THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 596 J.R.]

BETWEEN

S.H.I.

APPLICANT

AND

THE INTERNATIONAL PROTECTION TRIBUNAL

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENTS

(No. 2)

JUDGMENT of Mr Justice David Keane delivered on the 3rd May 2019

Introduction

1. This is the judicial review of a decision of the Refugee Appeals Tribunal, now the International Protection Appeals Tribunal ("the IPAT"), dated 5 October 2015 and made under s. 16(2)(a) of the Refugee Act 1996, as amended ("the Refugee Act"), affirming a recommendation of the Refugee Applications Commissioner ("the Commissioner") that the applicant should not be declared to be refugees ("the IPAT decision").

2. On 29 April 2016, Mac Eochaidh J gave the applicant leave to apply for certain reliefs, principally an order of *certiorari* quashing the IPAT decision and an order remitting the applicant's appeal for a fresh determination before a separate member of the tribunal.

3. In an *ex tempore* decision, *sub nom*. S*.H.I. v Refugee Appeals Tribunal and Minister for Justice and Equality* [2016] IEHC 218, Mac Eochaidh J granted the applicant leave to seek judicial review on a single ground. It is that the IPAT acted in breach of fair procedures and natural and constitutional justice, and in particular the principle *audi alteram partem*, by making adverse findings about the applicant's credibility in the course of a 'papers only' appeal when no such finding had been made at first instance.

4. At the time when leave was granted, the International Protection Appeals Tribunal was known as the Refugee Appeals Tribunal. When s. 71(5) of the International Protection Act 2015 ("the Act of 2015") came into force on 31 December 2016, the former was substituted for the latter in these proceedings by operation of law.

Background

5. The applicant is a 43-year-old South African national of South Asian ethnicity who applied for asylum in the State upon his arrival at Dublin Airport from South Africa (via Dubai) on 16 January 2014, claiming a well-founded fear of persecution in that country on grounds of race. The applicant was first interviewed by an immigration officer, in accordance with the requirements of s. 8 of the Refugee Act, upon his arrival at Dublin Airport.

6. Having completed the necessary questionnaire for the Office of the Refugee Applications Commissioner ('ORAC'), he was then interviewed by an authorised officer of the Commissioner, pursuant to s. 11 of the Refugee Act, on 30 January 2014.

7. The Commissioner wrote to the applicant on 7 February 2014, enclosing a report, dated 31 January 2014, pursuant to s. 13 of the Refugee Act, recommending that he should not be declared to be a refugee on the basis that state protection was available to him in South Africa through internal relocation. The report included a finding that the applicant is a national of South Africa, a designated safe country of origin under s. 12(4) of the Refugee Act, bringing his claim within the scope of the s. 13(5) 'papers only' appeal procedure by operation of s. 13(6)(e) of that Act. The Republic of South Africa was designated a safe country of origin by operation of the Refugee Act 1996 (Safe Countries of Origin) Order 2004 (S.I. No. 714 of 2004).

8. Through his legal representatives, the applicant submitted a notice of appeal, dated 20 February 2014; written grounds of appeal, dated 3 March 2014; a written statement of the applicant of the same date; and final written submissions, dated 31 August 2015.

Relevant Aspects of the Applicant's Refugee Status Claim

9. The note of the s. 8 interview, signed by the applicant on 17 January 2014, records that he gave the following reasons for seeking asylum:

> 'That he was employed by a company called Bondi Distribution as a truck driver, he was the only Indian truck driver at this company.
>
> After the death of Nelson Mandela, he started to get [harassed] by fellow workers and told to leave the company and the country as Indians were no longer welcome in South Africa. The applicant did not report this as he felt that he could handle it.
>
> Later, when he was on a delivery job, he hired an outside person to assist him. The applicant states that he was allowed by the men who stole his money and phone and told him that, if he was seen again, he would be killed. The applicant thinks that his helper set him up to be hijacked.
>
> The applicant reported this to the police and got a case number but there has been no progress in the investigation, so the applicant decided to leave South Africa for his own safety.
>
> The applicant fears for his safety if he was to return to South Africa.'

10. The undated and unsigned ORAC questionnaire that the applicant completed between his s. 8 and s. 11 interviews, contains the

following passage (in which I have corrected the spelling, though not the grammar):

> 'I was happy in my country only Nelson Mandela died after every thing's going wrong. Black persons don't like other community and they attack me and want to kill me until I leave the country. That's why I save my life to come here.'

11. The authorised officer's handwritten note of the s. 11 interview of 30 January 2014, countersigned by the applicant, states in material part:

> 'Q.55. What exactly do you fear will happen to you if you were to return to South Africa?
>
> My life is not safe there. I may be killed or badly beaten.
>
> Q. 56. Who exactly do you fear will do this to you?
>
> South African people who are xenophobic.
>
> Q. 57. When exactly did your problems in South Africa begin?
>
> It's all the time, but after Nelson Mandela passed away it is too much.
>
> Q. 58. Okay, but when did the first incident occur which caused you to fear for your safety in South Africa?
>
> On 30 December 2013.
>
> Q. 59. What happened that day?
>
> The company I worked in is called Bondi Distribution. I was their one Indian truck driver. After Mandela's death, the other truck drivers and workers were saying to me "Mandela is dead, maybe it is time for your people to go home and leave our country." I thought they were joking at first. One day, I was doing a delivery and my boss allowed me to bring an assistant to help me. When I loaded the truck and was ready to go, I asked some of the black guys if there was someone to come with me as an assistant. They gave me directions to a place, a corner where people looking for work stand and wait. When I got there, I picked up a guy, we agreed on pay and then we set off. We did the deliveries and collected payments from customers. I had a last delivery to finish and after that I had around 10,000 or 11,000 rand on me. I asked the guy where I could drop him off. He told me to take him to a garage near where I picked him up. I paid him 100 rand and took him to the garage. When we got there, he said just to drive a little further. Then he directed me to pull over where there were 2 guys. He said he was going to go with them. When I stopped, those 2 guys came to the truck with guns. They got in, told to drive to wherever they told me. They took all the money, my phone and they beat me. They smashed my face. They said they will kill me if they see me there again. They said, Mandela is dead, they don't want me in South Africa anymore.
>
> Q.60. Did you report this attack to the police?
>
> Yes, after I went to the police station in Silvertown. I told them my story.
>
> Q. 61. What did the police say or do?
>
> The opened an investigation into the case. I didn't get any answer or call from them.
>
> Q. 62. So, did this attack take place in Pretoria?
>
> Yes.
>
> Q. 63. These guys with the guns, whereabouts in Pretoria were you when they got into the truck?
>
> Silvertown. Then they took me and my truck to Mamalodee.
>
> Q. 64. And they guy who was your assistant, he was one of the attackers too, is that correct?
>
> Yes, he was with them.
>
> Q. 65. Did you encounter any further problems in South Africa, after this incident?
>
> No.
>
> Q. 66. Did you return to work?
>
> I returned to the job. I told my boss everything that happened.
>
> Q. 67. Did you remain working until you left South Africa?
>
> Yes. I quit that job.
>
> Q. 68. When did you quit the job?
>
> The same day I returned to the office and spoke to my boss. I told him everything and asked him for help and he said he could not help, that is the way the country is. So then I quit.
>
> Q. 69. So you quit your job on 30 December 2013, is that correct?
>
> Yes.

Q. 70. Could you have moved to another part of South Africa to avoid your problems instead of leaving the country?

In the past I did, but there is no way to avoid this. Xenophobia is everywhere, they treat the white people and the Indian people the same.

Q. 71. From what I have read, xenophobia appears to be prevalent in the townships, so could you have moved somewhere in South Africa other than a township to avoid xenophobia?

It is the same problem everywhere, whether you go to a farm, a village or a town. It is the worst time for South Africa.

Q. 72. Have you personally encountered any other problems, xenophobic or otherwise, in South Africa?

There is no other problem. The main problem is the xenophobia. South Africa is a nice country, nice weather, nice to work in. But these people were getting worse. They are killing white and Indian people. They want to get revenge, they say. The whites and Indians are responsible for the deaths of black people in the past.

Q. 73. Have any of the other truck drivers in your company been robbed before?

There is all the black drivers. I am the only Indian. None of the others were robbed.

Q. 74. We are coming towards the end of the interview. Do you wish to add anything further?

That is all.

Q. 75. Are you satisfied with the way the interview has been conducted today?

I am.

Q. 76. Are you satisfied that you have been given every opportunity to fully relate your claim?

Yes.

Q. 77. Have you fully understood all of the questions I have asked you today?

I understood all.'

12. The applicant relies on two statements in the Commissioner's s. 13 report of 31 January 2014 for the purpose of the present application.

13. The first is in the section of the report that deals with the issue of 'persecution'. Having summarised the relevant portions of the applicant's statements at interview and answers in the ORAC questionnaire, the Commissioner concludes:

> 'The applicant's claim may be considered to constitute a severe violation of basic human rights and therefore may be considered to be of a persecutory nature and as such could satisfy the persecution element of the refugee definition.'

14. The second is at the commencement of the section headed 'Section 13(6) Findings', where the Commissioner observes that '[n]o credibility issues arose during the assessment of the applicant's claim', before making a finding under s. 13(6)(e) of the Refugee Act that the applicant is a national of South Africa, which is a designated safe country under s. 12(4) of that Act.

15. In his first ground of appeal against the Commissioner's recommendation, the applicant focussed on the finding in the section of the Commissioner's report headed 'Well-Founded Fear' that 'it is reasonable to assume that the incident on 30 December 2013 was the only time the applicant experienced problems in South Africa.'

16. That ground invoked the applicant's vague and imprecise statement, when asked at his s. 11 interview when his problems in South Africa began (at Q. 57), that 'it's all the time, but after Nelson Mandela passed away it is too much', while ignoring both his immediate clarification (at Q. 58) that the first incident that caused him to fear for his safety occurred on 30 December 2013, and his subequent statement (at Q. 65) that he encountered no further problems in South Africa after 30 December 2013, to assert that the Commissioner's assumption of a single incident was an erroneous one.

17. More significantly for the purpose of these proceedings, that assertion was then used as the putative gateway for the submission of what was described as a personal statement by the applicant. Although that document contains a recital beside the applicant's signature that it was sworn by him on 3 March 2014, it does not comply with the legal requirements for either an affidavit or a statutory declaration, which is a cause for some concern as the applicant was legally represented at that time. It what sense it was, or could have been, sworn remains entirely unclear. It is cast in the following terms:

> '1. I am a South African National of Indian ethnicity. I have sought asylum in Ireland on the basis of xenophobic attacks, which I suffered in South Africa. I believe I suffered these attacks as a result of my race. I fear that my life would be in danger if I were returned to South Africa.
>
> 2. I sought asylum in Ireland on the 16th January 2014. I was interviewed for my asylum application on the 30th January 2014. I was asked a number of questions in relation to my asylum application to which I believe I answered honestly and to the best of my ability.
>
> 3. I note that I was asked about when the attacks on me began (Q. 57). I note that I stated that they happened all the time but that they became serious after the death of Nelson Mandela. I say that the rest of my interview was focussed entirely on the attack, which occurred on the 30th December 2013, which forced me to flee my country. I say that the authorised officer agreed that this attack occurred and that it was racially motivated. I note that I had informed the State police about this attack but it was not investigated.
>
> 4. I say that the authorised officer focussed entirely upon that incident and did not acknowledge that I suffered attacks prior to that incident.

5. I note I have suffered many racially motivated attacks in South Africa. I note that the home that I was residing in with my cousin was broken into and money, laptops and cell phones were stolen. I say that local black people had attacked our home and told us to leave the country. I say that this incident occurred early in 2013.

6. I say that I have always suffered racist abuse while in South Africa. I say that this is a natural daily occurrence. I did not believe that the police would provide us with any help to stop these abuses.

7. I say that this discriminatory treatment occurred all the time and it wasn't until the incident dated 30th December 2013 where I was attacked beaten and my life was threatened, that I felt that I could no longer survive without seeking police protection. I say that after filing a police report and nothing being done by the police to protect me I had to leave the country to save my life.

8. I believe that I will be killed as a result of my ethnicity if I am returned to South Africa.'

18. Three points have to be made about this statement. The first is that it is difficult to reconcile with the applicant's earlier statements. He was not asked at his s. 11 interview about when the 'attacks' on him began; he was asked when his problems began. He did not state at that interview that attacks upon him happened all the time; he stated that the first incident that caused him to fear for his safety occurred on 30 December 2013 and that he encountered no further problems after that prior to his departure from South Africa. It is very difficult to view the applicant's subsequent written statement that he has 'suffered many racially motivated attacks in South Africa' as anything other than a direct response to the conclusion in the s. 13 report, based upon the applicant's statements at interview that 'it is reasonable to assume that the incident on 30 December 2013 was the only time the applicant experienced problems in South Africa.' And insofar as that response is in conflict with those earlier statements, it can have done nothing to bolster the credibility of the applicant's claims.

19. The second point is that the authorised officer of the Minister who conducted that interview did not focus specifically on the alleged incident that occurred on 30 December 2013; the applicant did. The authorised officer asked properly open-ended questions, such as 'when did the first incident occur that caused you to fear for your safety in South Africa?', 'did you encounter any further problems?', and 'do you wish to add anything further?'. It is, at best, incorrect, at worst, disingenuous to imply that the authorised officer conducted the s. 11 interview in a manner that inhibited or prevented the applicant from fully or properly presenting his claim at first instance.

20. The third point, which follows ineluctably from the first two, is that the applicant was making a wider and, hence, different claim in his written statement of 3 March 2014 than the one he had made in his s. 8 interview, his ORAC questionnaire and his s. 11 interview. That, in itself, would have given rise to an issue on the applicant's credibility overall. It also meant that the credibility or plausibility of each aspect of the wider claims the applicant was now advancing would have to be assessed for the first time in the context of a 'papers only' appeal, something of which the applicant could hardly have been unaware since he was by then legally represented.

The decision under review

21. After various introductory sections identifying the application, the nature of the claim advanced, and the documentation relied upon, the IPAT decision finds that the applicant is, as he claims, a South African national. The central section of the IPAT decision is headed 'Analysis of Credibility'. It states:

'[5.1] The core facts of the [applicant's] claim are; (i) whether the [applicant] home with his cousin was broken into (ii) whether the [applicant] was subjected to racially motiviated abuse at his work place (iii) whether the [applicant] was targeted and robbed on 30th December 2013.

(i) whether the [applicant's] home with his cousin was broken into and whether personal items were stolen

[5.2] The [applicant] stated in his sworn statement of 3rd March 2014 that the house where he resided with his cousin in Pretoria was broken into in early 2013 resulting in a number of personal valuables being stolen. Specifically, the [applicant] stated that money, laptops and cell phones were stolen from the burglary incident. During the [applicant's] interview he stated that his problems in South Africa were *"all the time, but after Nelson Mandela passed away, it is too much."* The [applicant] did not develop more of what he meant by having suffered problems all the time even before the passing of Nelson Mandela.

[5.3] During the course of the [applicant's] section 11 interview he was asked and invited to give a full account of all the details material to this claim for state protection…. At no stage during his section 11 interview did the [applicant] refer to the break in of his house as per his sworn statement…. In addition, no reference was made of this incident in the [applicant's] questionnaire.

[5.4] I do not accept that the [applicant's] home with his cousin was broken into and that personal valuables were stolen. I reach that determination for the following reasons; I do not find it plausible that the [applicant] would not mention this incident specifically where he stated in his section 11 interview that he had problems with xenophobia even before Mandela's death. It would then have been prudent to mention this incident as it could have been material to the [applicant's] clai. No mention of this break-in is evident in the [applicant's] questionnaire or section 11 interview. In addition, the [applicant] during his section 11 interview was provided with a number of opportunities to expand on the extent of his problems in South Africa including those separate from the incident of 30th December 2013. The [applicant] not withstanding this does not mention the break-in of his home as recounted in his sworn statement. On the balance of probabilities, I therefore do not find it credible that this event occurred and find against the [applicant] on this core aspect of his claim.

(ii) whether the [applicant] was subjected to xenophobic racially motivated abuse at his work place

[5.5] The [applicant] stated that his black co-workers were often insulting him that Mandela is dead and that maybe it is time for you people (meaning people of Indian extraction) to go home and leave our country…. The [applicant] in his questionnaire or section 11 interviw makes no reference of reporting this matter to his employer or the local police. As referred to above, the [applicant] was afforded an opportunity to provide every detail in support of his claim during the course of his section 11 interview…. No evidence of complaints were (sic) provided by the [applicant] to report these

instances of racially motivated mistreatment. The [applicant] and ORAC were afforded an opportunity by the Tribunal to provide it with all documentation in support of their respective positions….

[5.6] The [applicant] stated in this claim that when he resigned his position in the company he told his boss of everything in the context of the incident of 30th December 2013 but no specific mention is evidentin the [applicant's] section 11 interview that he reported this xenophobic racially motivated mistreatment.

[5.7] I do not accept that the [applicant] was subjected to xenophobic racially motivated abuse at his work place. I reach this determination for the following reason; I do not find it plausible that this occurred and that the [applicant] would not report it to the police or bring it to the attention of his employer. On the balance of probabilities, I therefore find against the [applicant] on this core aspect of his claim.

(iii) whether the [applicant] was targeted and robbed on 30th December 2013 on account of his race or ethnicity

[5.8] The [applicant] recounted in his section 11 interview details of being physically attacked and the victim of an armed robbery while conducting deliveries on 30th December 2013. The [applicant] attributed this incident to the fact that he is the only Indian driver that was employed by his former employers. The [applicant] believed therefore that he was targeted on account of pervasive xenophobic attitudes towards Indian people in South Africa. The [applicant] confirmed (in his section 11 interview) that since this incident he has not been the subject of any further problems in South Africa….

[5.9] The [applicant] confirmed that none of his fellow employees have been the subject of any attacks or armed robberies during the course and scope of their duties as truck drivers…. I have rejected that the [applicant's] fellow co-workers subjected him to racially motivated abuse at his work place. I do not therefore find it credible that the [applicant] was targeted and robbed on 30th December 2013 on account of his race or ethnicity. I do accept that he may have been robbed and physically assaulted but I do not accept that it was for the reasons and motivations which the appellant claims. On the balance of probabilities I therefore find against the [applicant] on this core aspect of her (*sic*) claim.'

22. Having reached those conclusions on the credibility or plausibility of the applicant's account, the next short section of the IPAT decision is headed 'Analysis of Well Founded Fear.' It states:

'[6.1] Having rejected all of the core aspects of the [applicant's] claim, I find that there is no need to proceed to analyse whether these facts provide a basis for finding that the [applicant's] fears are well founded, a Convention nexus, state protection or [the internal protection alternative ('IPA')]. I conclude my analysis here as, I find that the [applicant] has not provided a basis for possessing a well-founded fear.'

23. Thus, the IPAT decision affirmed the recommendation of the Commissioner that the applicant not be declared a refugee.

Analysis

i. did the Commissioner accept the general credibility of the applicant?

24. In the affidavit that he swore to ground these proceedings, the applicant avers that the IPAT decision is particularly unfair because the authorised officer who interviewed him had believed his story, whereas the tribunal in the conduct of a papers only appeal had found him not to be credible. This averment echoes or amplifies the request made to the tribunal on the applicant's behalf in the written submissions, dated 31 August 2015, to note 'the Commissioner's explicit finding that no credibility issues arose in respect of [the applicant's] account.'

25. Contrary to what the applicant states and what his legal representatives have implied, I do not accept that the Commissioner made a positive finding that his claims were generally credible. The statement in the s. 13 report that '[n]o credibility issues arose during the assessment of the applicant's claim' appears at the commencement of the short section of that report that is headed, and that deals specifically with, 'Section 13(6) Findings'. Properly interpreted in that context, the statement most obviously refers to the possibility of a finding under s. 13(6)(b), which is:

'that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to the lead to the conclusion that the application is manifestly unfounded.'

Other findings expressly contemplated under that sub-section are that 'the applicant showed either no basis or a minimal basis for the contention that the applicant is a refugee' (s. 13(6)(a)); that 'the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State'(s. 13(6)(c)); or 'that the applicant had lodged a prior application for asylum in another state party to the Geneva Convention' (s. 13(6)(d)).

26. The Commissioner's conclusion that no credibility issues relevant to any of the findings contemplated under s. 13(6) of the Refugee Act arose during the assessment of the applicant's claim is not the same thing as a finding that his claim was credible overall, much less can it be construed as an unqualified expression of belief in the veracity of the applicant's assertions.

27. Similarly, the conclusion in the 'Persecution' section of the s. 13 report that the applicant's claim 'may be considered' a severe violation of basic rights and, therefore, 'may be considered' to be of a persecutory nature, such as 'could satisfy' the persecution element of the refugee definition, is quite clearly a deliberately conditional statement that cannot properly be characterised as an unconditional finding that the applicant's claim was credible. Rather, it seems to me to represent the adoption by the Commissioner of the approach commended by the authors of Symes and Jorro, *Asylum Law and Practice* (2nd ed.) (2010) (at para. 2.6) that '[w]hilst recognising the possibility that there will be cases where the story falls to be rejected outright, in general it is safer for adjudicators to first analyse the claimant's account to determine whether the appeal [or claim] can succeed if true, and, having determined that issue, to proceed to examine the veracity of the asserted factual foundation' where satisfied that it could then succeed.

28. That approach is plainly within the discretion of the Commissioner or the IPAT in this jurisdiction. As Humphreys J explained in *A(R) v Refugee Appeals Tribunal & Ors* [2015] IEHC 686

'24. It is clear at a very basic level that there are a number of conditions for qualifying as a refugee, all of which must be satisfied before a person can be recognised as a refugee. Failure to satisfy even one of these conditions is fatal to an application. These conditions include:-

(i) That the person has a subjective fear of persecution as defined.

(ii) One of the conditions for the existence of a subjective fear is that the asylum seeker is generally credible. If the applicant's credibility cannot be accepted, it cannot be the case that they can be held to have a subjective fear, still less an objective one.

(iii) The fear of persecution for a convention reason must be objectively well founded.

(iv) The application must relate to persecution within the meaning of the Convention, and not to some lesser form of adverse treatment such as lawful prosecution, hardship or even discrimination.

(v) The persecution must be for one of the specified Convention reasons, namely race, religion, nationality, membership of a particular social group or a political opinion.

(vi) The applicant must be unable or owing their fear of persecution, unwilling to avail themselves of the protection of their country of origin. Thus, a finding that state protection is open to an applicant is fatal to an application.

(vii) As an element of the inability to return to the country of origin it must be shown that the option of internal relocation is not reasonably open to the applicant.

(viii) The fear of persecution must relate to present or future persecution of the applicant. The past persecution in a country where for example the political situation has improved such that there is not now a present or future threat to the applicant is insufficient to ground an application.

(ix) The applicant must not be a member of one of the excluded categories.

25. Again it is important to emphasis as a matter of logic and statutory construction that an applicant must meet *all* of these criteria. If an application fails to clear any one of these hurdles, there is no obligation on the decision maker to consider the matter any further.

26. There is nothing specific to refugee law about this approach. In any statutory application, a decision maker can only be asked to deal with relevant issues. If an issue is not necessary for a decision, or would make no difference to it, it cannot be said that the decision should be quashed for failure to deal with that issue.

27. Thus returning to the asylum context, an asylum seeker could satisfy all but one of the hurdles I have mentioned above, but failure to clear that final hurdle necessitates the rejection of the application. There are a number of ways in which an individual tribunal member may deal with such a situation. The member may go through every one of the hurdles and explain whether the applicant has met the test or not, and why, concluding with the rejection of the application by reason of failure to meet at least one of those tests. A related option would be to refer to two (or more) grounds of rejection without referring to other possible grounds. Alternatively, the tribunal member may focus only on a single ground which is being decided against the applicant and set out the reason why that issue is being decided against him or her, without dealing with any of the other points in the application.

28. I need to emphasise that each of these approaches is legitimate and any of them is lawfully open to a tribunal member.'

29. It is also important to remember that credibility is not necessarily a single indivisible quality that attaches to an individual. While broad formulations such as 'X was [or 'was not'] a credible witness' are frequently used by adjudicators, what is really meant is that particular statements or claims made by that witness have been broadly or entirely accepted or rejected, as the case may be. It is perfectly possible to find some statements or claims of a witness credible and others not so – indeed, that is what often occurs. Moreover, as O'Donnell J recently pointed out in *MM v Minister for Justice and Equality* [2018] IESC 10 (at paras. 26-30), the words 'credible' and 'credibility' are used in at least two different senses. Most obviously, a finding of lack of credibility can imply, in one sense, that the testimony of a witness was deliberately untruthful or, in another sense, that it was merely honestly mistaken.

30. For those reasons also, I am satisfied that there is no basis for the applicant's unqualified assertion that the Commissioner had believed his story or, differently put, that the Commissioner had accepted his general credibility.

31. And, of course, through his own conduct in raising new and wider claims for the first time before the tribunal – *i.e.* that, rather than being the victim of a single racially motivated robbery in December 2013, he had suffered many racially motivated attacks, including a racially motivated burglary at his home in early 2013 - the applicant had both created the need for an initial assessment of the credibility of those new or wider claims and, arguably, weakened the credibility of his refugee status claim overall.

ii. did the Commissioner and, by extension, the tribunal fail in their duty of co-operation with the applicant?

32. It is trite law, deriving from the United Nations High Commissioner for Refugees ('UNHCR') *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* ('the UNHCR Handbook') (para. 196), that there is a shared duty between the applicant and examiner to ascertain and evaluate all the relevant facts. A duty upon each Member State of the European Union to assess the relevant elements of the application in cooperation with the applicant is now enshrined in Article 4(1) of Council Directive 2004/83/EC ('the Qualification Directive'). In Case C-277/11 *MM v Minister for Justice, Equality and Law Reform* ECLI:EU:C:2012:744, the Court of Justice of the European Union clarified:

'66. This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.'

33. The applicant argues that the Commissioner and, by extension, the tribunal failed in that shared duty by, in the case of the former, not properly eliciting what the applicant meant by stating at his s. 11 interview that his problems in South Africa were 'all the time' and, in the case of the latter by not seeking further specific explanations from the applicant before reaching its decision.

34. I have already instanced the open-ended attempts that the Commissioner made to elicit from the applicant precisely what he meant by his initial broad, though vague, assertion of problems all the time in South Africa and, indeed, I have set out the clarification that he provided in response. Further, as the applicant accepts, the tribunal wrote to his legal representatives on 21 August 2015, after they had lodged a notice of appeal, grounds of appeal, and his written statement, to offer them a further opportunity to provide whatever additional information or clarification they might wish on his behalf, resulting in the provision of a final submission in an email of 31 August 2015.

35. The applicant suggests that the tribunal should have gone further. I do not agree. I do not accept that the State's duty to cooperate with the applicant in assembling the elements necessary to substantiate his application extends to an obligation to go behind, or 'tease out', the applicant's own voluntary statements, whether provided in the context of a properly conducted interview or in writing through his legal representatives. After all, regard must also be had to the applicant's own shared duty of cooperation in the ascertainment of the relevant facts. As Dunne J observed in *A.C. v Refugee Appeals Tribunal & Anor* [2007] IEHC 369 (Unreported, High Court, 19th October 2007), the applicant is not a passive participant in the process.

iii. did the tribunal act in breach of a requirement to put matters to the applicant for comment before reaching a conclusion on the credibility of his claims?

36. The clear difficulty that the applicant faces in mounting this argument is encapsulated in the following passage from the decision of Mac Eochaidh J in *M.A. v Refugee Appeals Tribunal* [2015] IEHC 528 (Unreported, High Court, 31st July, 2015):

> '20. The essential case made by the applicant is that the Tribunal Member should not have made new credibility findings against the applicant on a papers only appeal without reverting to him and putting these issues to him. I reject this argument. Where the Tribunal intends to make negative credibility findings based on the statements made by the applicant during the asylum process, whether on a papers only appeal or on an oral appeal, there is no obligation to revert to the applicant to give him or her an opportunity of explaining a perceived inconsistency, a contradiction, an implausible suggestion or any other circumstance arising from what the applicant has personally said, during the application process, which causes the Tribunal Member to conclude that credibility should be rejected. The Tribunal is no more required to do this than would a judge be required on hearing implausible testimony or on noticing an inconsistency in evidence to warn a witness that a negative credibility finding is imminent. The fact that the negative credibility finding is made on a papers only appeal is irrelevant. Counsel for the applicant has referred to certain Canadian authorities said to be authority for the proposition that:-
>
> > 'the intention to make a negative credibility assessment on the basis of any perceived evidentiary inconsistency must be disclosed in a timely way, and the applicant given a fair opportunity to respond to same'. [see page 158 and footnote 427 of Hathaway & Foster, ' *The Law of Refugee Status'* (2nd edition)].
>
> I am not of the view that this is the law in Ireland. In any event, I note that negative credibility findings were made in the s. 13 report, yet none of these were specifically addressed in the notice of appeal and the accompanying written submission to the R.A.T.
>
> 21. The complaint in this case maybe based on a misconception of the requirement that certain matters must be 'put to' a witness. A witness should be given an opportunity of commenting on evidence to be given by another witness which contradicts his or her own evidence. Breach of this rule of fair procedures may result in the other evidence being excluded.
>
> 22. No reliance could be placed on material unknown to an applicant to defeat a claim for asylum. Thus, country of origin information which contradicts an applicant's narrative must be disclosed and an opportunity afforded to address it. Contrarily, it must be assumed that an applicant is aware of what he or she has said during the asylum process. It is noted that an applicant has full opportunity in an appeal, even a 'papers only' appeal to address any inconsistency, contradiction, implausibility or any other problem arising from what has been said during the asylum application process.
>
> 23. No negative credibility finding was made based on material unknown to the applicant because he is taken to be aware of what he has said personally, and because he was aware of the basis of the rejection of credibility in the s. 13 report, and he had adequate opportunity to address relevant issues during the appeal to the R.A.T.'

37. Nonetheless, the applicant in this case has succeeded in persuading Mac Eochaidh J that he has made out a substantial ground to challenge the lawfulness of the IPAT decision. In his judgment on the application for leave *ex parte*, Mac Eochaidh J explained:

> 'I accept that it might have been unlawful for the decision maker not to revert to the applicant on a credibility issue raised for the first time on a papers only appeal where credibility had been accepted at first instance. The failure to give the applicant an opportunity to deal with this issue could well be a breach of the standard of inquiry required in respect of a papers only appeal. This is particularly so where the papers only appeal results not from a perceived weakness in the applicant's narrative, but rather from the unrelated fact that South Africa is a so called 'safe country,' and pursuant to s. 13(6)(e) a papers only appeal results.
>
> If the papers only appeal had resulted from a rejection of credibility or from the absence of a Convention nexus, an applicant would be on notice that such issue is in play, and that it is required to be addressed by the applicant in the notice of appeal/appeal submissions. Failure to do so could be fatal and a decision maker is not required in such circumstances to revert on that issue.'

38. There is no doubt – and the respondents accept - that heightened vigilance is necessary in the judicial review of a papers only appeal under s. 13(5) of the Refugee Act; see, for example, *V.M. v Refugee Appeal Tribunal & Ors* [2013] IEHC 24 (High Court, Unreported (Clark J), 29th January, 2013) (at para. 21). It has more than once been stated, almost as a corollary, that the tribunal is required to take 'extreme care' in the conduct of such an appeal; see *B.Y. v Refugee Appeals Tribunal & Ors* [2015] IEHC 60 (Unreported, High Court (Stewart J), 5th February, 2015) following *V.M.,* already cited. I consider the former proposition more correctly states the position than the latter, since, while standards of review can and do vary, I am uncomfortable with the conception of a variable standard of care in decision-making.

39. In seeking to distinguish *M.A.*, the applicant principally relies on the following passage in *Idiakheua v Minister for Justice, Equality and Law Reform & Anor* [2005] IEHC 150, (Unreported, High Court (Clarke J), 10th May, 2005):

> 'If a matter is likely to be important to the determination of the [Refugee Appeals Tribunal] then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation to do so rests on the Tribunal. Even if, subsequent to a hearing, while the Tribunal member is considering his or determination an issue which was not raised, or raised to any significant extent or sufficiently at the hearing appears to the Tribunal to be of significant importance to the determination of the Tribunal then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it. This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or the applicant's legal advisors or, indeed, legal issues which might be likely only to be addressed by the applicant's advisors.'

40. The applicant also relies on the following passage from the judgment of Baker J in the High Court in *Chawke v Mahon* [2014] IEHC 398, [2014] 1 IR 788 (at 799-800):

> '[29] As stated by Clarke J. in *Idiakheua v Minister for Justice* [2005] IEHC 150 (Unreported, High Court, Clarke J., 10th May 2005) at p. 9:-
>
> "However the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them remains. In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such a body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest."
>
> [30] In that case, Clarke J. was dealing with a body of inquisitorial and not adversarial structure and he accepted as a matter of first principles that the rights explained in *In Re Haughey* [1971] IR 217 would apply to the determinations of such an inquisitorial body when the decision of that body might materially affect the rights of the person, and that imperative was properly met by giving the applicant an opportunity to comment on matters which might materially affect the decision of the Tribunal or as he put it, following White J. in *Nguedjdo v. Refugee Applications Commissioner* (High Court, White J., 23rd July, 2003) sufficient to meet a test of "*drawing reasonable attention to factors which may influence the Tribunal's determination*".'

41. The applicant submits that he comes within the principle in Idiakheua because the tribunal's concerns about the credibility of his claims of racially motivated attacks upon him were not fairly put to him, nor did the tribunal draw reasonable attention to the credibility of those assertions as a factor that may influence its determination, thus depriving him of an opportunity to engage with those issues.

42. It seems to me a point of signal importance that, in the words of Charleton J in *M.A.R.A. (Nigeria) (an infant) v Minister for Justice and Equality* [2015] 1 I.R. 561 (at 575), an appeal to the tribunal under s. 16 of the Refugee Act, whether it involves an oral hearing or not, provides a complete opportunity to present any new facts or arguments; to reargue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full. While in a papers only appeal there will be no opportunity to adduce new evidence *viva voce*, it appears to me to follow nonetheless that, in every appeal, the issue of credibility must be assessed anew by the tribunal without regard to any prior finding of the Commissioner on that issue, whether positive or negative.

43. The question, therefore, is not whether the tribunal was entitled to form a negative view about the applicant's credibility, but whether the applicant was first afforded an opportunity to deal with the credibility issues that led to the judgment of the tribunal against his interest.

44. I conclude that the applicant must have been aware that the credibility of his claims to have suffered many racially motivated attacks in South Africa and, in particular, a racially motivated burglary of his home in early 2013 was a matter likely to affect the judgment of the tribunal, since he had made those claims for the first time in a written statement submitted to the tribunal in March 2014, as part of his appeal against the recommendation made by the Commissioner in January 2014, before whom he had not raised those claims.

45. For the reasons set out earlier in this judgment, I conclude that the submission made on behalf of the applicant that the Commissioner had accepted his general credibility or, in the words of that submission, 'had believed him' is incorrect. The Commissioner had considered the substance of the applicant's claim, on the assumption that it was credible, and had found that the claim could not in any event succeed because of the availability of internal relocation in South Africa as a reasonable alternative to international protection. The Commissioner had later concluded that no issue of credibility arose in the assessment of the applicant's claim in the limited context of s. 13(6) of the Refugee Act, which contemplates, most notably in that regard, a finding that an applicant has provided statements or information so false, contradictory, misleading or incomplete as to lead to the conclusion that the claim is manifestly unfounded. The absence of any such finding on the applicant's claim is very different from the presence of a positive finding that it was generally credible.

46. Just as Mac Eochaidh J did in his decision granting the applicant leave to bring the present application, I accept that if the applicant's general credibility had been expressly accepted at first instance in respect of the same claims as he raised on appeal to the tribunal, then a failure to give the applicant an opportunity to deal with any credibility issue on those claims could well be a breach of the requirements of natural and constitutional justice and fair procedures on a papers only appeal; see the decision of Cooke J in *S.U.N. (South Africa) v Refugee Applications Commissioner* & Ors [2012] IEHC 338; [2012] 2 IR 555 . But that was not the position on the facts of this case as established by the evidence.

47. Applying the analysis of Mac Eochaidh J in *M.A.* to the facts of the present case, I conclude that there was no requirement on the tribunal to put its concerns about the credibility of the applicant's statements to the applicant for his comments before reaching its decision. Thus, its failure to do so did not amount to any breach of the applicant's entitlement to natural and constitutional justice and fair procedures.

Conclusion

48. The application is dismissed.