had not made up his mind about the asylum process. He only made up his mind at some time towards the end of March 2011, when a friend told him that his family and the extremists were still looking for him.

56. This answer has to be seen in light of an earlier answer given by the applicant to Q. 60, quoted above, which stated that he hoped that his family would accept him.

57. Taking the two answers together it would appear that the applicant's case was that he came back to Ireland on a valid student visa. At that time, he hoped that he would be able to mend relations with his family in Pakistan. He hoped that they would accept him and, in the months that followed, he was making up his mind whether to seek asylum in Ireland. It would appear that his hope of reconciliation with his family was extinguished when his friend returned from Pakistan in March 2011 and told him that his family and the religious extremists were still looking for him. It was at that stage, upon the expiry of his student visa, that he decided to seek asylum. He obtained some information on asylum and made the application on 7th April, 2011.

58. ORAC did not carry out any analysis of this account, nor did it say why it was found not credible. In the circumstances, the applicant's account required clear reasons to be stated by ORAC as to why it was not accepting the account as credible. ORAC failed

to give this account proper consideration. For this reason, the decision will have to be quashed.

59. Accordingly, I will make an order in the terms of para. 2 of the Notice of Motion dated 31st August, 2011, and grant certiorari of the recommendation of the ORAC dated 13th July, 2011.