Neutral Citation: [2016] IEHC 528

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 859 J.R.]

BETWEEN

H. R. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY & LAW REFORM AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 15th day of August, 2016

1. This is a telescoped hearing wherein the applicant seeks certiorari of the decision of the second named applicant dated 12th May, 2010.

Background and procedural history

2. The applicant is a Somalian national. He claims to be a member of the Reer Xamar clan in Southern Somalia and he says he was born on 10th February, 1982 in Mogadishu. He says that his family fled Mogadishu in 1992 and went to Afgooye. He says that from aged 10 he lived in Afgooye until he left Somalia in 2008. The applicant claims persecution on grounds of race and ethnicity by reason of his membership of the Reer Xamar clan. He states that his father was killed in 1996 and two of his brothers were killed, one in 1998 and the other in 2006. He also states that a sister was kidnapped and forced into marriage in 2006. The killings and the sister's abduction were at the hand of the majority Habar Gadir clan in Somalia. The applicant claimed that two other brothers disappeared in 2006 and 2007 respectively. The applicant himself claims to have been attacked and shot by Habar Gadir in 2002 and he states that he was imprisoned for three months in a militia camp in 2003. He was subsequently captured several times from his house. In 2005he was held for seven months and released only after relatives paid 500 dollars to secure his release. Thereafter, the applicant was subjected to forced labour on occasions. He states that in 2007 following continued harassment and assaults from Habar Gadir and a threat made to him by members of Al Shabaab who were of the belief that the applicant was a spy and wanted him to fight with them against the transitional government and the Ethiopian forces, the applicant believed that he had no option but to leave Somalia. Thus in January, 2008 he fled Somalia with financial assistance rendered by an aunt who lived in Australia.

3. The applicant claims that he arrived in this state by air on 7th January, 2008. He applied for asylum on that date. He completed an ASY1 Form and a s. 8 interview on 9th January, 2008. He underwent two s. 11 interviews on 16th and 19th July, 2008, respectively. In a decision dated 27th February, 2009, the Refugee Applications Commissioner refused the applicant refugee status. The Commissioner found that the applicant's general credibility had not been established, thus precluding the application of the benefit of the doubt. In refusing the application, the Commissioner relied in part on a Sprakab language analysis report which was obtained by ORAC in 2008.

4. The applicant appealed the Commissioner's recommendation on 16th April, 2009 to the Refugee Appeals Tribunal. Subsequent to the filing of the appeal, the applicant's present solicitor instructed De Taal Studio, an entity based in the Netherlands, to prepare a contra-expertise language analysis. De Taal's report, dated 14th January, 2010, was duly furnished to the Refugee Appeals Tribunal on 22nd January, 2010. Revised grounds of appeal and submissions were furnished to the Tribunal on the date of the oral hearing of the appeal, being 10th February, 2010.

5. The decision of the Tribunal dated 12th May, 2010 issued on 9th June, 2010 and it upheld the Commissioner's recommendation not to declare the applicant a refugee. The salient parts of the Tribunal's decision are referred to elsewhere in this judgment.

6. The within proceedings issued on 24th June, 2010 seeking, *inter alia*, relief by way of *certiorari* of the decision on some 28 grounds.

The submissions on behalf of the applicant

7. Counsel on behalf of the applicant submits that while the Tribunal Member accepted that the applicant was Somali, thereafter she made no proper assessment of the applicant's core claim, namely that as a member of the Reer Xamar clan he was at risk of persecution from a majority clan. In support of the argument that the Tribunal Member failed to deal with the applicant's core claim, counsel relies on the *dicta* of MacEochaidh J. in *A.A.S. v. RAT* [2013] IEHC 44 and in *B.O.B. v. RAT* [2013] IEHC 187. In the latter judgment, MacEochaidh J. states:

> *"7. Having set out how the Tribunal Member approached the claim, I now examine the first complaint in respect thereof. Was the applicant's core claim actually decided by the Tribunal Member? A number of authorities are cited by the applicant in support of the proposition that a core claim should be decided (see E.P.A. v. The Refugee Appeals Tribunal, (Unreported, Mac Eochaidh J., 27th February 2013) [2013] IEHC 85), where the court said, as to the core claim:*
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> > *"A clear and reasoned finding on this central issue was required of the Tribunal and a failure by the Tribunal Member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision is unlawful ... (see paragraph 9 of the decision)."*

8. Furthermore, the necessity to deal with the core claim was underscored by Clarke J. in *M.M.A. v. Minister for Justice* [2009] IEHC 217:

> *"42. This is the key issue in the case. The applicant contended that the Tribunal Member failed to address the core issue in the applicant's claim namely that he is a non-Arab Darfuri whose village was attacked. It was argued that his case is supported on an objective basis by both medical evidence and very specific COI. Counsel argued that decision-makers in*

asylum cases must deal with the core issue of the case and reliance was placed on Sango v. The Minister for Justice, Equality and Law Reform [2005] IEHC 395 where Peart J. granted leave on the basis that it was arguable that the Tribunal Member had made negative credibility findings on three matters that were "arguably of too peripheral to the core issue to justify an overall adverse credibility finding." Peart J. held that "There must be a cogent nexus between the matters upon which the applicant has been found not to be credible and the core issue in the application."

9. The Tribunal Member erred in not carrying out any forward looking assessment. In support of this contention, counsel relies on the *dictum* of O'Keeffe J. in *J.N.A. v. RAT* [2012] IEHC 480 and *F.A. (Pakistan) v. RAT* [2015] IEHC 502. Insofar as it could be said that the assessment of future risk was broached by the Tribunal Member it was by way of the general statement that nothing the applicant told the Tribunal Member convinced her that he had a well-founded fear of persecution for a Convention reason. That statement was so general as to be meaningless.

10. The Tribunal's omissions were in the teeth of the findings in the De Taal language analysis report which supported the applicant's claim that he was from southern Somalia and of the Reer Xamar clan. The De Taal findings, together with the country of origin information which was before the Tribunal Member, advanced a very strong case for refugee status for the applicant. The De Taal report conflicted with the Sprakab report, yet this conflict was neither addressed nor resolved by the Tribunal Member. The decision-maker did not say which aspects of the De Taal report were either accepted or rejected. The Sprakab Report commissioned by ORAC was subjected to heavy criticism in the applicant's appeal submissions yet those criticisms were not addressed. In aid of the submission that the Tribunal Member improperly failed to state why the Sprakab report was preferred over the De Taal report, counsel cites *D.V.T.S. v. Minister for Justice* [2007] IEHC 305. It is submitted that insofar as the personal history of the Sprakab language analyst was concerned, the report did not state where in Somalia the language analyst was born. Furthermore, the reports attested that the analyst had last visited Somalia in 1990. More importantly, there was no suggestion that he analysed the Reer Xamar dialect, nor had the applicant been asked to speak in the Reer Xamar dialect for the purposes of the analysis.

11. Furthermore, insofar as the Tribunal Member noted the submissions made by the applicant with regard to the qualifications of the Sprakab analyst, all that is recorded in the decision is that the submissions were "duly noted", yet she failed to engage with the observations made by De Taal on the quality of the Sprakab report.

The Tribunal Member erred in failing to give the applicant any credit for the knowledge he displayed of aspects of life and living of the Reer Xamar clan. Contrary to the Tribunal Member's assertion, the applicant's knowledge of Reer Xamar was indicative that he was a member of that clan. Insofar as the Tribunal Member observes that such knowledge was "easily available" that was never put to the applicant in the course of the hearing.

12. As it was accepted by the Tribunal Member that the applicant was Somali, what was required was a rigorous investigation into his claims which was not done. It is not clear whether or not the Tribunal Member believed the applicant to be Reer Xamar, which was a required finding in light of the country of origin information on the position of Reer Xamar from southern Somalia. If in fact the Tribunal Member accepted that the applicant was a member of this clan then the decision must fall given the absence of any future risk assessment. If on the other hand, the Tribunal Member found that the applicant was not of the Reer Xamar clan then the decision is entirely unreasoned and in any event flies in the face of the De Taal report, which is not dealt with at all in the decision.

13. As part of his appeal submissions to the Tribunal, the applicant's present solicitor furnished country of origin information which included a UNHCR Advisory on the Return of Somali Nationals to Somalia (dated November 2005).

This report advised, *inter alia*, as follows:

> "According to the Report of the [UN] independent expert on the situation of human rights in Somalia… "The right to life continues to be violated on an extensive scale in Somalia. Most of the country is marked by insecurity and violence and the most insecure areas are in the South, notably the capital city Mogadishu."… In southern and central Somalia … breakouts of fighting occur on a regular basis and inter-clan conflicts, motivated by competition on control of resources and the cycle of revenge killings, continue to be a significant problem, leading to pattern of recurring displacement. … Some observers have noted an increase of targeted killings and violence in Mogadishu and interpreted these to be meant as a warning/intimidation to the Transitional Federal Parliament and Government, and any outside intervention.
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> ……..
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> UNHCR acknowledges that not all Somali asylum-seekers may qualify for refugee status under the 1951 Convention. However, UNHCR considers that asylum-seekers originating from southern and central Somalia are in need of international protection and, excepting exclusion grounds, should be granted, if not refugee status, then complementary forms of protection."

14. Counsel further relied on a 2008 UK Border Agency OGN as rendering it imperative that the Tribunal Member have regard to the expert report furnished by the applicant. While the Tribunal Member did not have to accept the De Taal report it was incumbent on her to deal with what was on its face compelling important evidence supportive of the applicant's claimed origins. Thus it was imperative that the Tribunal Member establish whether the applicant was of this ethnicity or not in order to assess whether the applicant could return to Somalia. Yet, in light of this backdrop, the De taal report was not analysed or discussed by the Tribunal Member in the decision.

Moreover, while the Tribunal Member refers to country of origin information as indicating that "most members of the minority Reer Xamar left Somalia at the outset of the troubles" it is not clear what exactly the Tribunal Member was saying in this regard. Is it that the applicant was not a member of Reer Xamar and that accordingly the De Taal report was wrong?

15. Counsel also submits that the findings of a SPIRASI Report were unfairly dealt with by the Tribunal Member. It is submitted that the report was effectively sidelined. The Tribunal Member while quoting the part of the SPIRASI Report which alluded to the applicant's scars, failed to have regard to the finding in the report that the absence of any other obvious scars or abnormalities "[did] not refute the history of beating with blunt objects, as this is likely to cause swelling and bruising, which normally disappear after a few days." Furthermore, the Tribunal Member did not avert at all to the assessment of the applicant's mental state in the report.

16. It is further submitted that many parts of the decision are incoherent.

17. While the Tribunal Member stated that she had "serious reservations and concerns" relating to the account given by the applicant she did not state what those concerns were thereby rendering the finding opaque.

18. The purported inconsistencies relied on by the Tribunal Member were not inconsistencies but rather material errors of fact on the part of the decision maker.

19. It is submitted that the Tribunal Member made a fundamental error of fact in stating that the applicant in his first interview did not mention that two of his brothers had gone missing. The applicant had in fact referred in his first s.11 interview to two of his brothers having disappeared in addition to stating that two brothers had been killed. In any event even if the applicant had failed to mention the disappearance of two of his brothers in the first interview, the Tribunal Member has not stated why this omission should have led to a rejection of his claim.

20. The Tribunal's finding that the applicant was "very specific" in the account of his family history as given to the SPIRASI physician was speculation on the Tribunal Member's part. As attested to by the applicant in his affidavit, the "Client's history" section of the SPIRASI Report is short, incomplete and inaccurate. The applicant had attended the SPIRASI physician as a victim of torture for counselling and for medical reasons. The account of the applicant's claim as documented in the SPIRASI Report was at best an abbreviated history and was never meant to be the determinative record of his claim. Yet this account was used by the Tribunal Member to find the applicant inconsistent in the account he gave of the events which led him to flee Somalia.

21. Furthermore, the applicant's legal representative had made submissions to the Tribunal regarding the limited nature of the note taken by the SPIRASI physician evident from the "Client's history" section of the report, and made the case that the applicant had not understood the interpreter which had been provided at the SPIRASI examination very well. Counsel submits that from the outset of the asylum process the applicant faced difficulties regarding the quality of the interpretation services provided, as set out in his grounding affidavit. The interpreter provided to him during his first s. 11 interview did not speak the applicant's dialect and accordingly the applicant did not understand everything the interpreter said. This concern was communicated by the applicant to the s. 11 interviewer yet the applicant's concern was treated merely as an accusation, which it was not.

22. The Tribunal's reference to the SPIRASI report stating that the applicant's problems began in 1996 is factually incorrect. That date given in the SPIRASI report was linked to the year in which the applicant's father was killed. The applicant's account to the Tribunal of events in1991/1992 related to the Civil War following which the applicant's family had to leave Mogadishu. Thus, there was no conflict in the applicant's account of events. Secondly, the narrative in the SPIRASI report of one brother going missing is linked in time to when a second brother was killed. There was no logical reason for the SPIRASI report to mention a second brother going missing at this point. In any event, the applicant's s.11 interview made clear that his brothers went missing in 2006 and 2007 respectively. Furthermore, insofar as the SPIRASI report records the applicant as stating that he left his mother, two younger brothers and three sisters in Somalia that was not inconsistent with what he told the Tribunal as his evidence was that "the only news he had was that his mother and two sisters are alive". Thus, no meaningful inconsistency has been identified by the Tribunal. Even if it were an inconsistency, it is submitted that it was an inappropriate reliance on the evidence given by the applicant, given its nature and context.

23. While the Tribunal Member's conclusions referred to the applicant being unable to explain the inconsistencies in his accounts of the fate of various family members, it is submitted that the only inconsistency was between what is recorded by the SPIRASI physician and what the applicant told ORAC and the Tribunal. In the course of the oral hearing, the applicant had explained that the reason for that inconsistency.

24. It is submitted that the finding that the applicant's account of his travel was implausible and not capable of being believed cannot be sustained in circumstances where many asylum seekers travel on false documents. In any event, the relevance of the applicant's mode of travel was questionable save that there is a statutory obligation on the Tribunal Member to consider it.

25. There were no clear findings regarding past persecution, yet the applicant's account of the killing of his family members and his account of the torture inflicted on him, if accepted, would entitle him to refugee status on the basis of past persecution alone, as envisaged by Regulation 5(2) of the European Communities (Eligibility for Protection) Regulations, 2006. In aid of the submission that the applicant's account of past persecution warranted the application of Regulation 5(2) of the 2006 Regulations, counsel relies on *N.B. v. Minister for Justice* (High Court, 29th April, 2015).

26. The Tribunal Member states that she had the opportunity "to observe acutely this applicant throughout the hearing" yet nothing was clarified by the decision-maker in this regard. Insofar as the Tribunal Member seeks to make a "demeanour" finding, one is left none the wiser as to the reason for the Tribunal Member's observation.

27. In all the circumstances of this case, the Tribunal Member failed to deal with the applicant's credibility in the manner advocated by Clarke J. in *S.R. v. RAT* [2013] IEHC 26 which itself quotes the principles set out by Cooke J. in *I.R. v. RAT* [2009] IEHC 353.

The respondents' submissions

28. Counsel for the respondents submits that the applicant has not advanced any legal basis to quash the Tribunal decision. Rather, counsel for the applicant has conducted a roving analysis of the decision and the proceeding process and has subjected the Tribunal decision to death by a thousand cuts. Throughout the asylum process, the applicant was shown to be mendacious and prone to thinking up explanations to overcome discrepancies that appeared in his count of events. At no point has the applicant taken responsibility for the discrepancies in the accounts which he gave to third parties including ORAC, his SPIRASI physician and the Tribunal. Rather he lays the blame at the feet of the SPIRASI physician by stating that the latter recorded his history inaccurately. He does so without giving the physician an opportunity to comment on the claimed discrepancies in the SPIRASI Report. Yet by the same token, the applicant seeks to rely on the findings in the SPIRASI Report to undermine the Tribunal's decision. It is submitted that the applicant can not have it both ways. He is obliged to take the SPIRASI Report for good and ill. If, as the applicant maintains, the SPIRASI Report is inaccurate in it's recording of the applicant's history, then what weight can the Tribunal or indeed the court contributed to those parts of the report on which the applicant relies.

It is submitted that what is in issue in the within proceedings is the Tribunal's decision. What is not in issue is how ORAC conducts it's business or how good or bad the standard of interpretation was at the ORAC stage of the applicant's asylum process. There was no challenge by the applicant by way of judicial review to the s. 13 report. Thus, notwithstanding the applicant's attempts in these proceedings to impugn that decision, same as not opened to challenge at this remove. Furthermore, insofar as the grounding affidavit takes issue with the standard of interpretation at the ORAC stage, it appears that this cause of concern had disappeared by the time of his appeal to the Tribunal as the notice of appeal does not allude to any such concern on the applicant's part.

29. The applicant claimed asylum on 7th January, 2008. His s. 8 interview gave him an opportunity to set his claim in summary form. It is noteworthy that the record of that interview does not make any reference to the disappearance of two of the applicant's brothers. Yet the applicant availed of the opportunity at that point to apprise the interviewer of the death of his father and brothers and that

his ethnic group were forced into marriage and subjected to forced labour.

30. As to why the applicant left Somali, he states the following in his questionnaire:

> "The problems that made me leave my country are things like killings, rape, torture, muggings and many atrocities perpetuated against me and my family. My father and two brothers were killed and my sister is being kept against her will; and has been raped. I was tortured, enslaved and I risked loosing my life. All of these problems happened because we are from a minority tribe called Reer Xamar. I am scared that if I return to my country, I will be killed the same way they killed my father and brothers."

31. That comprised effectively the applicant's claim. Counsel submits that it is noteworthy that this short summary account contrasts with the very detailed accounts which are often provided by asylum seekers in the questionnaire by way of addendum.

32. Essentially, the applicant challenges the decision on the basis that the core of his claim was insufficiently considered in that there was no assessment of whether the applicant was of Reer Xamar ethnicity and that there was no assessment of future risk or harm.

33. In the first instance, the Tribunal Member did accept that the applicant was a Somali national that is evident on the face of the decision.

34. However, with regard to the applicant's account of persecution, the Tribunal Member found a number of important inconsistencies as between the account given by the applicant to ORAC/the Tribunal and the account given by him to the SPIRASI physician. These are outlined in the decision. The applicant claimed to the Tribunal that his difficulties began in 1991-1992 at the hands of Habar Gidir, yet his account to the SPIRASI physician was that his problems began in 1996. The Tribunal is told by the applicant that two of his brothers were killed and two went missing yet the SPIRASI Report details only one brother as missing. More significantly, the Tribunal Member noted the applicants first interview (according to the respondents counsel the s. 8 interview) records that two brothers were killed but made no mention of any brothers being missing. In the questionnaire, there is reference to two brothers having been killed and two brothers missing. It is clear that the comparator being referred to in the decision is between the s. 8 interview and the questionnaire. Thus, contrary to the applicants counsel's argument, there is no error of fact on the part of the decision-maker.

35. The Tribunal Member also found a discrepancy with the applicant's account to the Tribunal of having been kidnapped in 2003 and made to work for his captures during the day and being incarcerated at night. The account given by the applicant to the SPIRASI physician of the same kidnapping was that he was kept locked up for the entire duration of his detention and the Tribunal Member noted the specifics of the applicants account as noted by the physician. It is submitted that the Tribunal Member was entitled to take account of this discrepancy in assessing the applicant's credibility. Equally, she was entitled to regard as "strange" the fact that despite the applicant recounting the killings and abductions perpetrated on his family, none had left Somalia over a seventeen year period. Similarly, the Tribunal Member was within jurisdiction in regarding the applicant's account of how he entered the State as implausible and lacking in credibility. In this regard, the Tribunal Member is not obliged to suspend common sense when analysing the applicant's account of his travel.

36. It is submitted that the finding of "serious reservations and concerns" relating to the applicant's account of events was entirely in context. Had the Tribunal Member expressed that finding simplicitor without any context then the decision would fall on *IR* grounds but in the present case, prior to sole concluding the decision-maker had already focused on a number of discrepancies in the applicant's claimed history. Thus, the present case is entirely distinguishable from *J N A v. RAT*, upon which the applicant relies. It is submitted that the Tribunal Member has weighed the applicant's account and found it wanting.

37. While the decision maker accepted that the applicant had knowledge of aspects of life and living off the Reer Xamar that was not sufficient of itself to establish that the applicant was of Reer Xamar ethnicity given the easy availability of such knowledge. As the applicant was a Somali national, he would know of the Reer Xamar.

38. The conclusions on the SPIRASI Report were entirely within jurisdiction. The Tribunal Member made the perfectly acceptable observation that the SPIRASI Report had to be considered in light of the applicant's overall account and that the medical examiner was in the same position as that of the Tribunal in that he could not say with any particularity how medical *sequelae* came about.

39. Insofar as the applicant asserts that there was a failure to address whether he was a member of the Reer Xamar clan, the Tribunal Member dealt with the Sprakab and Detaal Reports and she repeated the De Taal finding that the applicant was born in Mogadishu and socialised in Afgooye.

40. It is submitted that the weight to be attributed to evidence is a matter entirely for the decision-maker and in this regard counsel cites *A.A. v. Minister for Justice* [2010] IEHC 143.

41. It is submitted that counsel for the applicant overstates the relevance of the De Taal Report. That report is not unequivocal and it fell to be weighed in the context of the evidence overall. In this regard counsel relies on *MSM v. Olive Brennan/RAT* [2015] IEHC 237:

> *"30. The Minister did not only have evidence of the first named applicant having obtained a UK visa on the basis of a Tanzanian passport, he also had regard to the Linguistic Analysis Report commissioned during the asylum process. As with the information which had been obtained from the UK Border Agency, the weight to be attached to the language report was a matter for the Minister, as decision-maker. In so finding, I adopt the dictum of Barr J. in M.A.A. v. RAT & Anor. [2014] IEHC 492 , as follows:*
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> > *"In these circumstances, the Tribunal Member had to weigh the various pieces of evidence including the language analysis report. This was a matter for the Tribunal Member."*

42. Both the Sprakab and the De Taal language analyses were considered by the Tribunal Member. As neither had a definitive finding as to whether the applicant was of Reer Xamar ethnicity she then turned to other evidence. While she found the applicant was a Somali national she was unable to accept him as a member of the Reer Xamar ethic group. That finding was within jurisdiction. The De Taal Report was not irrefutable evidence – there were traits of other dialects found by De Taal and some words used the applicant were common to all dialects, thus the De Taal Report does not bear out the applicant's claim to be Reer Xamar.

43. Counsel submits that the De Taal Report does not explain why, if the applicant is Reer Xamar, there were other traits found in his language

While the court may well take the view that the language analyses were important, the applicant's own account was also important. The Tribunal Member was obliged to see how the applicant's account fitted in with the available historically narrative of Reer Xamar fleeing prosecution from 1991 onwards. Many had left since 1991 yet the applicant had managed to remain in Somalia until 2008. Therefore, the Tribunal member had to weight the applicant's narrative.

44. Had the applicant's account been coherent, the Tribunal Member would have been able to give him the benefit of the doubt despite the two language analyses being at sixes and sevens.

45. Thus, the Tribunal Member had to look at other elements in his account in the round. The decision-maker did this and had serious reservations. The applicant's story did not add up. Accordingly, he could not be accepted as being of Reer Xamar ethnicity. As the Tribunal Member rejected the applicant's claim in this regard, there was no obligation on her to state what ethnicity the applicant had. In this regard, counsel cites *B. N. v. RAT* [2015] IEHC 255 and *R.S. v. RAT* [2014] IEHC 55.

46. While the Sprakab Report may have gone too far in opining that the applicant's knowledge of the Reer Xamar sounded "rehearsed", there was no suggestion in the decision that the Tribunal Member's observation on how the applicant could have gained knowledge of the Reer Xamar was motivated by the Sprakab finding.

47. Insofar as the applicant challenges the findings on the SPIRASI Report, there is no merit in that challenge. The report documented that the marks on the applicant's body were "consistent with" the applicant's account of how they were caused. Under the Istanbul Protocol, that means that they "could have been caused by the trauma described, but it is not specific and there are many other possible causes".

48. The decision demonstrates that the probative value of the SPIRASI Report was clearly considered. While the applicant raises a complaint about the lack of reference to psychological symptoms, it is submitted there was no obligation on the Tribunal Member to set out in a discursive manner the psychological symptoms referred to in the report. In this regard counsel cites *Pamba v. RAT* (unreported 19th May, 2009) in that case Cooke J. states:

> *"There is no specific or concrete finding, assertion or opinion in that report which would run so counter to the Tribunal member's primary assessment of the applicant's personal credibility as required distinct explanation of statement of reasons….*
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> *There is no necessary connection between the applicant's condition as presented to the medical expert and the events in her claim. The expert confirms that she is anxious, distressed, terrified of returning to Uganda and suffering from post-traumatic stress disorder, but the opinion is not so obviously or necessarily incompatible with the appraisal of credibility made by the Tribunal member as to require a distinct statement of reasons as to why it did not operate to change the Tribunal member mind."*

49. Thus, insofar as counsel for the applicant (in written submissions) relies on the applicant's poor short-term memory to account for inconsistencies in the applicant's account of events, there is nothing in the medical report to suggest that that could be a reason for the discrepancies. In any event, as demonstrated by the applicant himself both to the SPIRASI physician and the Tribunal, he was capable of recounting events as far back as 1991.

50. With regard to the submission that the Tribunal Member erred in not conducting a forward looking test, it is submitted that in the first instance, the decision whether or not to return the applicant to Somalia is one for the Minister to make under the Immigration Act 1999. In considering whether or not to return the applicant, the Minister is bound by s. 5 of the Refugee Act 1996 and s. 4 of the 2000 Act. In this regard, counsel relies on *MOI v. RAT* [2014] IEHC 291. The role of the Tribunal is to consider whether the claim for refugee status is well founded.

51. It is established law that the Tribunal is only obliged to carry out a forward looking assessment if the applicant's core claim is found to be credible. In *Kramarenkok v. RAT* [2004] IEHC 101, Finlay Geoghegan J. put it thus:

> *"There do not appear to be substantial grounds for contending that the second named respondent erred in law in failing expressly to apply a forward looking test in the light of his conclusions on the alleged past discrimination. I would therefore refuse leave on that ground in this case."*

52. Additionally, in *Hateka v. Minister for Justice* (High Court, 12th February, 2008) Bermingham J. states:

> *"… The Tribunal member is criticised for not applying a forward looking test. However, that ignores the fact that the suggested explanation for fears looking into the future is what happened to the applicant in the past and his account in that regard was not regarded as credible. That is the essential foundation to engage in the exercise of looking forward and is absent."*

53. It is submitted that a similar approach was adopted in *A v. RAT* [2008] IEHC 136 where Herbert J. states that "*the applicants claim to future fear is based upon alleged past persecution and that has been rejected and the applicant is in addition found to be lacking in personal credibility, it is not necessary to consider the future risk of persecution*." The applicant's case can be distinguished from *MLTT v. Min. for Justice* [2012] IEHC 568 where the core claim (mistreatment of students in Cameroon) was accepted by the Tribunal and accordingly there should have been a forward looking assessment. Counsel further submits that the applicant's reliance on *J NA* is misplaced as there was no evidence corroborative to the applicant's claim to be Reer Xamar.

54. Based on the applicant's case as presented to the Tribunal, the decision-maker was entitled to draw inferences on the account given in light of the situation in Somalia, as known. Accordingly, it cannot be said that the Tribunal Member's finding as "strange" that the applicant and his family would have stayed in Somalia for so long amounted to speculation on her part. The Tribunal Member was entitled to take a common sense approach in querying why the applicant had not left Somalia earlier. The finding in this regard is only one of many instances where the applicant was found not to be credible.

55. The Tribunal Member's finding on travel was entirely in order and counsel relies on the *dictum* of Cooke J. in *NAU v. RAT* [2010] IEHC 149:

> *" It could not, in the Court's judgment, be considered in any sense unreasonable or illogical for the Tribunal member to conclude, having regard to the circumstances that have prevailed in matters of public security in international airports since September, 2001, that this explanation could not be believed."*

56. It is submitted that there was no basis for the applicant to get the benefit of the doubt in circumstances where his general credibility was discounted. In this regard, counsel relies on the dictum of Herbert J. in *N v. Minister for Justice* [2008] IEHC 140 to the effect that giving the benefit of the doubt to the applicant does not mean and, could not mean, disregarding the Tribunal's finding that the applicant's evidence was not cogent or credible by reference to country of origin information and the applicant's own inconsistencies.

57. Finally, counsel submits that if the court were to conclude there was a discrete illegality in the decision, then any remand to the Tribunal should be on that basis alone. In this regard, counsel cites *I v. Minister for Justice* [2011] IEHC 144.

Considerations
58. The applicant challenges the decision on the ground, *inter alia*, that his core claim of having been subjected to persecution at the hands of the Habar Gidir because of his of his Reer Xamar ethnicity was not properly addressed. While I agree with counsel for the applicant that there was not an express finding as to whether or not the applicant was Reer Xamar, the overall thrust of the decision pointed to a rejection of the applicant's claim to be of his Reer Xamar ethnicity. Thus, a principal issue for determination is whether the Tribunal Member lawfully rejected the applicant's claim in this regard.

It is contended by the applicant that:

> (i) The De Taal report furnished by the applicant as corroborative evidence of his ethnicity was not properly considered and the Tribunal Member made no reasoned finding with regard to it;
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> (ii) Information furnished to ORAC and the Tribunal had put the validity of the Sprakab report in issue, yet this was not addressed;
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> (iii) There was no assessment of future risk;
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> (iv) Parts of the Tribunal decision are incoherent;
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> (v) There were material errors of fact in the decision;
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> (vi) The SPIRASI findings were not set out properly or considered;
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> (vii) There was no clear finding as to past persecution; and
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> (viii) the benefit of the doubt should have been applied to the applicant and the Tribunal Member in her application of the benefit of the doubt namely that she was "not convinced", used the wrong standard.

The language analysis reports
59. The Sprakab language analysis report which was commissioned by ORAC was conducted by Sprakab analyst ea13. The linguistic analysis was attributed to linguist 01. The type of analysis carried out by Sprakab was said to be a linguistic analysis and knowledge of "country and culture" analysis. In its "General comments" section the report stated as follows:

> "The person, who is a man, speaks Somali on the recording. He speaks the language to the level of a mother tongue speaker. The person says he was born in Mogadishu and raised in Afgooye, in Southern Somalia. He speaks a variety of Somali with certainty found in Northern Somalia. It is apparent that the person's knowledge of Afgooye and Mogadishu is vague. However, his knowledge sounds rehearsed for the moment."

60. The report's conclusion on phonology was that the applicant spoke Somali "using a pronunciation with certainty found in the kind of dialect spoken in Northern Somalia." The morphology analysis concluded that the applicant "constructs words and sentences in a manner typical of a variety of Somali spoken in Northern Somalia". He was also found to enumerate numbers "in a manner typical of a variety of Somali spoken in Northern Somalia". The lexicon and colloquialisms analysis concluded that the applicant used certain words and expressions "typical of a dialect spoken in Northern Somalia."

61. The summary of findings was expressed as follows:

> "The person speaks Somali to the level of a mother tongue speaker. He speaks a variety of Somali with certainty found in Northern Somalia. The person's knowledge of Afgooye and Mogadishu is vague. It sounds as if his knowledge could be rehearsed for the moment."

62. The personal data provided in relation to "ANALYST ea13 LINGUIST 01 was addressed as follows: "[b]orn and raised in Somalia and came to Sweden in 1990; The analyst visited Somalia in 1990. The analyst interprets for the Swedish authorities. The analyst analyses the Somali language and the Somali dialect May-May". Areas of expertise were described as "Linguistics", "Dialectology", "Lexicology", " Semantic " "Computational linguistics". Under "Educational Qualifications" the following was recorded:

"Bachelors Degree in Computer Linguistics, Stockholm University, Sweden

Bachelors Degree in Nordic Languages, Stockholm University, Sweden

Bachelors Degree in Law, Somalia

Sociological studies in law, Stockholm University, Sweden"

63. In May, 2008, and February, 2009, the applicant's then solicitors, the Refugee Legal Service, made submissions as to the alleged flawed nature of the Sprakab language analysis conducted in respect of the applicant and urged the Commissioner not to rely on the said report. Although an opinion challenging the report was furnished on the applicant's behalf (Pg.), it is accepted that for the purposes of the process before the Commissioner, the applicant did not avail of an opportunity to procure his own language analysis report.

64. However, for the purposes of the appeal to the Tribunal, the applicant's solicitors arranged for the De Taal language analysis. Prior

to carrying out their language analysis, De Taal received the recording of the applicant which Sprakab had analysed. In a letter of 25th September, 2009 to the applicant's solicitors, De Taal observed as follows:

> "We have serious doubts about the possibility to draw a reliable conclusion on the basis of the recording made by Sprakab only. In addition to the doubtful technical standard of the recording, it is unlikely that your client was specifically requested to speak in the Reer-Hamar dialect as this is not indicated in the Sprakab report – in fact your client's ethnicity is not mentioned in it at all – and your client instructs he was not asked about his ethnic group or his dialect during the interview, and even if he were, the circumstances were most probably not appropriate for doing so. We therefore strongly advise you to make a supplementary recording of your client speaking in the Reer-Hamar dialect. We will send this supplementary recording together with the original recording to the linguist, who will then base his contra-expertise report on both recordings."

In their "Case Analysis" of the Sprakab Report, De Taal found the quality of the Sprakab analysis "poor", observing that the finding that the variety of Somali spoken by the applicant "found with certainty in Northern Somalia does not necessarily rule out the possibility that this variety is also spoken in Southern Somalia." Moreover, it found that the Sprakab analyst failed to discuss in the report which variety or varieties of Somali is or are spoken in Afgooye and Mogadishu. It was also observed that while the Sprakab Report found the applicant's knowledge of Afgooye and Mogadishu vague, hardly any examples of information that the applicant did not know was given in the report.

65. De Taal's critique of the Sprakab analysis was furnished to the Tribunal on 29th October, 2009.

66. The language analysis of the applicant as conducted by De Taal itself was furnished to the Tribunal on 22nd January, 2010. Prior to that, the CD recording on which the De Taal analysis was based was forwarded to the Tribunal and to ORAC along with the details of the person who conversed with the applicant during the recording which took place in the presence of the applicant's solicitor.

The De Taal language analysis

67. In a similar manner to the Sprakab analysis, the report contains an analysis of the applicant's phonology, lexicon, morphology and syntax. The conclusions on phonology were as follows:

> "The applicant's phonology includes mainly features of the Benaadir [Reer Xamar] dialects (some of which belong to the so-called Af-Xamar spoken in Xamar-Weyne the oldest district of Mogadishu) and some traits of the Daarood dialects (shared with the Northern Somali in its proper sense)."

De Taal found that

> "the applicant's lexicon includes three categories of words: 'neutral', i.e. common to all Somali dialects, those which belong to the Benaadir dialects, and those which are properties of the Daarood dialects (partially shared by the Northern Somali in its proper sense."

It was found that "the applicant's morphology reveals mainly features of the Benaadir dialects, yet some traits of the Daarood dialects shared with the Northern Somali in its proper sense can be detected." Further, a number of traits in the applicant's syntax were peculiar to the Benaadir dialects. An analysis of the recording used by Sprakab (referred to as the Original Recording/OR) and the recording used by De Taal (the Supplementary Recording/SR) found that "the applicant demonstrates excellent knowledge of Afgooye."

68. De Taal's comment on the Sprakab recording was that the quality was not satisfactory. It noted that "the voice of the interpreter/interviewer is hardly heard because of heavy background noise. Therefore it is not possible to elaborate on his dialect. The voice of the applicant is heard better, but still with difficulty." It found the quality of the supplementary recording good and noted that "the atmosphere during the interview was friendly and the applicant did not feel embarrassed. The interviewer spoke in one of the Benaadir dialects, close to Af-Xamar, spoken in the district of Beledweyn in Mogadishu." Under the heading "Extent to which the two recordings provide different or similar data" it was found that "the applicant's speech on S.R. is similar to that O.R., though the latter contains several Benaadir elements that are not on S.R."

69. De Taal's conclusion was as follows:

> "The applicant's speech, as mirrored in the extensive linguistic material analysed… contains numerous features which are typical of the Benaadir dialects in general and of the dialects spoken in Mogadishu in particular. These features penetrate all the constituents of the applicant's speech – phonology… vocabulary… morphology… and syntax. They are more numerous than can be expected from a person who was born and socialised in Afgooye…, but they are natural for the applicant who was born in Mogadishu and lived in the claimed district of … in his childhood. The not numerous Daarood traits in the applicant's speech agree with his claimed background. Although he spends the rest of his life in Afgooye, he managed to retain the majority of the Benaadir traits adopted during the 10 year stay in Mogadishu. I have no doubts that the applicant was born in Mogadishu and socialised in Afgooye. My conclusion would have been the same, had I only listened to the O.R. [Sprakab recording]."

70. Its conclusions on the Sprakab language analysis was that,

> "In the applicant's speech there is NOT A SINGLE element that might be attributed to the Northern Somali in its proper sense only… quite the contrary, his speech is full of the Benaadir, i.e. southern features."

71. The De Taal analyst's biographical details were that he was from Russia, and that he graduated from Moscow State University as a linguist in the field of Amharic and Somali. It was stated that in 2000 he defended a PhD thesis on the Somali syntax.

72. The Tribunal Member was specifically put on notice of the applicant's reliance on the De Taal report in revised grounds of appeal and skeletal submissions which were furnished on 10th February, 2010 and which advised, *inter alia*, that "the report from De taal Studio confirms that the applicant is a native Somali speaker and that he was born in Mogadishu and then moved to Afgooye. … The said report strongly rejects the conclusions of the Sprakab report relied upon by the Commissioner, and comprehensive reasons are given. It must be noted that the author of the De Taal Studio report has a degree as a Somali linguist and has a PhD on the Somali syntax."

The Tribunal's consideration of the reports

73. In the Tribunal decision, the language analyses to which the applicant was subjected was addressed as follows:

> "A language analysis was carried out by Sprakab on 11th April, 2008. The language analysis report was to the effect that the applicant spoke Somali to the level of a mother tongue and that he speaks a variety of Somali found with certainty in Northern Somalia. Submissions were made in relation to the qualifications of the language analysis (sic) and they have been duly noted by the Tribunal. The applicant submitted a contra-expertise language analysis of 14th January, 2010 carried out by De Taal Studio. The report is to the effect that the examiner has no doubts that the applicant was born in Mogadishu and socialised in Afgoye. The Tribunal has no difficulties regarding the origins of the applicant and indeed accepts that in all probability the applicant is indeed Somali. However the Tribunal has serious reservations and concerns relating to the accounts given by the applicant relating to his being persecuted by majority clan members as a result allegedly of his Reer Xamar ethnicity. While the applicant had knowledge in relation to aspects of life and living of the Reer Xamar clan, such knowledge is easily available and is not *per se* indicative that simply because an applicant has such knowledge that they are a member of the Reer Xamar minority clan."

Firstly, I accept the applicant's counsel's argument that in light of the fact that the Tribunal Member had the De Taal and the Sprakab reports, her observation that it was "difficult to establish that the applicant is in fact a Somali national" and that the Tribunal "has to rely on general information questions" was an erroneous approach on her part given that she had two, albeit conflicting, language analyses which each proffered an opinion on the applicant's language and which had at least the potential to assist in establishing whether or not the applicant was Reer Xamar. There is no suggestion in the decision that the decision-maker had concluded that an assessment or weighing of the respective reports would yield little benefit in the particular case, as might entitle her to disregard either report. Short of offering any such reasoned conclusion it seems to me that there was a failure on the Tribunal Member's part to deal with the evidence proffered by the applicant in direct rebuttal of the Sprakab findings. As early as 2008, the applicant's previous solicitors, the RLS, had raised concerns as the reliability of the Sprakab report. Those concerns were such that when preparing the notice of appeal to the Tribunal, the applicant's present solicitors procured the De Taal report which was itself highly critical of the Sprakab report.

74. Consequent on the De Taal report, both with regard to its findings on the applicant's language and its opinion on the Sprakab report, and by reason of the submissions advanced on the applicant's behalf to the Tribunal, there was, in fact, a real issue before the Tribunal Member in 2010 for determination. As a matter of due process the applicant was entitled to a reasoned assessment of the expert evidence he adduced which was said to be corroborative of his claim to be of Reer Xamar ethnicity. The resolution of this issue was of course solely for the decision-maker as indeed was the weight to be attributed to the respective reports. However, this exercise was not carried out. There is no evidence on the face of the decision as to the weight attributed to either report. The submissions made by the applicant as to the probative value of the De taal report were not addressed in any real sense. One aspect was De taal's commentary on the qualifications of the Sprakab language analyst and linguist. In their Case Analysis of the Sprakab report, furnished to the applicant's solicitors under cover of correspondence dated 25th September, 2009, and which was duly furnished to the Tribunal, De Taal opined that "since the expertise and background of the [Sprakab] analyst and the linguist seem to be combined in one list, it is unclear which of them holds which of the degrees mentioned under "educational qualifications". I would like to point out though that it is doubtful if a Bachelor's Degree in Nordic Languages or in Computer Linguistics would provide either a language analyst or a supervising linguist with the necessary expertise."

75. The Tribunal Member did no more than record that submissions which were made regarding the qualifications of the Sprakab language analyst were "duly noted". This served no purpose for the applicant, particularly when he was relying on a language analysis which was undertaken by an individual who had qualified as a linguist and who in 2000 had defended a PhD thesis on the Somali syntax. Most egregiously, there was no analysis of the conflicting findings of the Sprakab and De Taal reports as to the make-up of the applicant's language. This constitutes to my mind a failure of jurisdiction on the part of the decision-maker. As I have already said, she was not obliged to adopt either to the exclusion of all other evidence before her but due process requirements obliged her to weigh the De Taal report in the round with all of the other evidence in order to assess whether the applicant was of Reer Xamar ethnicity. There is no indication from the face of the decision what weight, if any, was attributed to the De taal report. While counsel for the respondents rely on *A.A. v. Min. for Justice* [2010] IEHC 143 in support of the argument that the Tribunal member dealt adequately with the language analysis reports, I am satisfied that the present circumstances are entirely distinguishable from the factual matrix in *A.A.* as here the applicant's legal representatives had adduced contradictory evidence to that contained in the Sprakab report.

While emphasising that what was required was a considered assessment of the De Taal report and its relative merits or otherwise over the Sprakab report, the court is conscious that it must not intrude on the role which tribunals themselves must play in their assessment of evidence. In the decision of the UK Supreme Court in the case of *Secretary of State for Home Department v.MN and KY* [2014] UKSC 30

Lord Carnwath states:-

> *"46. The first is as to the weight to be given to such evidence in future cases. Tribunals are advised that, where there is a "clear, detailed and reasoned linguistic analysis" leading to "an opinion expressed in terms of certainty or near certainty", then "little more" is required to support a conclusion. This seems to me to underplay the importance in any case of the tribunal itself examining such a report critically in the light of all the evidence, and of the reasoning supporting its conclusion (not necessarily limited by the scope of any criticisms or evidence that may be presented by the appellant). The language of the guidance gives rise to a real risk of being interpreted as prejudging issues which are for the individual tribunal to determine. As will be seen, the present appeals are illustrative of that risk."*

In the present case however, there is no critical analysis by the Tribunal Member of the De Taal report, or for that matter the Sprakab report.

Counsel for the respondent argues that the Tribunal Member was left in the invidious position of having two language analyses which were of some assistance but ultimately not of great assistance and she thus had to focus on the history the applicant himself gave, which was found to be wanting for the reasons set out in the decision.

76. However, I am not satisfied that the decision-maker did in fact make that judgment call as to the potential assistance of the reports, which was for her to make and not counsel for the respondent or indeed the court. It was not good enough to merely recite the ultimate findings of the respective reports. She was obliged to give due consideration to the relative merits of the reports and render an opinion thereon taking into account all the evidence. If, as I have already stated, it was the case that if one or both of the reports were found not to be of assistance for whatever reason, then the Tribunal Member was obliged to offer a reasoned opinion as to why that was the case.

77. It was all the more imperative that the Tribunal Member deal with the conflicting language analysis reports given that a UK Border Agency OGN of December, 2008 was reporting that:

> "Somalis with no clan affiliation are the most vulnerable to serious human rights violations, including predatory acts by criminals and militias, as well as economic, political, cultural and social discrimination. These groups comprise an estimated two million people, or about one third of the Somali population and include the Benadiri (Rer Hamar) and Bravanese."

That report also stated that,

> "The Benadiri or Bravanese are generally one of the minority groups unable to rely on a patron clans support and vulnerable to discrimination and societal exclusion due mainly to them being culturally and ethnically unconnected to any major clan group. For those Benadiri/ Bravanese claimants who have demonstrated a reasonable likelihood that they have encountered ill treatment amounting to persecution a grant of asylum is therefore likely to be appropriate."

78. I accept the applicant's counsel's submission that in light of this country of origin information and given the applicant's claim to be Reer Xamar from southern Somalia, a consideration of the relative merits of the the De Taal report over the Sprakab report was the least the applicant could expect. I would also add that the UK Border Agency OGN, indicating as it did a continued need in 2008 for vigilance where the Reer Xamar are concerned, does not accord with the Tribunal Member's finding that "Country of origin information indicates that most members of the minority Reer Xamar left Somalia at the outset of the troubles there…"

For the reasons set out above, the court is satisfied that the Tribunal Member's did not lawfully engage with the De Taal report, as relied on by the applicant. Given this failure, it cannot be said that the applicant's core claim was lawfully addressed.

Events relating to the Sprakab Language Analysis Report which post-date the Tribunal's Decision

79. In November, 2014, when the substantive hearing in the within proceedings was first listed for hearing, counsel for the applicant advised the court of a matter which was brought to his attention and which potentially concerned the Sprakab report which had been procured by ORAC and which was referred to in the Tribunal's decision. Counsel's concern related to the contents of a newspaper article published on 13th November, 2014, in "The Independent" newspaper in the UK. That newspaper article referred to criticisms of a Sprakab language analyst which was the subject of the Swedish documentary which was broadcast in that country's public service channel in the days prior to the newspaper article. The media report also referred to criticism of the analyst by the UK Supreme Court in its judgment in *Secretary of State for Home Department v. M.N. & KY* [2014] UKSC 30.

Subsequently, a motion to amend the statement of grounds issued. I will revert to this motion in due course.

80. Between January and April, 2015, efforts were made by the applicant's legal representatives to ascertain whether the language analyst ea13, the Sprakab analyst who conducted the analysis of the applicant's language, could be one and the same as the language analyst who was the subject of the newspaper article of 15th November, 2015, and of the UK Supreme Court judgment already referred to. The applicant's solicitor wrote to Sprakab at its Swedish headquarters on 28th January, 2015, and 20th March, 2015, but received no reply to this correspondence.

81. On 28th January, 2015, the applicant's solicitor wrote to ORAC seeking any information in the possession or procurement of ORAC as to whether the Sprakab analyst procured by ORAC was the analyst identified in the newspaper article or one of the analysts referred to by the UK Supreme Court. On 11th March, 2015, ORAC replied, to the effect, that the analyst who conducted the applicant's language analysis was not the analyst referred to in the UK judgments. The applicant's solicitor wrote again to ORAC on 20th March, 2008, requesting that ORAC review the information it had relayed on 11th March, 2015, in light of the fact that the correspondence referred to a language report dated 11th April, 2008 in respect of the applicant whereas, in fact, the Sprakab language analysis report in issue was dated 22nd April, 2008. In correspondence received by the applicant's solicitor on 24th March, 2015, ORAC replied as follows:-

> "I wish to confirm that the analyst who completed the Language Analysis for the…applicant was analyst ea13…the analyst who was referred to in Judgment of the UK Supreme Court was ea 20…the article in the Independent referred to the analyst who was referred to in the UK Supreme Court's Judgment findings…"

82. In April 2015, counsel for the respondent advised the court that analyst ea13 and analyst ea 20 were, in fact, one and the same person. This position was confirmed in an affidavit sworn on 17th June, 2015, by Lucinda McMahon, an Assistant Principal Office in ORAC. This affidavit exhibited correspondence which passed between ORAC and personnel in Sprakab in Sweden which included written confirmation from Sprakab that ea13 and ea20 were the same person. That correspondence went on to state that Sprakab did not accept that the validity of the language analyses undertaken by ea13/20 was undermined as a result of the allegations made in the Swedish documentary and which were subsequently reported in the article in "The Independent". Sprakab furnished ORAC with a response to the documentary refuting the allegations made against analyst ea13/20 which was circulated by Sprakab on 1st December, 2014. In the course of that correspondence, Sprakab confirmed that analyst ea13/20 had not completed a course of studies in sociology at Stockholm University although his CV represented that he "had studied Sociology at Sthlm University".

Counsel for the respondent submits that the Sprakab response of 1st December, 2014, to the Swedish documentary concerning language ea13/20 dealt comprehensively with the allegations which were levelled against the analyst. That response made clear that the Swedish documentary took issue only with a criminal conviction for drug possession against the analyst which was over twenty years old and knowledge assessments of Somali asylum seekers conducted by the analyst. However, no issue was taken with the linguistic analyses he conducted. It is further submitted that the Sprakab response of 1st December, 2014 addressed the criticisms levelled at ea13/20's qualifications and made clear that the work of Sprakab analysts is subject to rigorous testing within Sprakab and to external oversight. Moreover, the Sprakab response made clear that some of their best analysts never went past primary school which proved to be no impediment to their ability. It is submitted by counsel for the respondent that neither he nor counsel for the applicant can gainsay Sprakab in this regard. The respondents also submit that if the applicant wished to pursue arguments in relation to analysts ea13/20's competency, expertise or qualifications or for the necessity to have academically qualified language analysts, then expert evidence should have been adduced by the applicant in the within proceedings, which was not done. Counsel also contends that the applicant has no grounds upon which to attack the services provided by Sprakab to ORAC in a general way. It is argued that what the applicant seeks is for the court to include cautionary statements in its judgment as might prevent the Irish authorities from relying on Sprakab in the future.

83. Counsel for the respondents also argues that insofar as the applicant now seeks to challenge the analyst ea13/20's qualifications that challenge was not made in the statement of grounds. It is submitted that what is referred to in the statement of grounds is that the Tribunal Member did not take the De Taal report into account.

While the respondents acknowledge that both the Scottish Court of Sessions and the UK Supreme Court in the case of *Secretary of State for Home Department v. M.N. and K.Y*. have criticised ea13/20 for professing an opinion on an asylum applicant's state of knowledge, it is contended that in the present case, other than referring to the applicant's knowledge of Afoogye and Mogadishu as "vague", analyst ea13/20 stuck rigidly to analysing the applicant's language. It is submitted nothing in the analyst's past history which impacted on his ability to analyse the applicant's language.

Counsel for the applicant submits that the information which has come to light post the Tribunal decision is relevant to the within proceedings. In particular, it is submitted that the respondents have engaged with the issue which has arisen by relying on Sprakab's response of 1st December, 2014 to the Swedish documentary.

Counsel for the applicant argues that the lack of qualifications of the Sprakab analyst ea13/20 is a relevant factor in the within proceedings, albeit that this has only been confirmed subsequent to the Tribunal's decision.

84. I am not persuaded by the case made by the applicant regarding the analyst's qualifications in the light of the new information. With regard to information which post-dates the Tribunal decision and which is now before the court, the court cannot make findings on evidence that was not before the Tribunal Member. In any event, the court has already pronounced on the Tribunal Member's failings with regard to the evidence that was before her, including submissions made to the Tribunal in 2010 on the Sprakab analyst's qualifications.

85. It is a fact that the Sprakab analyst opined at least three times in the report that the applicant's knowledge of Afgooye and Mogadishu was "vague" and that his knowledge "sounds rehearsed" or "could be rehearsed". Counsel for the applicant submits that this opinion had the potential to influence the Tribunal Member and contends that it may well be the case that the remarks made by the Tribunal Member to the effect that such knowledge as the applicant had of "aspects of life and living of the Reer Xamar clan" "is easily available" were influenced by the analyst's opinion. It is submitted that the court should impugn the decision on the basis that the Tribunal Member may well have been influenced by the opinions expressed by Sprakab analyst ea13/20 in circumstances where the UK courts have criticised tribunals' reliance on such views where no expertise has been demonstrated by those professing such views.

I am not persuaded that the court can render a definite opinion on whether the Tribunal Member was influenced by the Sprakab findings on the applicant's knowledge. The court cannot determine with any degree of certainty whether the Tribunal Member's view that the applicant's knowledge of the life and living of the Reer Xamar was easily available to him was arrived at from her own independent analysis or from the Sprakab observations, as there is no indication on the face of the record as to how the Tribunal Member arrived at her determination in this regard.

86. As a matter of general principle however, I would endorse the view of the Scottish Court of Sessions in *Secretary of State for Home Department v. M.N. & K.Y*. (Scotland) [2013] CSIH 68, which had, *inter alia*, as its subject matter the same analyst ea13/20. In that case, with regard to the propriety of a language analyst expressing an opinion on an applicant's deficient knowledge of country and culture and commenting on the quality of that knowledge, Lord McPhail stated:-

> *"[53] ……I find it convenient to deal first with the criticism made by the appellants concerning the inclusion in the respective Sprakab reports of a section on country and culture in respect of which the report alleges a 'deficient' knowledge and makes other comments respecting demeanour and the substantive responses to questions in that domain. This criticism may, I think, be treated relatively briefly since counsel for the Advocate General accepted that in what purported to be expert evidence of a linguistic analysis the author was stepping outside his proper field of expertise in expressing such views and comments."*

The propriety of language analysts expressing opinions on matters beyond the scope of their expertise was also the subject of comment by the UK Supreme Court in *Secretary of State for Home Department v. M.N. & K.Y.* [2014] UKSC 30. Lord Carnwath states:-

> *"55. …. the observation that KY's knowledge 'sounds rehearsed for the occasion' reads as that of an advocate rather than an independent expert witness, and was wholly inappropriate even if the relevant expertise had been established. Expert witnesses should never act or appear to act as advocates.*
>
> *56. Furthermore, on a fair reading of the careful judgments of the immigration judges in each case, I find it impossible to treat this aspect of their reasoning as severable from the remainder. In the first place this aspect formed an intrinsic part of Sprakab's overall assessment in each case, on which the judges relied. In KY the judge refers in terms to 'the two experts' comment on her knowledge of country and culture', and in the absence of any 'contradictor in terms of the expert views given' adopts them as part of the conclusions, without distinguishing the different aspects (paras 39-49). The position in MN is perhaps less clear, in that the judge undertook her own commendably detailed examination of the evidence relating to the claimant's knowledge of his area, but I am unable to say that the supposedly 'expert' views on this aspect expressed in the Sprakab report played no significant part in the overall reasoning.*
>
> *57. In my view, this point on its own is sufficient to undermine the decisions of the AIT in each case, and to this extent at least to require us to uphold the decision of the Court of Session. [I should add that, as Lord Eassie noted, it was not an issue which had arisen in RB. We were told that this aspect of the Sprakab forms had been altered or deleted in later versions. The current form states (in capitals) that 'knowledge assessment is separate and forms no part of the language analysis'.]"*

I note that in *MN and KY* the UK Supreme Court has provided general helpful pointers with regard to Sprakab reports but did not impugn the integrity of Sprakab. The pointers are, *inter alia*,:-

> *"(i) On the basis of the material we have seen, I see no reason in principle why Sprakab should not be able to report on both (a) language as evidence of place of origin and (b) familiarity with claimed place of origin provided, in both cases, their expertise is properly demonstrated and their reasoning adequately explained. (As will be seen below, the problem in relation to (b) was not the nature of the evidence, but the lack of demonstrated expertise.)*
>
> *(ii) As to (a), language:*
>
> *(a) The findings (on evidence) in RB are to my mind sufficient to demonstrate acceptable expertise and method,*

which can properly be accepted unless the evidence in a particular case shows otherwise;

(b) The Upper Tribunal ought to give further consideration to how the basis for the geographical attribution of particular dialects or usages can be better explained and not (as it often currently seems to be) left implicit. The tribunal needs to be able to satisfy itself as to the data by reference to which analysts make judgements on the geographical range of a particular dialect or usage.

(c) The RB safeguard requiring the Secretary of State to make the recording available to any expert instructed for the claimant is not only sensible, but essential.

(iii) As to (b), familiarity:

(a) The report needs to explain the source and nature of the knowledge of the analyst on which the comments are based, and identify the error or lack of expected knowledge found in the interview material;

(b) Sprakab reporters should limit themselves to identifying such lack of knowledge, rather than offering opinions on the general question of whether the claimant speaks convincingly. (It is not the function of an expert in language use to offer an opinion on general credibility.)….."

The Motion to amend the statement of grounds

87. In the course of the within proceedings and consequent on the material of which the applicant became aware in late 2014, leave was sought to add additional grounds of challenge to the twenty eight grounds in the statement of grounds, as follows:-

"xxix. The decision the subject matter of the within proceedings is vitiated by the actual or possible weight attached to the report of Sprakab dated 22 April 2008.

xxx. The use made of the report of Sprakab dated 22 April 2008, deprived the applicant of the right to an effective remedy in the contested decision pursuant to Article 39 of Counsel Directive 2005/85/EC.

xxxi. The inherent jurisdiction of this Honourable Court and/or the right to an effective remedy pursuant to Article 39 of Counsel Directive 2005/85/EC permits the applicant to challenge a fact underlying the contested decision which he was not in the position to so challenge at the time the decision was made, in the unique circumstances of the present case.

xxxii. The second named respondent is under a duty to make its own enquiries as to the validity of the Sprakab report and, if its validity is in question, to quash its decision."

88. With regard to ground xxix, counsel submits that this ground alone is sufficient to render the decision unlawful. With regard to ground xxxi, in oral argument counsel conceded that the basis for this new ground is information which was not before the Tribunal Member. Grounds xxx and xxxii were not pursued in oral argument.

Counsel submits that because the respondent has chosen in the within proceedings to defend the Sprakab report (as is evident from its statement of opposition and the respondents' submissions), it is appropriate for the court to allow the amendments relied upon.

89. Having considered the arguments advanced by the applicant's counsel, the court did not find it necessary to accede to the application to amend the statement of grounds in order to conduct a judicial review of the Tribunal decision. The court is satisfied that the Tribunal Member's failings vis a vis the language reports are sufficiently put in issue in the existing grounds for the court to pronounce upon the challenge which the applicant has mounted to the decision on this basis, and which the court has pronounced upon.

90. Save the court's general endorsement of the principles enunciated by the UK authorities as to the necessity for expert reports to be compiled by experts and for such experts to confine themselves to the scope of their expertise and not to act as advocates, it is not the function of the court in the within proceedings to pronounce upon the arrangements as may exist between Sprakab and the Irish asylum authorities.

The Tribunal's credibility findings

91. The question which remains to be considered is whether notwithstanding the unlawful manner in which the De Taal report was addressed, the Tribunal Member's "serious reservation and concerns" are sufficient to uphold the finding that the applicant did not have a well-founded fear of persecution.

Counsel for the respondents contends that the "serious reservation and concerns" which the Tribunal Member had regarding the applicant's account of his personal history and family situation more than justified her finding that he did not have a well- founded fear of persecution and submits that on this basis the decision should be upheld. Counsel for the applicant submits that the Tribunal Member's "serious reservations and concerns" were not explained in the decision. It is further submitted that insofar as the decision-maker made findings that the applicant gave inconsistent accounts of events the Tribunal Member's conclusions in this regard were based on errors of fact.

One of the inconsistencies which the Tribunal Member commented on related to two brothers of the applicant said by him to be missing in Somalia. The issue was addressed in the decision as follows:

"The applicant gave an account to the Tribunal that his problems began in Somalia in 1991 – 2 at the hands of the Habar Gadir. The applicant underwent a Spirasi Report on 11th June, 2008 in which he stated his problems began in 1996. The applicant had told the Tribunal that two brothers were killed and two went missing. The Spirasi Report records that one brother went missing. The applicant was insistent that he told the examining physician that two brothers were missing. In the applicant's first interview, the applicant stated that two brothers were killed, but made no mention of any brothers being missing. In the applicant's questionnaire he stated that two brothers were deceased and he did not know the whereabouts of two others. When asked to explain this lacking in information pertinent to the applicant's claim, the applicant told the Tribunal that he was told that if he forgot anything he could explain it at his interview and that he would be given a form to explain his own problems."

92. There was a debate between counsel for applicant and counsel for the respondents as to whether the reference to the applicant's "first interview" was a reference to the first of his two s. 11 interviews or the earlier s. 8 interview, Counsel for the applicant submits it is the former and contends that in finding that the applicant told the Tribunal something different to what he said at the first s. 11 interview the Tribunal Member made an error of fact as the record demonstrates that the applicant clearly advised ORAC in the first s. 11 interview that two brothers went missing in 2006 and 2007 respectively. The respondents contend that the comparator the Tribunal Member makes is with the s. 8 interview where no reference is made to any of the applicant's brothers going missing.

The s. 8 interview records as follows:

> "[The] applicant claims that he cannot return to Somalia because his father and brothers were killed and he feels that his life was under threat from the militia Habir Gadir. [The] applicant claims that he and his family are under threat from this militia group because he is a member of a minority group and they have nobody to defend them. [The] applicant states that the members of the Habir Gadir have forced female members of his ethnic group into marriages and have [forced] other members of his tribe into forced labour."

93. I note that if as counsel for the respondents suggests the Tribunal Member's reference is to the s. 8 interview, the Tribunal Member herself in commenting on the lack of reference by the applicant to any missing brothers specifically refers to the applicant advising that "two brothers were killed". Yet, if the decision-maker's comparator is the s. 8 interview, I note that interview does not mention "two brothers" as having been killed (emphasis added). On the other hand, as contended by counsel for the applicant, the first s. 11 interview does in fact contain information that two brothers were killed and two disappeared. If, as suggested by counsel for the respondent, the Tribunal Member's reference to the applicant's "first interview" is indeed intended to refer to the s. 8 interview, I am of the view that at its height that interview is noted as having been conducted with the applicant over the telephone on 9th January, 2008, in circumstances where the record does not disclose what questions the applicant was asked. Thus, even if no error of fact can be attributed to the decision-maker, I find that the frailty which attaches to the finding in question is that the nature of the s. 8 interview being a preliminary record of the applicant's claim is such that, absent a complete contradiction in the applicant's story therein recorded, it would be unfair to treat it as a legitimate comparator for the purpose of relying on inconsistencies in a protection applicant's account of his or her case history.

94. Addressing the applicant's account of his capture and detention in 2003, the decision maker stated:

> "The applicant told the Tribunal he was kidnapped in 2003 and was made work for his captors during the day and that he was incarcerated at night, and that he spent three months in captivity. In the course of inter-clan fighting he was released by the more powerful, successful clan and he went looking for his family. In the course of the applicant's SPIRASI Report the applicant gave an account that he was kept in a room without windows for the entire duration of his detention, that he was chained to a metal bed without any mattress on it and was given food once a day. The applicant was very specific and went on to claim that there were no toilets or washing facilities in the room, and that after about 3 months he was released during fighting between groups of militia in the area. The applicant was insistent that he told the examining physician that the militia were using him in the day to work. The applicant was asked if he had an interpreter available to him during the SPIRASI Report. The applicant told the Tribunal that he was told there was an interpreter but at that he himself did not know what he was. This was the best that the applicant could do in this regard."

95. In the conclusions section of the decision the Tribunal Member stated "[t]he applicant's account in relation to that which allegedly befell him whilst in captivity in 2003 was at variance with the account given by him to the Tribunal and to the examining physician in the course of his SPIRASI examination."

The applicant's counsel submits that insofar as the Tribunal Member found an inconsistency between the applicant's account to SPIRASI and the Tribunal regarding his detention in 2003, it is submitted that the SPIRASI report simply excludes the detail that the applicant was subjected to forced labour during the day. It is further submitted that it is clear from the face of the SPIRASI report that the "client's history" portion of the report was not exhaustive. He cites the "examination" section where reference is made to a gunshot wound on the dorsal aspect of the applicant's left foot which is stated to be "consistent with the history of superficial shotgun wound". Yet, the "client's history" portion does not expressly make reference to this gunshot wound and makes reference only to a gunshot wound to the applicant's groin which occurred in the same incident. This, counsel submits, is indicative that the "client's history" portion of the SPIRASI report cannot be deemed exhaustive and thus, the comparison made with the evidence given by the applicant to the Tribunal was unfair. Additionally, counsel submits that no full details were taken by the SPIRASI physician of how many brothers and sisters the applicant had and what was the precise fate of each of them.

As testified to in the applicant's grounding affidavit (which is not contradicted), in the course of the oral hearing before the Tribunal the applicant's solicitor submitted that the SPIRASI record was not the applicant's evidence but rather the doctor's note of the account given by the applicant and it was submitted that if the doctor's interview record was to be treated as an interview record like that of the Commissioner, the applicant should have been given an opportunity to examine and approve the doctor's handwritten notes before the report was written. I find merit in the arguments canvassed by the applicant on this issue. The record demonstrates that applicant was given an opportunity at the S.11 interview stage to agree what was being recorded. While I do not suggest for a moment that a similar process was necessary when the applicant recited his personal and family history to the SPIRASI physician, it seems to me that the principles of fairness dictated that the Tribunal Member, when comparing the two accounts, should have been cognisant of the circumstances in which the SPIRASI note was made and should have given some weight to the submissions which were made at the hearing on the applicant's behalf, or at least explained if no weight was to be attached to the submissions, why this was so.

96. I also note that the Tribunal Member summed up the applicant's explanation for the inconsistency with the words "[t]his was the best the applicant could do in this regard". I do not find this language particularly helpful in decision making. Thus, I have some sympathy for counsel for the applicant's complaint about opaqueness in the decision.

97. After reciting the applicant's account of what he claims happened to him between 2005 and 2007 the decision-maker stated:

> "The applicant told the Tribunal an aunt who was in Australia made arrangements for him to leave Somalia, however the applicant himself never made contact with this aunt and that his aunt contacted the applicant's mother through using a neighbour's telephone and an agent was sent to Mogadishu to make arrangements to enable the applicant to leave Somalia. It seems strange to the Tribunal, given that the applicant and his family on his own account had suffered death, abductions, forced marriages, forced labour and threats, that the applicant and his family did not leave Somalia heretofore. According to the applicant his father was killed as were two brothers and another two brothers went missing.

> The applicant was asked why this aunt at such a remove in Australia had not come to the family's assistance heretofore and why did she come simply to the assistance of the applicant only. The applicant was asked specifically who remained behind belonging to him in Somalia. The applicant told the Tribunal that the only news he had is that his mother and two sisters are alive. However in the SPIRASI Report when asked who belonged to him in Somalia the applicant stated he had two younger brothers and three sisters remaining there. The applicant told the Tribunal that he himself had suffered the most. Notwithstanding the fact that the applicant claimed to be uneducated, the applicant completed the questionnaire himself and told the Tribunal that he had learned to read and write at home."

In the "Conclusion" section the issue is further addressed as follows:

> "Notwithstanding ongoing and continuous trauma, deaths, beatings, abductions, forced marriages, an aunt in Australia assisted the applicant to leave Somalia on 1st January, 2008 some 17 years after the family's alleged problems began in Somalia. The applicant was unable to provide any explanation to the Tribunal as to why such assistance was not afforded to his family at an earlier time or indeed why he himself continued to remain in Somalia up until 2008….
>
> The applicant and his family had the wherewithal and indeed the potential assistance of an aunt albeit at a very far remove who some 17 years after the troubles commenced in Somalia did come to the aid of the applicant but did not afford any assistance to any other members of the applicant's family including her own sister."

98. It is submitted by counsel for the applicant that while the Tribunal Member found it "strange", given the history recounted by the applicant, that the applicant or his family did not leave Somalia prior to 2008, the decision maker does not elaborate on this finding; the matter is simply left hanging in the air. Similarly, he submits that while the Tribunal Member compares the answer given by the applicant to the Tribunal as to what family members were left in Somalia to the information which he provided to the SPIRASI physician, this comparison is also left hanging in the air as if it was an inconsistency, yet it is not specifically referred to as such. In any event, counsel submits that the answer given by the applicant was not necessarily inconsistent with the information provided to the SPIRASI physician given that a year had elapsed between the SPIRASI examination and the Tribunal hearing.

99. I note that the Tribunal Member does not *expressly* state whether the applicant's account of being assisted by an aunt to the exclusion of other family members was believed or otherwise, other than the reference to it being "strange". Again, I do not find the Tribunal Member's choice of language helpful in decision making. However, it is patent from the decision that the fact that it was the applicant solely who was assisted in the manner described weighed with the decision-maker. That was entirely an issue within jurisdiction and it has not been suggested by counsel for the applicant that it was an irrational or unreasonable conclusion. Thus, I cannot find fault with the Tribunal Member's reliance on this factor in her assessment of the applicant's claim. However, in the absence of any lawful consideration as to whether the applicant was of Reer Xamar ethnicity, I am not satisfied that the Tribunal Member's observation on the applicant being the sole member of his family to have been assisted is sufficient of itself to uphold the finding that the applicant did not have a well-founded fear of persecution.

100. The Tribunal Member found the applicant's account of his travel to Ireland on a "red passport" which had neither his photograph nor his name and which, on his own account, he presented to airport authorities en route to Ireland to be "implausible" and "not capable of being believed" "in the light of the situation that exists at all international points of immigration". The Tribunal Member noted that the applicant had no travel documentation other than his own account and the Tribunal did not know "when or how the applicant arrived in the jurisdiction." Counsel for the applicant asserts that the decision-maker's reliance on the applicant's mode of travel was questionable in the overall scale of things.

101. In the particular circumstances of his case, where the applicant essentially asserts that he was able to pass through airport immigration with false document with neither his name nor photograph thereon, I cannot fault as either irrational or unreasonable the Tribunal Members observations. While the court has upheld the decision-maker's finding in this regard and while the Tribunal Member was entitled to consider it in the round, it is, of itself, not sufficient to sustain the decision, given its relative peripheral nature to the applicant's core claim.

102. It is submitted by the applicant that in analysing his credibility the Tribunal Member did not fairly consider the SPIRASI report which had been furnished on his behalf. The applicant was assessed by a SPIRASI physician on 13th May, 2008, at the behest of the RLS, his then legal representatives. The physical examination revealed a 4cm long scar near the applicant's right groin and a 3cm lineal scar on the dorsal aspect of his left foot which were found to be "consistent with" his history of a gunshot wound. The physician found no other abnormalities but stated that "this[did] not refute the history of beating with blunt objects, as this [was] likely to cause swelling and bruising, which normally disappear after a few days."

103. The applicant's mental state was assessed as follows:

> "[The applicant] presents features of anxiety and of a post-traumatic state, such as disturbed sleeping pattern, flashbacks and nightmares. Poor short-term memory and fatigue also in keeping with a distressed mental state. He also exhibits some psychosomatic symptoms: recurrent tension-type headaches, back pain and muscular tension are also common in a post-traumatic state."

In her "conclusion" the physician found the "physical and mental state examinations" "consistent with" the applicant's history. She went on to state:

> "In my professional opinion [the applicant] shows features of post traumatic stress disorder and will require counseling and psychological support in order to come to terms with his traumatic experiences and the loss of his family members at the hands of the militia in his home country."

In the decision, the report was addressed as follows:

> "The Spirasi physical examination indicated that the applicant has a 4cm long scar on his right groin which is slightly irregular with no signs of sutoring [sic] and that this is consistent with a history of a superficial shot gun wound. There is also a 3cm long linear scar on the applicant's left foot which is consistent with the history of shotgun wound as narrated by the applicant. There are no other obvious scars or other abnormalities. The Spirasi Report has to be considered in light of the applicant's overall account."

The decision-maker also observed:

> "In relation to the Spirasi Report, while medical practitioners are capable and competent to give a medical report and sequelae as found by them in the course of an examination, 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. Indeed it may well be the case that such injuries could have been inflicted as a result of acts of criminality or indeed because the applicant was a member of a warring majority clan. All the Tribunal can do is assess and weigh the various accounts given by an applicant in the course of the asylum process and to test to the best of the Tribunal's ability the credibility of an applicant…"

Insofar as the decision-maker considered the probative value of the scars which the applicant had, they were found by the physician to be merely "consistent with" his history of a shotgun wound and thus at the lower end of the Istanbul Protocol. In those circumstances the Tribunal Member opined that the SPIRASI report had to be weighed against the account given by the applicant. The decision-maker cannot be faulted in this regard. The fact that no express reference was made by the decision-maker to the other observation made by the physician regarding the applicant's physical examination does not to my mind impugn the finding with regard to the applicant's scars. Thus, the Tribunal's approach to the SPIRASI physician's physical findings would accord with the approach of Bermingham J. in *ME v. RAT* [2008] IEHC 192.

> *"28. The medical report spoke of the injuries as being "consistent with" a beating with a light rod or stick. If one follows the approach of the Istanbul Protocol, this would mean that while the injuries were "consistent with" such a beating, there are also many other possible causes (see para. 186). Even if one accepted that the injuries were caused by the method described (i.e. a beating with a light rod or stick), the report offers no assistance as to where, when and in what circumstances the injury was caused. The report is indicating that it was possible that the injuries were caused as described but does not elevate that to a probability."*

104. However, the report did not just deal with physical sequelae. On its face, the decision does not indicate what weight if any was given to the SPIRASI mental state assessment. While the weight to be given thereto is entirely a matter for the decision-maker, the applicant as the addressee of the decision and the court are left in the position where one has to second guess the view taken by the Tribunal Member on the applicant's mental state and the possible causes for same. The court is not the forum in which to do that. In my view the Tribunal Member was obliged to weigh the mental state assessment in the round, as she did the physical examination findings. The mental state assessment had at least the potential to add weight to the applicant's account of his history. As the court cannot be satisfied from the face of the decision that this weighing exercise was engaged on by the decision-maker, the Tribunal Member's overall assessment of the applicant's account of his history is impugned as a result.

Counsel for the applicant also complained that the Tribunal Member's reference to having had the opportunity to "acutely observe" the applicant throughout the hearing without elaborating further on the nature of those observations was unfair. I agree that the reference is suggestive of a finding on the applicant's demeanour. If such a finding is to be made, then the basis for same should be spelled out in the decision. This was not done, thus leaving the applicant and the court none the wiser with regard to the Tribunal Member's acute observations. However, of itself, the Tribunal Member's cryptic statement would not vitiate the decision had it been the only fault found with the decision.

105. Counsel for the applicant took issue with the standard of proof utilised in the decision. The court does not regard it as necessary to deal with this in any comprehensive fashion save to say that the Tribunal Member should have addressed the claim on "a reasonable likelihood" basis, as indeed was recited by her in part 5.5 of the decision.

106. In all of the circumstances of this case and for the reasons enunciated above, I find that the Tribunal Member's "serious reservations and concerns" cannot sustain the decision, albeit the court has upheld certain discrete findings.

Was there an obligation to conduct a forward looking test?
107. In *J.N.A. v. RAT* [2012] IEHC 480 O'Keefe J. reprised the jurisprudence of Cooke J. with regard to protection applicants from Somalia. He stated:

> *"14. In C & Ors. V. Refugee Appeals Tribunal & Ors [2012] IEHC 4 Cooke J. discussed the difficulties faced by decision makers when dealing with asylum applications of Somali nationals:*
>
> > *"Because of the undoubted fact that Somalia is notoriously a dysfunctional and failed state and a place of internal conflict and a source of international lawlessness, it follows that any decision maker faced with a claim for asylum based upon a risk of persecution of any applicant who is accepted as being from Somalia must proceed with extreme caution and must reject a claim upon grounds of lack of personal credibility only when it is compellingly necessary to do so".*
>
> *15. Cooke J. went on to discuss the need for decision makers to carry out an assessment of future risk even where there are doubts as to the applicant's credibility:*
>
> > *"It must also be borne in mind when considering the validity of decisions in the asylum process based on lack of credibility, that the evaluation of the claim to refugee status involves not only the assessment of the truth and reality of the claim made on the basis of alleged past persecution or serious harm previously suffered but may also require a prospective assessment to be made of the likelihood of future persecution or serious harm in the event of repatriation to the country of origin in question. The particular story told by the asylum seeker may correctly be disbelieved but it may yet be important to examine the possibility that the person in question may nevertheless have a valid Convention based reason for being unable or unwilling to return to the country of origin especially where it is known to be a place of internal conflict or of prevalent violence"*

In *M.A.M.A v. Refugee Appeals Tribunal* [2011] IEHC 147, Cooke J. set out the seminal test as to the requirement to conduct a forward looking assessment:

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

108. In the present case, the entire thrust of the decision was a rejection of the applicant's claim to be of Reer Xamar ethnicity. The extent of the rejection thus absolved the decision-maker from embarking on a forward-looking test. The fact that this court has impugned the process and rationale upon which the credibility assessment was based, including the treatment of the De Taal report cannot retroactively impose on the decision-maker an obligation to carry out a forward looking assessment of risk. The requirement for such will depend on a lawful assessment of the applicant's credibility.

Past persecution and Regulation 5(2) of the 2006 Regulations
109. The applicant challenges the decision on the basis that the Tribunal Member did not afford the applicant the benefit of the "*counter exception*" in Regulation 5(2) of the 2006 Regulations. I do not find merit in this ground of challenge. The Tribunal Member effectively rejected the applicant's claim of past persecution. As such there were no circumstances whereby the decision-maker was obliged to apply the "*counter exception*". The fact that this court has impugned the process whereby the Tribunal Member rejected the applicant's claim for protection does not alter the position.

Summary
110. For the reasons set out in this Judgment, I will grant leave to the applicant. As these are telescoped proceedings and being satisfied that the challenge to the Tribunal Member's assessment of credibility has been made out, I am satisfied to make an order quashing the decision and to remit the matter for *de novo* consideration before a different member of the second named respondent.