Neutral Citation: [2014] IEHC 566

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 239 JR]

BETWEEN

M. G. D.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 27th day of November, 2014

1. This is an a telescoped application for leave to apply for judicial review seeking an order of *certiorari* in respect of the decision of the Refugee Appeals Tribunal, dated 31st January 2010, to refuse the applicant a recommendation of refugee status. The applicant was refused a recommendation at first instance by the Office of the Refugee Applications Commissioner ("ORAC") in a decision dated 9th October 2009. The Commissioner also made a finding pursuant to s. 13(6)(b) of the Refugee Act 1996, namely that "*the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded*". As a result, in accordance with s. 13(5), the applicant's appeal was dealt with by the Tribunal on a papers only basis, without an oral hearing.

Background

2. The applicant is a Sudanese national, born on 6th June, 1985, and is a member of the Dinka tribe. He claims to have fled his village, Abyei, when it was attacked by militia on 17th May, 2008, an attack in which he states his mother was killed. The applicant claims to have suffered an injury in the course of escaping from the attack but cannot say whether it was caused by gunshot or not. The applicant fled to Libya where he remained for a year before arranging passage out of that country through an agent, arriving in the State on 5th July, 2009. The applicant was arrested on arrival at Dublin Airport and held in Cloverhill Prison before claiming asylum on 7th July, 2009.

3. The applicant was initially helped by a friend, who completed his questionnaire in Arabic, as he claims he can speak that language but is unable to write it. The applicant was represented by the Refugee Legal Service in making his asylum application and had an interpreter present at his s. 11 interview at ORAC which took place on the 3rd and 15th September, 2009. The applicant's claim was rejected by the Commissioner principally on the grounds of a lack of credibility, such that it was ultimately held that his claim was manifestly unfounded.

4. The applicant appealed this decision, and written submissions were made on his behalf by the Refugee Legal Service. The applicant claimed that the Commissioner failed to take into account all relevant information, including country of origin information in reaching his findings. The applicant included the relevant supporting documentation with his submissions in this regard. The Refugee Appeals Tribunal upheld the recommendation of the Commissioner and refused the applicant's appeal, once again citing a lack of credibility in respect of the applicant's claims. It is that decision which is impugned in these proceedings.

5. Before turning to the substantive matters in this application, it is necessary to deal first with two issues pertaining to the applicant's case.

Extension of time

6. The present proceedings were issued six days outside the time limit laid down by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. While the respondent has not objected to the applicant's application for an extension of time, it is necessary, nonetheless, that the court be satisfied that there is good and sufficient reason for granting the extension.

7. An affidavit has been sworn by Mary Conroy of Judicial Review Unit of the Refugee Legal Service in which she sets out the steps which were taken on behalf of the applicant to issue the within proceedings. According to Ms. Conroy, the impugned decision was sent to the applicant under cover of a letter dated 8th February, 2010. When the applicant attended at the offices of the RLS, his file was transferred to Ms. Conroy in the Judicial Review Unit.

8. Ms. Conroy considered the file and formed the view that it was appropriate to apply, as required, to the Legal Aid Board for permission to obtain counsel's opinion. She did this on Thursday, 18th February, 2010. She was notified of the grant of that permission on the same date. Thereafter, she arranged for a brief to be prepared and to be forwarded to counsel. That brief was sent out on Monday, 22nd February, 2010. Counsel received the brief on Wednesday, 24th February, 2010, and forwarded a written opinion on the following day. Thereupon, Ms. Conroy applied to the Legal Aid Board for a legal aid certificate authorising the institution of proceedings. Such certificate was granted on Friday, 26th February, 2010. Counsel forwarded draft pleadings over the weekend and on Thursday, 3rd March, 2010, Ms. Conroy contacted the applicant and an interpreter and arranged for them to attend at the offices of the Refugee Legal Service to discuss the draft pleadings and to amend and/or confirm the contents thereof as appropriate.

9. Ms. Conroy submitted that, having regard to the internal procedures in operation within the Refugee Legal Service, the delay was neither inordinate nor inexcusable. She also submitted that none of the respondents had suffered any prejudice by reasons of the delay herein.

10. Having regard to the affidavit sworn by Ms. Conroy, I am satisfied that a good explanation has been given for the short delay in instituting the within proceedings. I will extend the time for the issuing of the proceedings up to and including 3rd March, 2010, which is the date on which the notice of motion issued.

Application to Strike out the Applicant's Claim
11. After the conclusion of the hearing of the application herein, the respondent applied to the court for an order dismissing or striking out the proceedings as an abuse of process and/or for wrongful conduct and/or lack of candour and/or non-disclosure on the part of the applicant.

12. This application was based on an affidavit sworn by Ms. Katherine Bateson of the Chief State's Solicitor's Office on 24th April, 2014. She deposed to the fact that in the s. 11 interview and at hearing before the RAT, the applicant had maintained that he was a Sudanese national with a date of birth of 6th June, 1985, and that he fled to Libya from Sudan and remained there until 25th June, 2009, before travelling to Ireland. It was submitted that the applicant continued to maintain this at the hearing before the High Court.

13. The applicant's legal representatives had requested certain documentation from the applicant's file, which was thought to be in the possession of the respondents. However, it transpired that his file had been held in the Irish Naturalisation and Immigration Service (INIS) since 13th August, 2012. Subsequent to the hearing before the High Court, the applicant's file was received by the Tribunal and the Tribunal became aware for the first time of correspondence on that file received by the INIS from the UK Border Agency dated 9th December, 2011. That correspondence stated that the fingerprints of the applicant herein matched a person by the name of Ali Mahmed, a Somalian national with a date of birth of 1st January, 1989, who was encountered at the UK Controls in Calais, France, on 22nd January, 2009, and handed over to the French authorities on the same day.

14. A letter was sent to the applicant and his solicitors giving him 15 days in which to respond to this new information. A response was sent by the RLS on behalf of the applicant by letter dated 26th October, 2012. It stated as follows:-

> *"The applicant instructs that he is from Sudan. The agent was supposed to take him to the UK. He was in Libya on 20th May, 2008 and remained in Libya [until] 25 June 2009. The agent took him by ship from Libya which was at sea for many days and he was not allowed up on deck until he docked in a port that he now knows to be Calais (although he did not know the name of it at the time) and the agent tried to get him and others onto a ship bound for the UK in a container, however, he and the others were encountered by UK immigration and were removed and taken to an office where he gave a false name and false nationality. He said the reason that he gave his nationality as Somalian was that it was the first nationality that 'came out of his mouth'. He said they were released in Calais and the agent (Egyptian) took them to a tent in the forest where he stayed for a number of months until the agent arranged for them to be brought by air from an unknown airport in France to Dublin (after telling them that they could travel to Belfast and onto the UK mainland). He instructs that he did not have any documents when he arrived in Dublin Airport as the agent disappeared on leaving the plane and the agent had their travel documents. He said that as he did not have travel documents he was detained by immigration and imprisoned for 1.5 months in Cloverhill and had a private solicitor, Mark Quinn, representing him. He instructs that in order to be released from prison he had to produce a genuine Birth Certificate from Sudan which his father sent him from Sudan and he submitted his Birth Certificate to the judge in court. It appears that same is not in the asylum file presently."*

15. An affidavit was sworn by Mr. Chris Walsh, a solicitor in the Law Centre (Smithfield) (incorporating the Refugee Legal Service) in which he stated that the issues concerning the applicant's alleged presence at Calais on 22nd January, 2009, were dealt with by a unit of the Refugee Legal Service other than the unit involved in the judicial review proceedings. He stated that neither he nor any other legal representative involved in the within proceedings was aware of the information alluded to in the affidavit of Ms. Bateson until they received notice thereof from the respondents after the conduct of the hearing.

16. In a supplemental affidavit sworn by Mr. Walsh on 7th June, 2014, it was averred that upon receipt of the letter dated 17th August, 2012, from the respondent, a solicitor and case worker were assigned to ascertain the applicant's response to the information supplied by the UK Border Agency. Mr. Walsh stated that it appears from the file that it was not possible to take instructions from the applicant at a consultation. Instead, they had to proceed by way of a telephone call without the assistance of an interpreter. Mr. Walsh set out content of those telephone instructions in the following manner:-

> *"I say and believe that, thereafter, and in view of the need to submit representations to the respondent without delay, it was decided to take the applicant's instructions over the telephone. I say and believe in that regard, that the case worker posed a number of questions to the applicant and that the applicant endeavoured to respond thereto. I say that no interpreter was involved in this interaction and I also say that other correspondence on the applicant's file at the time, indicates that his English was of a poor standard. I say and believe, in retrospect, that it was not appropriate to have taken instructions in relation to such an important matter over the telephone without the assistance of an interpreter. I say, having regard to the affidavit sworn by the applicant on 17th June, 2014, that the applicant did not have sufficient English to understand what was being asked of him in the course of his telephone conversation. I say that this understanding is borne out by the fact that the representations submitted to the respondent on his behalf as exhibited in the affidavit of Ms. Bateson do not appear to make sense, as they maintain that the applicant was indeed in Libya in January 2009 and remained there until June 2009 while, at the same time, implicitly acknowledging that he was in Calais in the early months of 2009. I say and believe in light of the above, that it would be unjust if these submissions were used against the applicant."*

17. I accept the averment made by Mr. Walsh that neither he nor any other legal representative involved in these legal proceedings was aware of the information set out in Ms. Bateson's affidavit.

18. The fact that the applicant allowed the proceedings before ORAC, the RAT, and this Court to proceed on the basis that he had been in Libya from 20th May, 2008, until 5th July, 2009, is a very serious matter. However, having regard to the candid affidavit sworn by Mr. Walsh, I am satisfied that an attempt was made to inform the respondent of the truth by means of the letter from the RLS dated 26th October, 2012. That this account was itself inaccurate, and indeed as pointed out by Mr. Walsh was internally inconsistent, was due to the fact that instructions had been taken over the telephone without the aid of an interpreter. The essential point in that letter was that the applicant admitted to having been in Calais in 2009 prior to his departure for Ireland. He also admitted using a false name and giving a false nationality. In these circumstances, the applicant would have understood that he had made a clean breast of matters at the time that the RLS letter was sent on 26th October, 2012.

19. I do not think that there was any attempt by the applicant or his legal advisers to mislead the court. Accordingly, I refuse the relief sought by the respondent in its notice of motion dated 7th May, 2014.

20. I now turn to consider the substantive matters arising in this case.

Submissions

21. Counsel for the applicant opened her submissions by pointing out the similarity between the findings reached by the Commissioner and those reached by the Tribunal. In particular, it was submitted that the Tribunal Member erred in stating that there was no documentation before her pertaining to the time frame within which the applicant claims his village was attacked; the applicant further submitted that in doing so the RAT has breached the requirements of constitutional and natural justice. Counsel cites the decision of Cooke J. in *I.R. v. Minister for Justice* [2009] IEHC 353; of Clark J. in *N.M. (Togo) v. Refugee Appeals Tribunal* [2013] IEHC 436; and two decisions of Finlay Geoghegan J. in *Traore v. Refugee Appeals Tribunal* (Unreported, High Court, 14th May 2004) and *Averina v. Minister for Justice* (Unreported, High Court, 7th October 2004) in this regard. It was contended that while the applicant has submitted country of origin information central to the issue of whether or not there was unrest in Abyei on 17th May, 2008, the Tribunal Member has failed to even refer to it, much less give it proper consideration.

22. The applicant submitted that the Tribunal Member has reached an irrational conclusion based on speculation and conjecture in finding that the nature of the alleged injury sustained by the applicant in escaping from his village would have been explained to him when he received medical attention in Libya. Counsel asserted that there was no evidence of any sort before the Commissioner or the Tribunal to indicate whether the nature of the applicant's injury (and whether it was caused by a gunshot) was explained to him by medical personnel, or indeed what language such explanation might have been provided in. As such, the applicant submitted that there was no basis for the Tribunal's finding in this regard, and the applicant quoted from the judgment of Cooke J. in *I.R. v. Minister for Justice* [2009] IEHC 353, where the learned judge held: "*A finding 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*."

23. The Tribunal Member's finding in respect of the apparent inability of the applicant to correctly identify the denomination of Sudanese currency is dismissed by counsel as being made without reference to, or mention of, the submissions made by the applicant on his appeal. In this regard, it is contended that the country of origin information forwarded to the Tribunal with the notice of appeal contained information on the realities of life within Sudan, the fractured nature of that state between north and south, and the fact that the use of the new currency was not as commonplace as believed. It was submitted that the country of origin information relied on by the respondents was drafted prior to the introduction of the currency, was theoretical in nature, and set out what the Central Bank of Sudan proposed would happen. In the event it was asserted that this situation did not materialise and that the Tribunal erred by failing to have regard to relevant considerations set out by the applicant in breach of natural and constitutional justice. Counsel referred to the decision of Finlay Geoghegan J. in *Bujari v. Refugee Appeals Tribunal* [2003] IEHC 18 with regard to the failure of a Tribunal Member to consider an explanation offered for an apparent inconsistency, and to the decision of Clarke J. in *F.H.Z. v. Refugee Appeals Tribunal* [2005] IEHC 462 in support of this view.

24. The applicant makes a series of complaints about the manner in which the Tribunal Member stated, in the conclusion section of the decision, that the applicant had done "*nothing to support his claim to have suffered persecution or indeed that he is a national of Sudan*." In this regard, the applicant submitted that the Commissioner accepted in his s. 13 report that the applicant was a national of Sudan and it was claimed that the applicant did not need to appeal any negative finding of the Commissioner in that regard. Further, it was submitted that if the statement by the Tribunal constitutes a finding that the applicant is not from Sudan, then it was not lawfully made and is without basis. Coupled with this, it was contended that the Tribunal Member failed to make a definitive finding in relation to the applicant's ethnicity, despite acknowledging that the issue was at the core of his case. Once again, it was submitted that the Tribunal failed to take into account all of the relevant considerations in this regard.

25. The Tribunal Member also made certain comments in his conclusions to the effect that the applicant has none of the traditional markings of the Dinka tribe on his face. Counsel claims that if this comment constitutes a finding that the applicant was not from the Dinka tribe, then it is irrational and without evidential basis. In this respect it was submitted that short of evidence to the effect that all members of the Dinka tribe bear such markings (evidence which was not before the Tribunal) it is not open for such a finding to be made. Finally, it was submitted that the Tribunal Member failed to refer to the argument in the applicant's written appeal regarding the possibility of his suffering prospective persecution into the future.

26. In reply, counsel for the respondent invited the court to examine carefully the testimony given by the applicant over the course of his s. 11 interview with the Commissioner, in light of the country of origin information attached to the s. 13 report, and that submitted by the applicant in his appeal. She noted that the applicant failed to mention any attack on the market on 14th May, 2008, until a Reuters report regarding that attack was put to him by the Commissioner in his second interview. The exchange led the applicant to comment: "*The actual fighting took place on the 14 May 2008 and the second massive attack took place in Abyei on the 17 May 2008*".

27. Counsel for the respondent submitted that the Reuters report identified that fighting between the SAF and the SPLA broke out on the 14th May, 2008, and led to some deaths. The Human Rights Watch report submitted by the applicant also stated that mortar and artillery fire began on 13th May, 2008, and that there was fighting in Abyei market the next day. Counsel noted that the Human Rights Watch report states that at least 18 civilians were killed on 14th May, 2008, and that by 17th May, 2008, up to half the buildings in the town had already been burned to the ground. The report notes that fighting restarted on the 20th May, 2008, when the SPLA launched a fresh offensive with reinforcements, and were pushed back. The respondent submitted that there is a reference in the report to the rounding up of Darfuri traders in the market by the SAF demanding their money, but no reference to shooting or fighting taking place on 17th May, 2008. The respondent submitted that there is no reference in the report to a "second massive attack".

28. In light of the examination of these sources, the respondent submitted that while there was clearly continuing trouble in Abyei and in what was left of the market on 17th May, 2008, and it was not as described by the applicant in making his claim. Further it is submitted that none of the documentation supplied by the applicant in his appeal corroborates his claim of a second massive attack in Abyei on 17th May, 2008, resulting in the killing of a civilian such as his mother. In this regard, counsel submitted that there was sufficient material before the Tribunal Member to ground her finding that there was nothing documenting the massive attack as described by the applicant. The respondent contended that the Tribunal's finding clearly follows from the premise of the supporting country of origin information and cannot be characterised as irrational or unreasonable.

29. The respondent pointed out a clear inconsistency in the evidence of the applicant with regard to the manner in which he injured his leg while seeking to escape his village. In this regard, it was submitted that while the applicant claimed that he was shot in the leg in his questionnaire, at his s. 11 interview he states that he did not know whether he was shot or injured while running away. It was submitted that in the context of this inconsistent evidence, and the fact that the applicant subsequently received medical treatment, the Tribunal Member could legitimately conclude that it was difficult to understand how the applicant did not know whether he had been shot or not. The respondent submitted that this was not mere speculation or conjecture on the part of the Tribunal, but the expression of an opinion. The comments of Clark J. in *A.A. v. Refugee Appeals Tribunal* [2009] IEHC 445, at para. 28 of her judgment, were quoted by the respondent, to the effect that:

"An expression of opinion or the rejection of certain parts of a person's evidence does not amount to conjecture. It would only be conjecture if a Tribunal Member guessed or hazarded reasons or formed an opinion on the basis of no or very slim evidence."

30. It was submitted that the applicant failed to provide any medical evidence in support of his claim. Nor did the applicant put in evidence about whether or not the injury was explained by the medical personnel who attended him in Libya.

31. The respondent submitted that the explanations given by the applicant as to why he was unable to identify the Sudanese currency correctly were confused and inconsistent. In this respect, it was submitted that the applicant has produced no country of origin information to show that the new pound currency introduced in 2007 was not used in southern Sudan in 2007 and 2008 before his departure, or that the information which was relied on was theoretical and did not materialise. It was submitted that the Tribunal's concerns with the applicant's testimony were reasonable and fairly made, and that the case law relied on in submissions by the applicant has no relevance to the decision of the Tribunal.

32. With regard to the remaining claims of the applicant, the respondent noted that the issue of the facial markings of the Dinka tribe was initially brought up by the applicant who provided two different explanations for why he did not have the mark. Notwithstanding this, it was submitted that the absence of the traditional Dinka marking on the applicant's face formed a part of the credibility findings of the Commissioner but was not challenged in the applicant's notice of appeal, and nor did the applicant provide any country of origin information about the tradition, to support his explanations. Counsel noted that, pursuant to s. 11A(3) of the Refugee Act 1996, as amended, the burden of proof is on the applicant in the context of an appeal, and she pointed out that the applicant was legally represented at the time. In these circumstances it was submitted that it was open to the Tribunal not to accept the applicant's explanation for the lack of a marking and such finding was reasonable and rational. The respondent submitted that there is no legal impediment on the Tribunal agreeing or disagreeing with the findings of the Commissioner based on the evidence before it.

33. Finally, it was submitted that in light of the decisions in *B. v. Refugee Appeals Tribunal* [2006] IEHC 237 and *A.G.R.B. v. Refugee Appeals Tribunal* [2009] IEHC 527, there is no obligation on a decision maker to consider whether there is a future risk of persecution if an applicant is found not to have a well-founded fear of persecution on the basis of a lack of credibility.

Decision

34. The first area of complaint about the RAT decision was in relation to the finding that there was no objective information relating to a second "massive attack" on the applicant's village on 17th May, 2008. The applicant claimed that this finding could not stand as the Tribunal had said that there was no documentation before it relating to an attack on 17th May, 2008. This was factually incorrect as the applicant had supplied a significant amount of COI which showed that there was fighting in Abyei on 14th May, 2008, and for days thereafter.

35. The applicant had furnished a significant amount of COI dealing with the fighting that occurred in the region in May 2008. A report entitled "Abandoning Abyei" from the Human Rights Watch organisation, dated 21st July, 2008, contained the following information:-

"Eyewitnesses told Human Rights Watch that in the days following the initial clashes on May 14, the SAF and SAF-supported Misseriya militia, wrought havoc in Abyei, torching the market and at least half the houses, and systematically looting property from civilian homes and NGO premises.

…

Several eye-witnesses who stayed in Abyei after May 14 told Human Rights Watch they saw soldiers and government supported militia set fire to houses. An eyewitness saw SAF soldiers moving through the town with AK47s burning and destroying tukuls and property. He told Human Rights Watch that while walking from the SAF barracks toward the UNMIS compound:

> *"I saw Misseriya, some in uniforms, some in civilian clothes, burning houses. They used torches made from grass they set on fire with matches. I saw burning buildings and the tukuls near the market were all burned down."*

By May 17, he said, the whole of the market and more than half the homes in Abyei had been razed to the ground.

SAF and allied militia also looted and severely damaged the premises of UN agencies and NGOs, taking furniture, air-conditioners, and even removed electrical wiring from the walls. The looting continued for at least six weeks after the first fighting."

36. There was further COI submitted by the applicant which was generally in the same vein. The applicant complains that the Tribunal Member did not even refer to this documentation, much less give it proper consideration. The applicant's submission in this regard is well made. In her report, the Tribunal Member referred to the fact that a Reuters report was shown to the applicant. The report referred to an attack which occurred in the applicant's town in Sudan on 14th May, 2008. The Tribunal Member stated "*no mention was made nor could any record be found of any such attack having taken place in Abeji on 17th May, 2008*". I am satisfied that there was a significant amount of COI submitted by the applicant which set out clearly that there was prolonged fighting his village in the days after 14th May, 2008. In the circumstances, the applicant's complaints that this material was not referred to in the decision, or much less given proper consideration, is well made. Accordingly, this finding cannot stand.

37. The second finding of the RAT, concerned the fact that despite having received medical attention in Libya in the form of a penicillin injection, the applicant could not definitively say whether he had been shot in the leg, or had obtained that wound in some other fashion. In particular, the applicant complains that the Tribunal Member engaged in speculation or conjecture in finding that given that he had received medical treatment on 28th May, 2008, it was difficult to understand how the applicant did not know whether he was shot or not. There was no evidence before the Tribunal that the nature of the applicant's injury was explained to him by any medical personnel. There was no evidence that the applicant could have understood the language used by the doctors in Libya.

38. In the circumstances, I am satisfied that this finding was based on speculation or conjecture as to what the applicant may or may not have been told at the time of receiving medical attention. As such, the finding is irrational and cannot stand.

39. The third contested aspect of the decision concerned the applicant's lack of knowledge of the new Sudanese currency. The applicant submitted that the new currency was introduced by the government in Carthoun, which is in the north of the country. The

applicant stated that it was not used extensively in the south of the country. The respondent pointed out that the COI produced by the applicant on this aspect referred to the old Dinar which was never introduced or accepted in the south of the country. There was COI before the Tribunal which referred to the introduction of the new currency in 2007. The applicant submitted that this was an aspirational document issued by the Sudanese Central Bank as to what would happen on the introduction of the new currency.

40. The applicant submitted that his evidence was to the effect that the use of the new currency did not materialise in the south of the country, and that he and others in southern Sudan continued to trade without reference to the new currency. This evidence was entirely ignored by the Tribunal. In so doing, it was submitted that the Tribunal acted in violation of the requirements of natural and constitutional justice by failing to have regard to relevant considerations.

41. The applicant submitted that there was an obligation on decision-makers to consider an explanation offered by an applicant for asylum for an apparent inconsistency or differing account provided to the decision maker. In support of his contention that the respondent should have considered any explanation offered by the applicant in relation to the currency issue, the applicant relied on the following extract from the decision of the High Court (Finlay Geoghegan J.) in *Bujari v. Refugee Appeals Tribunal* [2003] IEHC 18:-

> *"On a careful consideration of the decision of the member of the tribunal herein, that no reference is made at all by him to any explanation given to him at the oral hearing by the applicant for the material difference in the facts as stated in the initial interview and at the oral hearing. Further I am satisfied that on a fair reading of that decision the change in the facts was a material factor in the tribunal member's assessment of the credibility of the applicant and his ultimate assessment that the applicant's story (presumably the story given at the appeal) was not credible.*
>
> *I have concluded that on the facts of this case the tribunal member was under an obligation as a matter of fair procedures in the assessment of the applicant's claim for refugee status to consider and assess the explanation given to him at the appeals oral hearing of the reason for which the applicant did not disclose at an earlier stage and was now disclosing the fact that his father was a Serb collaborator and that this was the cause of his parents killing and his fear of returning to Kosovo."*

42. The applicant also referred to the judgment of Clarke J. in *F.H.Z. v. Refugee Appeals Tribunal* [2005] IEHC 462, where the learned judge proceeded to consider whether the Refugee Appeals Tribunal in failing to consider the explanation offered for a discrepancy between materials set out in the applicant's ORAC interview and that provided in the questionnaire, the Tribunal Member had acted in violation of the requirements of natural and constitutional justice. In that regard, Clarke J. held:-

> *"It is submitted that in this instance, while it was open to the RAT member to reject the explanation given as to why the applicant had not mentioned certain information at the first instance, the member was nonetheless obliged to address same before rejecting it.*
>
> *The respondent, on the other hand, seeks to distinguish Bujari on the grounds that the RAT in that case was concerned with a contention of a psychological barrier which allegedly prevented disclosure of the ground at an early stage.*
>
> *…*
>
> *It may well be that if the decision maker had actually recorded a conclusion similar to the submission by counsel, it would have been difficult for the applicant to mount a challenge to it. However, the point here is that, as in Bujari, there is no evidence that the RAT decision maker actually considered the explanation. It seems to me therefore that the applicant has established substantial grounds under this heading for his challenge."*

43. The court is satisfied that the Tribunal did not address the explanation offered by the applicant for why he could not recognise some of the new bank notes. In the circumstances, this finding was made in breach of the applicant's rights to fair procedures and cannot stand.

44. The applicant also took issue with the manner in which the Tribunal stated that the applicant had done "*nothing to support his claim to have suffered persecution or indeed that he is a national of Sudan*". In this regard, the applicant noted that the Commissioner had accepted that he was a national of Sudan, so that he did not have to appeal that aspect of the Commissioner's decision. The applicant submitted that if the statement by the Tribunal constituted a finding that the applicant was not from Sudan, then it was not lawfully made, and was without basis. In addition, it was noted that the Tribunal failed to make a finding about the applicant's ethnicity, despite acknowledging that that issue was at the core of his case. It was submitted that the Tribunal failed to take into consideration all relevant matters.

45. It was not clear whether the Tribunal was actually making a finding that the applicant was not from Sudan. It seems to me that if such a finding had been made by the Tribunal, an explanation would be required, given that ORAC in its decision had held that the applicant was from Sudan.

46. The applicant also took issue with the finding that the applicant did not have the usual Dinka facial markings. The applicant had explained at interview that he did not want to have these markings. In the absence of evidence that all members of the Dinka tribe had such markings, the applicant submitted that it was not open to the Tribunal to make the finding that he was not of the Dinka tribe.

47. The respondent submitted that the applicant had not supplied any COI about the tradition of having the markings which supported his explanation. In the circumstances, it was submitted that it was legitimately open to the Tribunal Member not to accept the applicant's explanation for the lack of the markings and the finding was reasonable and rational.

48. The question of the applicant's tribe was central to the case. If the Tribunal Member was going to make a finding that the applicant was not of the Dinka tribe, due to the absence of facial markings, he would have had to have some evidence that such markings were always found on Dinka men. There was no engagement by the Tribunal with the applicant's explanation for why he did not have the facial markings. The applicant's complaint in this regard is well made.

49. The applicant also took issue with that portion of the Tribunal's decision which stated that he appeared to have more education than the four years that he admitted to having spent in an English school. It is not clear that any adverse finding was made against the applicant under this heading. While the Tribunal Member noted that he went to an English school but did not speak English, I do not think that this formed a major credibility finding against the applicant.

50. The applicant also submitted that the Tribunal Member did not make any finding in relation to the prospects of him suffering persecution if he is returned to Sudan. This appears to be correct. There is no forward looking test in the decision.

Conclusion

51. For the reasons set out herein, the decision of the RAT dated 31st January, 2010, will have to be quashed and the matter referred back to the RAT for consideration by a different Tribunal Member.