Neutral Citation Number: [2012] IEHC 393

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1166 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) AND

IN THE MATTER OF THE IMMIGRATION ACT 1999, AND

IN THE MATTER OF THE ILLEGAL IMMIGRATION (TRAFFICKING) ACT 2000

BETWEEN

A. M. N.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 3rd day of August, 2012

1. The applicant was granted leave to apply for judicial review by way of *certiorari* on the 8th November, 2011 (Hogan J.) challenging the decision of the Refugee Appeals Tribunal ("the Tribunal") made on the 7th July, 2010. That decision rejected the applicant's appeal against the Refugee Applications Commissioner's recommendation that he not be afforded a declaration that he was a refugee. The decision is challenged on the grounds that in assessing the applicant's claim for asylum the Tribunal erred in law and/or in fact and dealt with him in a manner which was in breach of principles of constitutional and natural justice and was, in all the circumstances, unreasonable and/or irrational. It was contended that these errors were such as to render the decision fundamentally flawed. The main focus of the challenge is on alleged deficiencies in the manner in which the credibility of the applicant was assessed and in particular how a medical report was considered by the Tribunal.

2. Background

2.1 The applicant was born in June, 1938 and is now aged 74. He is from Asmara in Eritrea and is an orthodox Christian. At the age of 45 he was married in 1983 to a fifteen year old girl. Ten years later they started a family and now have five daughters and a son. The applicant contends that his wife converted to the Pentecostal faith in 1999 and prayer meetings were held at their house two to three times per month. The Pentecostal church is persecuted by the government of Eritrea. On the 2nd February, 2009, the applicant contends that police arrived at his home whilst a service was in progress. All members of his family were arrested. The police asked for the head of the household and he was arrested and taken to Ala Detention Centre. He alleged that he was held in an underground cell in solitary confinement for a week, after which several other prisoners were placed in the cell making it so overcrowded that there was barely room to lie down. The cell was dark, extremely hot and infested with ticks and lice. He alleged that throughout his time in Ala Prison he was regularly subjected to beatings from the guards who kicked and beat him with their firsts and rubber sticks. This caused swelling and wounds which bled profusely and were never treated. He alleged that "on several occasions they tied my wrists and ankles behind my back, holding them together with a wooden stick and I was left in this extremely painful position for up to an hour at a time". His detention continued for a period of seven months and fifteen days. On 14th September, 2009, when detailed with a number of other prisoners to work outside the prison, the convoy in which he was travelling was ambushed, in the course of which he and other prisoners managed to escape.

2.2 The applicant claimed that he and another escapee made their way on foot to the Eritrean/Sudanese border and then to Kassala a city on the border with the Sudan. He met a truck driver from his own ethnic background who took him to Khartoum and then to a coffee shop frequented by Eritreans. He met a fellow Eritrean from his village who had escaped from a different prison. This person was able to source an address for his wife's brother and sister who resided in Canada. He stated that following a phone call to Canada he received $7,000.00 *via* a Somalian man who brought him the money. In the meantime he said he sought "the assistance of an agent", who secured a passport and arranged his passage to Ireland. He travelled through Dubai and Turkey and arrived in Ireland on the 29th September, 2009. He then applied for asylum.

2.3 The applicant completed the usual questionnaire and an interview was conducted with him under s. 11 of the Refugee Act 1996 on the 23rd October, 2009. On the 30th December, 2009, the Refugee Applications Commissioner recommended that he should not be declared a refugee. The court is furnished with copies of this decision and the s. 13(1) report that had been prepared under the Refugee Act 1996.

2.4 That report summarised the country of origin information acknowledging that Eritrea was amongst one of the most repressive countries in the world. The authorities in Eritrea had severely restricted freedom of religion for unregistered groups. Members of these groups, including those practising the Pentecostal religion, had been harassed, arrested and arbitrarily detained in custody. The authorities had targeted members of these groups while they were holding religious services in their homes and there had been widespread reports that those arrested had been subjected to lengthy arbitrary detention and had been abused and tortured whilst in custody. It was accepted in the report that the general circumstances outlined by the applicant were "within the bounds of plausibility".

2.5 However, the report also examined the specific facts reported by the applicant. It stated that it did not appear plausible that the applicant would have been prepared to tolerate a situation where his life and liberty and those of his young children were being put at risk on a daily basis by his wife's insistence that she be allowed to practice her religion of which he disapproved. It was not thought

to be credible that the applicant despite being aware that his neighbours knew that Pentecostal services were being conducted in his home, would have allowed these services to take place regularly in a climate where people caught conducting such services were being imprisoned and tortured.

2.6 The report also suggested that since the position of women in Eritrea was normally subordinate to that of men, it did not appear plausible that he had no choice but to allow his family to convert and conduct regular services in the house. The writer of the report also regarded the applicant's description of his escape from custody that led to his arrival in Ireland as "highly improbable". The applicant appealed against this recommendation to the Tribunal.

3. The Medical Report
3.1 A medical report dated the 26th April, 2010, was prepared by Dr. Sabrina Vassia from the Centre for the Care of Survivors of Torture/SPIRASI in Dublin and submitted to the Tribunal in support of the applicant's appeal. In completing the report the doctor had available to her the same documentation that was submitted to the Tribunal. Her report states:-

> "Numerous small white flat scars on his torso, both anteriorly and posteriorly. Mr. N stated that they appeared after his period in detention, but did not know why. Their appearance was strongly suggestive of Tinea Versicolor, a superficial fungal infection of the skin that has a number of predisposing factors: among these are malnutrition, excessive heat and humidity. Such condition is therefore consistent with the history, given the prison condition described.
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> Examination of the left arm revealed a slight decrease in power and muscle bulk on that side, including a weaker hand grip. Sensation appeared to be normal, but posterior rotation of the shoulder was painful and reduced compared to the other side. The findings are in keeping with the history of forced traction of the arms posteriorly from being restrained in the manner described above: this may have caused partial damage to the brachial plexus….
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> There was widespread scarring in both pre-tibial areas of both legs, and the lateral aspect of his left leg. The scars were irregular, hypotrophic and measured up to 6cm in length. Mr. N said that they resulted from injuries sustained from kicks with boots while in detention. They had the appearance of healed lacerations, and are therefore consistent with the history."

3.2 Dr. Vassia concluded that the findings of the physical examination were "overall consistent to highly consistent with the history". She concluded that the treatment described by the applicant was of such severity that it satisfied the definition of torture given in the Istanbul Protocol.

3.3 Dr. Vassia also assessed the state of the applicant's mental health. He was diagnosed as suffering from severe depression and post traumatic stress disorder. The symptoms described were validated in the course of a psychological examination and were thought to be highly consistent with the history furnished by the applicant. She concluded that the applicant would require specialist assessment and treatment of his physical symptoms as well as psychological treatment and support for a prolonged period of time.

4. Istanbul Protocol
4.1 Dr. Vassia relied on the Istanbul Protocol in an effort to indicate the degree of consistency between the injuries and the cause to which they were attributed by the applicant. In that context the range of terms used generally are to be found in para. 187 of the Protocol, and they are:-

> "(a)not consistent: the lesion could not have been caused by the trauma described;
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> (b) consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
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> (c) highly consistent: the lesion could have been caused by the trauma described, and they are few other possible causes;
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> (d) typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
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> (e) diagnostic of: this appearance could not have been caused in any way other than that described."

5. The Tribunal Decision
5.1 Having considered all of the documentation and having heard the applicant in person at the oral hearing, the Tribunal determined that the applicant's account of events was "simply not credible". The Tribunal found many aspects of the applicant's story implausible or not credible for much the same reasons as those set out by the Commissioner. The Tribunal stated:-

> "The applicant's account of his alleged imprisonment and the circumstances surrounding his escape is also implausible. The applicant claimed that he was in solitary confinement for some one week and then was released into the company of others. While going out on a work detail the applicant claimed that the convoy was attacked and he and others managed to make good their escape. The applicant claimed he originally travelled to Kassala, the journey took some two days and the applicant told the Tribunal that he did not eat or drink for any of this time. His friend parted company with him there and the applicant continued on his journey to Khartoum. There is he was dropped off at an Eritrean café where the owner contacted other Eritreans and contact was made with the applicant's wife's relatives in Canada. This man made contact with the applicant's relatives in the applicant's home village who supplied him with this address and when the applicant contacted these relatives in Canada they agreed to send US$7,000.00 to Sudan to fund his travel. The applicant on his own account used this money to obtain a forged passport which did not contain either his name or his photograph and arranged his journey to Ireland. The applicant experienced no difficulties at any point of immigration in respect of being in possession of this false passport. This, in light of the situation that exists at all international points of entry, is simply not capable of being believed and the applicant's account in this regard is not credible. Other than the applicant's own account, the Tribunal does not know when or how the applicant arrived in the jurisdiction."

5.2 The Tribunal also noted that though a letter had been received by him in May, 2010 indicating that the applicant's children were

now with the applicant's brother and that the whereabouts of his wife was unknown, he could not say whether his children were now safe with his brother in Eritrea. In addition, he said that he had no further contact with his wife's relatives in Canada even though they had sent him a large sum of money. He had no knowledge as to whether his wife's family had made efforts to contact her or discover her whereabouts or what had happened to her. It was not explained why more detailed documentation could not have been sent by his brother in Eritrea to him to assist his application given that he had sent some documentation in relation to his student days in the 1960s. In addition, the Tribunal noted that the applicant was an elderly man and that his English, notwithstanding his contention to the contrary, was very good. When asked about this in the course of the oral hearing the applicant told the Tribunal he learned English in high school in Eritrea. However, the Tribunal concluded that the applicant's knowledge and grasp of English was far greater than one who had studied English allegedly some 40 years previously. Though no specific conclusion was drawn in respect of this aspect of the case by the Tribunal, it is clearly implicit in the decision that this was yet another factor that undermined the applicant's credibility when assessing his case.

6. The Issues in the Case

6.1 The applicant obtained leave to apply for judicial review on four grounds that may be reduced to two. The first ground relates to the failure on the part of the Tribunal to offer any specific grounds for the rejection of the medical report and its conclusions. I consider the second ground which is an amalgam of grounds 2, 3 and 4 to be that the Tribunal failed to consider adequately or at all the evidence and submissions made on behalf of the applicant and/or acted unreasonably, unfairly and irrationally or disproportionately when considering the materials and evidence in the case and in concluding that the applicant's account of his experiences in Eritrea, including his arrest, detention and imprisonment and his subsequent flight, was not credible. **7. The SPIRASI Medical Report**

7.1 The applicant claims that the Tribunal Member "acted in breach of the applicant's right to fair procedures in failing to have due regard to the contents of the SPIRASI medical report and, it disregarded the report on the assessment of the applicant's credibility, in failing to give adequate reasons for doing so".

7.2 In *R.M.K. (DRC) v. Refugee Appeals Tribunal & the Minister for Justice, Equality and Law Reform* (Unreported, High Court, 28th September, 2010) Clarke J. considered how medical evidence of the type submitted in this case should be considered:-

> "21. The applicant's next challenge was to the rationality of the tribunal member's rejection of the compelling and supportive medical opinion furnished in this case where the strong personal opinion of the SPIRASI physician well versed on the Istanbul Protocol and the UN Convention against Torture (UNCAT) was that Mr. K suffered torture. In the applicant's contention, it follows therefore that a report of such weight could only be disregarded if the primary credibility findings were of such force as to outweigh the medico legal report. The applicant is correct in his contention.
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> 22. There is a long line of authority on the general subject of the weight to be accorded to medical reports in asylum cases. While it is always a matter for the decision maker to assess the probative value of the contents of such reports, it is incumbent on the decision maker to provide reasons for rejecting the contents. A report which is general in terms has obviously little weight and requires no great explanation for its rejection. However, while medical reports are rarely capable of providing clear corroboration of a claim, it is well recognised that there are occasions when examining physicians report on objective findings and use phrases which attach a high probative value to those findings. Such reports are capable in an objective way of supporting the claim. Obviously, in such cases the need for reasons to be given for rejecting the probative value of the report must be more fully addressed."

7.3 There have been other High Court cases in which a similar approach has been adopted.

7.4 In *T.M.A.A. v. The Minister for Justice & Ors* [2009] IEHC 23, Cooke J. stated:-

> "The exercise which the adjudicating authority is required to carry out and to explain is to evaluate the totality of the information available; to weigh in the balance the different elements that tip in one direction and the other and to come to a conclusion as to the credibility of the evidence as a whole. It seems to this Court that where there is a physical piece of evidence that is capable of being related to the events claimed to have happened by the applicant, the obligation is, first of all, to take that into account and then secondly, to explain in the decision whether any significance was thought to attach to it at all and if not, why it is discounted as against the other factors that are taken into account as elements that embellish a story otherwise based upon public events."

7.5 In *B. v. Refugee Appeals Tribunal & Anor* [2011] IEHC 363, Hogan J. considered the medical reports prepared and submitted to a Tribunal in respect of an allegation made by the applicant that she had been raped by Moldovan police or agents of the police. Her emotional state was thought to be highly consistent with her having experienced the reported rapes. He noted that the conclusion reached in the report that the applicant was probably the victim of sexual violence and rape and that her emotional symptoms were "highly consistent" with that experience, did not of itself establish that she had been raped or abused by the police or agents of the police which was the essence of the allegation. In that case Hogan J. considered that the tribunal member had satisfied the appropriate test. Having weighed the evidence he concluded that the report did not fundamentally assist the applicant since it did not tend to show that the perpetrators of the rape were police agents:-

> "This must be understood against a background where the tribunal member had earlier rejected a key and integral factual aspect of her account, namely, that she was apprehended by such agents after speaking at the public demonstration the day before and that the rape took place while in such custody."

7.6 It must be emphasised that a doctor preparing a report is not concerned with determining whether the account given by the patient was true or not. The doctor can only make a diagnosis and then assess whether the mental and physical condition as presented are consistent with the history provided. In this instance, Dr. Vassia's report was appropriately qualified. She found that the findings on physical examination were "overall consistent to highly consistent with the history". In essence, the Istanbul Protocol finding of "consistent" equates to "possible" and the Istanbul Protocol standard of "highly consistent" equates with "probable". (See *Simo (D-V-T.S.) v. the Minister* [2007] IEHC 305 (Edwards J.)).

7.7 There is no doubt that the Tribunal set out at p. 16 of its decision the contents of the medical report of the 26th April, 2010. The decision faithfully recites the relevant findings made. It then goes on to simply state the following:-

> "While medical practitioners are capable and competent in giving a medical report on the sequelae as presented to

them by an applicant, they are in the same position as that of the Tribunal in that they cannot say with any particularity how and in what circumstances such sequelae came about. The SPIRASI report has to be considered in the light of the applicant's overall account to the Tribunal."

7.8 The Tribunal makes no further comment on the medical report. It simply states the obvious that medical practitioners are dependent in large measure on their patients' account in respect of how they came to sustain injury. However, the doctor in this case is relied upon as a person with considerable medical experience and specialist experience in the treatment and assessment of injuries said to be as a result of acts of violence including torture encompassing the full range of potential human brutality. A medical report presented appears to support the plaintiff's in significant respects as to how the injuries described were inflicted upon him. The report suggests a link between the fungal infection and the applicant's account of his conditions of confinement. The doctor found widespread scarring in both pre-tibial areas of both legs and the lateral aspect of the left leg. The applicant's account was that these had resulted from injuries sustained from kicks with boots whilst in detention. The doctor concluded that they had the appearance of healed lacerations and were therefore consistent with that history. The physical examination also revealed a slight decrease in power and muscle bulk on the left arm including a weaker handgrip. The rotation of the shoulder was painful and reduced compared to the other side. These findings were said to be in keeping with the history of forced traction of the arms posteriorly while being restrained in the manner described by the applicant which may have caused partial damage to the brachial plexus. It is fair to say that the coincidence of these injuries and continuing symptoms supported a central aspect of the applicant's claim. Clearly, it was evidence that is independent of the applicant and provides objective verification of an important part of his account. It was the doctor's expert opinion that these injuries were consistent or highly consistent with the account given by him. I am satisfied in the light of the principles outlined in the cases cited, that it is incumbent on the Tribunal to provide reasons for rejecting the contents of the medical report in this case. The medical report offered significant probative support of the applicant's claim.

7.9 The applicant had sustained injuries and given a vivid account of the brutality involved in inflicting them. It was accepted by the Tribunal that Eritrea is one of the most oppressive societies in the world and that the state does not tolerate any behaviour which challenges the authority of the state. It was satisfied that "those whom the authorities in any way view as challenging its authority are summarily dealt with in a harsh and brutal manner". Though each case must be examined individually, the medical report was of particular importance to the applicant's claim against the background of country of origin information that suggested that the type of arrest, detention and torture said to have been inflicted upon the applicant was consistent with the known behaviour of the regime towards its citizens, including adherents to the Pentecostal faith.

7.10 The Court recognises that the Tribunal addressed a number of features of the applicant's account which it found to be implausible or incredible, and which have been set out above. For example, the entire story about the applicant's escape, the fortuitous encounters that led to contact with relatives in Canada who were disposed to provide $7,000.00 and his account of his arrival in Dublin on foot of grossly inadequate documentation having passed through immigration control was unsurprisingly doubted by the Tribunal.

7.11 However, I am satisfied that the Tribunal erred in law in failing to describe what significance was attached to the medical report and if significance attached to it, why it was discounted as against other factors in the case. It was incumbent on the Tribunal to deal specifically with the medical report and state reasons as to why it was not accepted. The report is discounted on the basis of the applicant's "overall account to the Tribunal". The medical report was an objective piece of evidence that required more careful consideration. The mere recital of its terms does not amount to a sufficient consideration of its contents. I do not regard this case as one in which the primary findings of fact pertaining to the applicant's credibility were of such force as to outweigh the medico legal report to the extent that it could be dismissed in such a summary fashion. I am satisfied that in reaching its decision the Tribunal erred in law in failing to consider the medical report adequately and failing to give any adequate reason or explanation for rejecting the probative value of the report. The Tribunal failed to provide cogent reasons for rejecting a piece of evidence that was significantly supportive of the applicant's claim. The Tribunal's failure in this respect renders its decision fundamentally flawed.

8. Grounds 2, 3 and 4

8.1 These grounds constitute a challenge to the basis upon which the Tribunal reached its findings as to the credibility of the applicant and are based on the proposition that the Tribunal had acted unreasonably or irrationally or disproportionately in reaching its conclusion as to credibility in respect of the materials and evidence adduced. In assessing matters of credibility it must be recalled that this is not a court of appeal. In *I. R. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 24th July, 2009), Cooke J. helpfully summarised the guiding principles as to how issues of credibility should be dealt with on applications for judicial review in respect of asylum matters. The court's jurisdiction is confined to ensuring that the process by which the determination has been made by the Tribunal was legally sound and was not vitiated by any material error of law or the infringement of any statutory provision or the principles of natural and/or constitutional justice. In paragraph 11 of the judgment, Cooke J. said:

> "4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.
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> 5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.
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> 6) The reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given.
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> . . .
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> 8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.
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> 9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is *prima facie* relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.
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> 10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility

and the process of analysis or evaluation by which it has been reached."

8.2 I am satisfied applying those guiding principles that much of the criticism made by the applicant of the Tribunal's determination in respect of grounds 2, 3 and 4 is unwarranted. In ground 2 the applicant complains about a failure on the part of the Tribunal to engage with or give reasons for rejecting various explanations advanced in respect of the applicant's behaviour towards his wife , his failure to ensure that services were not held at his family home and/or that she disengage from the Pentecostal religion. Complaint is also made that in finding the applicant's account of his flight from custody not to be credible, the applicant was not afforded any adequate opportunity of addressing these issues by the Tribunal. I am not satisfied that these criticisms which are of a general nature are valid.

8.3 Similar submissions were made in respect of ground 3 concerning findings as to documentation, which I also reject. It was submitted as part of ground 3 that the decision of the Tribunal suggested a lack of candour on the applicant's part with reference to his knowledge and grasp of the English language. The Tribunal determined that the applicant's knowledge and grasp of English was "far greater than one who had studied English allegedly some forty years previously". The applicant had submitted a number of documents in respect of his education which showed that he had studied English in school and had been educated in the 1960s in a teaching training institution in Asmara. It was submitted that he required the assistance of an interpreter, although he was able to respond in English to some questions put to him during the course of the appeal hearing. It was submitted that a disproportionate emphasis was placed on his proficiency in English in determining the lack of credibility on his part. It was submitted that the applicant had by that time resided in this country for a period of ten months which would also have enhanced to some degree his English speaking skills.

8.4 The Tribunal Member noted that the applicant's command of English was very good and stated:

> "When pressed as to where he learnt his English, the applicant told the Tribunal that he had learned English in High School in Eritrea. The applicant's knowledge and grasp of English was far greater than one who had studied English allegedly some forty years previously."

It was not made absolutely clear by the Tribunal as to whether the conclusion regarding the applicant's competence in English undermined his general credibility or specifically his account of his whereabouts prior to his arrival in the State in that he may have been living in an English speaking country. I am satisfied that this is another matter that the Tribunal considered which told against the credibility of the applicant's story to some degree. I am also satisfied that it appeared to be of very limited importance. It was a small piece of the full picture as far as the Tribunal was concerned. It is not of such a nature as would undermine the Tribunal's decision as to credibility having regard to the more important features of the case considered in reaching the decision.

8.5 Ground 4 is framed in very general terms and I regard it as an amalgam of grounds 2 and 3. I am not satisfied that grounds 2, 3 and 4 provide any basis upon which to grant the applicant the relief claimed.

8.6 I am satisfied for the reasons set out above that the applicant is entitled to succeed in respect of ground 1 in relation to the failure on the part of the Tribunal to consider the medical report submitted on behalf of the applicant adequately, and having done so to give cogent reasons as to why its contents and conclusions were discounted in reaching a decision adverse to the applicant. I, therefore, grant an order of *certiorari* quashing the decision of the Tribunal in this case and remit the matter for consideration by a differently constituted Tribunal.