Neutral Citation: [2014] IEHC 499

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 466 J.R.]

BETWEEN

H. H. A. (A MINOR SUING THROUGH HIS NEXT FRIEND THOMAS DUNNING)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 2nd day of October 2014

Introduction

1. In this telescoped hearing, the applicant seeks an order of certiorari in respect of a report and recommendation of the first named respondent dated 22nd February 2010, wherein it was recommended that the applicant should not be declared a refugee. The applicant has set out a number of grounds on which he alleges that the s. 13 report of the first named respondent is defective and unlawful.

2. Before coming to the matters which are in issue between the parties to the proceedings, it is necessary to deal with the issue of the extension of time.

Extension of Time

3. It appears that the applicant received notification of the report and recommendation of the first named respondent by letter dated 1st March 2010. The notice of motion appears to have been issued on 16th April 2010. This was approximately one month outside the 14-day period provided for under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. This delay is dealt with in the affidavit sworn by the applicant's solicitor, Mr. Albert Llussa Itorra, sworn on 13th April 2010.

4. According to the applicant's solicitor, the delay occurred in the following manner: on 3rd March 2010, Mr. Llussa Itorra was referred the applicant's asylum appeal by the Refugee Legal Service (RLS) private practitioner scheme. The earliest time that a consultation could be arranged to suit the applicant's social worker and the deponent was on Monday 15th March 2010. On that morning, the applicant's solicitor received a phone call from the applicant's social worker, informing him that the applicant had been admitted into a hospital A& E Department and that the appointment had to be cancelled. The solicitor was instructed by the social worker to draft a Notice of Appeal and to consider possible grounds for judicial review. The solicitor submitted a Notice of Appeal to the third named respondent and then formed the view that there might be grounds for judicial review.

5. Counsel was instructed on 16th March 2010, and advised on 26th March 2010 that there were grounds for review.

6. On Friday 30th March 2010, the solicitor wrote to the applicant and the HSE, informing them that counsel had advised that there were grounds for review in this case and asked them to contact him immediately if they wished to arrange an appointment to discuss the matter. An appointment was requested and the earliest that the parties could meet was on Wednesday 7th April 2010. Mr. Llussa Itorra was out of the country on Thursday 1st April 2010, and the firm where he worked was closed on Tuesday 6th April 2010. The consultation was held on 7th April 2010 with the applicant and his HSE social worker and his next friend, Thomas Dunning. Following this consultation, Mr. Dunning consented to act as a next friend and the applicant gave instructions to initiate proceedings. It appears that these were commenced by Notice of Motion issued on 16th April 2010. The applicant's solicitor submits that the applicant did not himself delay in seeking to obtain advice on having the decision judicially reviewed. The solicitor submitted that any delay which seemed to be present in the case was reasonably explained by the procedural aspects of the private practitioners scheme operated by the RLS and the necessity to engage with the HSE in relation to the initiation of the within proceedings.

7. In the circumstances, I am satisfied that there was good and sufficient reason as to why the 14-day period was not adhered to in this case. It is reasonable to allow the applicant to pursue his case herein. Accordingly, I will extend time for instituting the within proceedings up to and including 16th April 2010.

Background to the Case

8. The applicant maintains that he is a Somali national of Bajuni ethnicity. He states that he was born on the island of Chula on 11th June 1992. He maintains that he was persecuted over a period of time by members of the Hawiye clan, who are a majority clan in Somalia. On one occasion, he was badly beaten by the Hawiye, leaving him with a serious leg injury. On a subsequent occasion, the Hawiye came to his house and took their three cows. On another occasion, the Hawiye forced the applicant's father to give them his boat. According to the applicant, the most serious incident occurred on 23rd July 2007, when the Hawiye again came to his house, this time looking for the applicant. He hid himself on the property. On this occasion, the Hawiye shot and killed his father and raped his mother and sisters.

9. The applicant states that on the night of that attack, he left the island in a boat with his mother and sisters. They travelled to Mombassa in Kenya, arriving the next day. The family stayed that night with a friend of his mother. The applicant's mother arranged for the applicant to leave with a trafficker named Mohammed. The man came to the house and took photographs of the applicant. On 25th July 2007, the applicant travelled with Mohammed by bus to Dar Es Salaam in Tanzania. They arrived later that day. On the following day, Mohammed brought the applicant to the British Embassy and provided him with a Tanzanian Passport in the name John Peter Thomas. The applicant gave his fingerprints and a UK visa was issued to the applicant in the name of John Peter Thomas.

10. That same evening, the applicant and Mohammed went to the airport in Dar Es Salaam and showed the travel documents in the course of boarding a flight. The applicant stated that he was told by Mohammed to say that he was Mohammed's son. They then flew, on what the applicant believes was an Ethiopian Air aeroplane, to an airport, which the applicant believed may have been in Ethiopia but he was not certain of this, although he was fairly sure that it was an African airport. The applicant states that they changed planes after two hours of waiting and flew to another airport, which he believed was in Ireland.

11. On arrival, Mohammed took back the book that they had been using as a travel document and they got into a small car driven by a friend of Mohammed. The applicant states that they drove for around two hours before coming to a house in the countryside. The applicant stayed there from July 2007 until December 2007. He was told not to go out and he just stayed indoors and watched television.

12. After some time, Mohammed told the applicant that he was going to take him somewhere in two weeks. The applicant states that during this period, Mohammed had impressed upon the applicant that he must give false dates and a false account of his travel to Ireland. On 11th December 2007, the applicant was driven for about three and a half hours by car and was left at the Offices of the Refugee Applications Commissioner (hereinafter RAC).

13. The first named respondent carried out an age assessment pursuant to s. 8(5) of the Refugee Act 1996, and found that the applicant was an unaccompanied minor and referred him to the HSE. He was 15 years old at the time. With the assistance of the HSE, he applied for refugee status on 31st July 2008. He completed his application for refugee status questionnaire on 14th August 2008. He was interviewed by the first named respondent pursuant to s. 11 of the Refugee Act 1996, on 11th February 2010. In a s. 13(1) report dated 22nd February 2010, the first named respondent recommended that the applicant not be declared a refugee.

14. In his application to the Minister for Justice, Equality and Law Reform under s. 8 of the Refugee Act 1996, the applicant had stated that he left his country of origin on 6th December 2007, and arrived in Ireland on 11th December 2007. He gave the following account of his journey to Ireland on that occasion:

> *"My mother left with her friend and came back in the evening. After one day, one man came and took photos of me. That is when my mother told me that she is preparing a journey for me and I will travel with this man. I started to cry and refused to travel alone and leave my family behind, but she insisted that I should go and that they were coming soon, just after me. So I believed her because I never thought that she would lie to me about this. Although I agreed with this, but I was not happy at all. The next day (which was the 9th) was when the man took me with him. We took a bus on that day and we arrived in the early morning of the following day at another place. So we went to a house which I think was his home. I asked him to help me with some medicine because I was not feeling well. So I thought that's my destination because he left me all alone and he went out the whole day. He told me he would be back in the evening. That evening, he came back and took me straight to the airport. He gave me a book which had my photo but not my name and directed me to show it when I was asked to do so. We were in a place with lots of foreigners. We stayed there almost an hour then we got on the plane. When we were on the plane, he told me to give him back the book. We reached a place where some people got off but we remained on the plane until we arrived here."*

15. However, prior to the s. 11 interview, the applicant had informed the RAC of what he claimed were the correct travel details. This was done by letter from the RLS dated 10th February 2010. He said that he had initially lied about his travel dates and details because the trafficker had impressed upon him the importance of not revealing his true travel itinerary.

16. The respondents make the case that the applicant only decided to come clean about his travel arrangements when the respondents had been informed by the UK Border Authority that the fingerprints of the applicant matched those of a John Peter Thomas DOB 11th June 1998, who was a Tanzanian national and who presented in Dar Es Salaam on 26th July 2007, with his Passport and was given a six-month multi-visit visa for the United Kingdom. The applicant was informed of this information and it is the respondents' case that he only decided to tell the truth about his travel arrangements when this information had been furnished to him.

17. The applicant alleges that there are a number of defects in the report issued by the first named respondent. I turn now to examine these in detail.

Fundamental Inconsistencies in finding on Identity

18. The applicant makes the case that he was treated by the respondent as a minor with a Date of Birth of 11th June 1992, and was placed in the care of the HSE. They did not question his Date of Birth. They accepted him as an unaccompanied minor. In December 2007, the applicant was interviewed for the purposes of determining his status. His physical appearance was assessed, as was his level of maturity. The applicant complains that no such assessment appeared to have been arrived at or carried out by the representatives of the first named respondent who completed the s. 13 report. His view was simply that the identity given by the trafficker when obtaining a UK visa for the applicant must be the applicant's true identity and that this was absolutely determinative of the matter. It was submitted that this was unreasonable and irrational.

19. On 5th October 2009, Sprakab, a Swedish language analysis company engaged by the respondents, found that the applicant spoke a variety of Swahili, found with certainty, not in Somalia but in Kenya. In the General Comments section, the report finds that the person, who is a man, speaks Swahili on the recording and does so to the level of a mother tongue speaker. The person states that he comes from Chula, an island in Somalia. He does not speak a variety of Swahili spoken in Somalia. He speaks a variety of Swahili, with certainty found in Kenya. The report continues:

> *"The person is asked which dialect he speaks on the recording and he says he speaks Swahili. He claims that he can speak a variety of Swahili spoken among Bajuni people in Somalia. However, when asked to speak Bajuni Swahili on the recording, he continues to speak a variety of Swahili typical of the language usage in Kenya. The person says that he has no education. However, he is using sentence constructions in a manner that implicates he has had education. The person on the recording has deficient knowledge of Chula in Somalia and some of the things he says are incorrect."*

20. The applicant contends that the Sprakab report was deeply flawed. This will be examined later in the judgment. However, without prejudice to that assertion, the applicant maintains that the first named respondent ignored the internal inconsistency and relied on the report to establish that the applicant was not a Somali of Bajuni ethnicity who had lived on Chula Island. The first named respondent does not address this inconsistency in finding, in the s. 13 report that "*one can only conclude that the applicant has deceived the authorities here and attempted to pass off as a Somali national when in fact he is from Tanzania*". The inconsistency with the Sprakab report, which suggested that the applicant was from Kenya, is ignored by the first named respondent. The applicant claims that the details in the Passport supplied by the trafficker are irrationally and unreasonably seen as conclusive regarding the

applicant's identity in the face of all other evidence.

21. The applicant also made submissions in relation to his religion. He stated that he was a Muslim. He pointed out that he has a Muslim name. In his s. 11 interview, he invited the interviewer to ask him any question about Islam and he would be happy to answer it. This invitation was not taken up by the interviewer. In the s. 13 report, the author did not take issue with the applicant's claim that he was a Muslim.

22. The applicant complains that no attempt is made in the s. 13 report to reconcile this with the fact that the Tanzanian Passport was in the name of a Christian, and the finding that the applicant's true name was John Peter Thomas.

23. It was submitted that this was another example of the respondent unfairly preferring to base his findings on the applicant's identity completely on the passport supplied by the trafficker, while totally ignoring all evidence against this.

24. The applicant argues that the decision maker has taken the easiest route of concluding that the applicant was the person named in the Tanzanian passport, rather than a fictitious name in a passport provided by the trafficker. The applicant states that in relying on the details in the Tanzanian passport, to the exclusion of all other contra-indicators, the first named respondent has opted for the shortest route possible to a conclusion on identity, in breach of natural and constitutional justice, and this has resulted in an irrational and unsafe decision in the applicant's case.

25. The applicant relied on the decision *in A.A. v. Minister for Justice and Equality* [2013] IEHC 355, where the applicant claimed to be a Somali was found to have been issued two UK visas in Dar Es Salaam in 2001 and 2004, using a Tanzanian Passport in a different name to his own. The Minister presumes that this must mean that his true identity was that contained in the Tanzanian passport i.e. he must be a Tanzanian with that name. In taking this approach, the Minister had ignored two language analysis reports which indicated that the applicant spoke Swahili with a Bajuni accent and was probably Somali. Mac Eochaidh J. quashed the Minister's decision on the basis that reliance on the UK evidence alone was insufficient:

> *"In essence, the decision maker should have balanced the evidence from the UK that the applicant was Tanzanian with the evidence from the language reports that he was Somalian. This exercise never occurred. In my view the conclusions reached in the absence of this exercise are unlawful."*

26. The respondent made the following points in relation to the criticisms of the applicant in relation to the issue of identity findings in the s. 13 report. The applicant was treated as an unaccompanied minor due to the fact that he had given his date of birth as 11th June 1992. However, there was no documentary evidence of this. The only evidence was the applicant's own statement which has been shown to be suspect in this case. The respondent pointed out that, in fact, no age assessment was carried out by the HSE. The referral by the respondent was based on the date of birth supplied by the applicant. This was put in doubt by the information by the UK Border Agency to the effect that the applicant had given a date of birth of 11th June 1988.

27. In relation to the language analysis report, it stated that the applicant spoke a version of Swahili, not found in Somalia, but found in Kenya. There was no finding that the version was or was not found in Tanzania. The applicant, in endeavouring to explain this, stated:

> *"I came to this country and stayed here for a long time before I sat for that language analysis. I have friends from Kenya, Tanzania and Congo and they speak Swahili. There is a huge possibility that I could be influenced in taking their accent."*

28. The respondent noted that the applicant, in giving this account, covers the possibility that he may be considered a Kenyan, Tanzanian or Congolese from the manner in which he speaks Swahili. The respondent pointed out that the most important thing is the fact that the applicant does not speak the Bajuni dialect which is spoken by the Bajuni people on Chula Island. This further undermined the credibly of the applicant's claim. The first named respondent has always pointed out that the language analysis report was only one element which was considered in the refugee status determination process in relation to the applicant.

29. In relation to his religion, the applicant stated he was a Muslim and volunteered to answer any questions on Islam. In the context of the false information given by the applicant at various stages, the respondent argued an ability to answer questions about Islam would not prove that the applicant was a Muslim. The responded pointed out that while the applicant had stated his name to be a Muslim name, in the absence of any documentary evidence to prove this and in circumstances where fingerprint and documentary evidence existed to show that he is known by a different name, this assertion could not be given much weight.

30. The respondent argued that none of the above matters relied upon by the applicant constituted strong evidence or evidence of such calibre to render the first named respondent's conclusions unreasonable or irrational.

31. The first named respondent also had regard to the fact that the applicant did have some knowledge of Bajuni culture and customs. However, he came to the conclusion that this was not sufficient to establish that the applicant had come from these islands. The basic questions that the applicant was unable to answer seemed to seriously question his credibility and whether he was from the Bajuni islands. While credit was given for correct information which the applicant did have, it was in the view of the first named respondent outweighed by the lack of knowledge on the part of the applicant of matters which a person from the Bajuni islands would be expected to have.

32. I am of the view that in analysing these apparent inconsistencies, the RAC had to weigh up different pieces of evidence in relation to each of the issues identified by the applicant. The weight to be attached to each of these factors was a matter for the RAC. I find no fault in the manner in which the Commissioner dealt with the evidence before him.

The Applicant's Age

33. The applicant submitted that he was an unaccompanied minor at the time of his application to the first named respondent. As such, he claims that he was entitled to the enhanced benefit of the doubt which would be afforded to minors. He states that it was wholly inappropriate of the first named respondent to disregard all guidelines on the special treatment of minors on the basis that the applicant admitted to having previously used a fake passport with a different identity and date of birth.

34. The applicant submits that if the first named respondent had done an age assessment before the s. 11 interview and had given reasons why he was reversing the age assessment assumption of December 2007 to the effect that the applicant was a minor born on 11th June, 1992, then there may have been some basis for depriving the applicant of the increased benefit of the doubt which he was entitled to as a minor. The first named respondent did none of this, instead he found that the applicant was not a minor, without

any reference to appearance or maturity and then going on to assess his credibility on the basis that he was an adult. It was submitted that this approach was fundamentally flawed and unfair.

35. The respondent submitted that given the credibility issues concerning the applicant's accounts concerning his identity and age, these matters were put to the applicant in the course of his interview and he gave answers to the various issues raised. He also put in written observations through his legal advisers.

36. The first named respondent gave consideration to whether the benefit of the doubt should be given to the applicant, but having regard to the various credibility issues surrounding the applicant's claim, considered it reasonable that the applicant should not be given the benefit of the doubt.

37. It was submitted that this was in accordance with the provisions of the UNHCR handbook which states that the benefit of the doubt should only be given where the examiner has obtained all available evidence and is satisfied as to the applicant's general credibility, which was not the case in relation to the applicant herein.

38. The respondent also pointed out that the applicant was afforded legal representation beyond a point where adults would be given such representation. At his interview in February 2010, the applicant was accompanied by a representative of the HSE, who subsequently made written submissions which were taken into account by the first named respondent. The applicant was kept informed of the process and of issues such as the information from the UK border authority as it became available. It was submitted that this was in compliance with the UNHCR Guidelines "*Refugee Children Guidelines on Protection and Care*" Geneva 1994.

39. There was considerable doubt about the applicant's true age. Given that the Tanzanian passport gave his date of birth as 11th June, 1988, it was reasonable for the Commissioner to reach the decision that the applicant was an adult. He was entitled to come to the conclusion that given the inconsistencies in the applicant's version of his travel to Ireland that he was not entitled to the benefit of the doubt. The report cannot be faulted for the findings in this regard.

Failure to Give Reasons for Rejecting Explanations
40. The applicant made the case that he had given incorrect details concerning the date of his arrival in Ireland and concerning his travel arrangements because he had been coached over six months by his trafficker not to reveal his true travel arrangements. The applicant complains that the respondent baldly rejected this explanation in the following manner in the report:-

> *"The applicant's repeated excuse that he was coached by the agent for six months before he was brought to apply for asylum is not accepted by this Office."*

41. The applicant complains that the respondent made no effort to give a reason as to why this explanation was not being accepted. It was reasonable to assume that a vulnerable minor would have been under the control and influence of his trafficker when in a strange country.

42. The applicant referred to the case of *Zhuchkova v. Minister for Justice, Equality and Law Reform & Anor* [2004] IEHC 414, where Clarke J. found that a rational analysis must be clear where an adverse credibility finding is made:-

> *"It does, however, seem to me to be arguable that there is a wider principle, being the one identified by Peart J. [in Da Silveiria] when he says that the finding cannot be based simply upon a gut feeling or a view based on experience or instinct that the truth is not being told. A finding of lack of credibility, it is at least arguable, must therefore be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told."*

43. In that case, the applicants had given additional evidence at their Tribunal hearing which had not been given earlier in their asylum claim. The Tribunal Member in that case had rejected this evidence as not credible without explaining why. Clarke J. went on to analyse the credibility assessment in the case thus:-

> *"Applying that general principle to the facts of this case, it seems to me that while there is an appearance of a rational reason, it is again at least arguable that on closer analysis there is in substance no true or proper analysis leading to such a conclusion. Essentially, the reason given is that because additional facts are relied upon, and because the Tribunal member did not accept the explanation given for those additional facts being relied upon, the overall credibility of both applicants was found to have been tarnished to a sufficient extent to reject all of their evidence. But is any reason given why the explanation is not to be accepted? I have been informed that both applicants gave evidence of their explanation. There was no contrary evidence given to suggest that their explanation was incorrect. It might be possible to draw an inference that the explanation could not be correct from a detailed analysis of the record of both the questionnaire and the interview. Indeed, Miss Farrell, for the respondents, pointed to some factors, which it might be argued, might lead to such a conclusion. However, there is no evidence that these were factors that weighed in the mind of the Tribunal member on the occasion in question. He simply states that he did not find the explanations credible. He gives no reason for that, and that seems to me to be precisely the kind of exercise which Peart J in Da Silveiria indicated should not be engaged in."*

44. The applicant submitted that the failure of the first named respondent to give reasons for rejecting the applicant's explanations was fatal to the s. 13 report.

45. The respondents submitted that the applicant had been given an opportunity in the interview to explain why he gave false and misleading information regarding his travel to this country. Even within his new account of how he travelled to this State he provided further information which simply could not be true (that he had travelled on the same aeroplane from Ethiopia to Ireland when there are no direct flights from there; that his agent had presented both passports when they arrived at Dublin Airport when this is not possible at immigration control in the airport; and that he had used a UK Visa to enter Ireland).

46. The first named respondent stated that although the applicant was blaming the agent for the fact that he failed to mention any of the information he gave at interview when he made his application and completed his questionnaire, he did not find this acceptable. He stated that the applicant knew the importance of being truthful when he made his asylum application and considered that if the information regarding the applicant's fingerprints had not been made available, the applicant would not have told him the truth at the interview.

47. In his general analysis of the applicant's credibility in the s. 13 report, the first named respondent noted how the applicant indicated at the beginning of his interview that there were some untruths in his questionnaire, namely dates and countries he

travelled through. He notes that later on in the interview he blamed the inconsistencies on the agent whom he claimed coached him on what to say in his asylum application. The first named respondent then concluded that given the length of time the applicant had spent in this country without coming clean on these matters and informing the office of the Refugee Applications Commissioner about the untruths, they only further undermined his credibility.

48. Looking at the overall asylum application of the applicant, it was reasonable for the first named applicant to conclude as he did that the applicant's repeated excuse that the false and misleading information he provided was due to coaching by an agent for six months was not credible. Even when the applicant attempted to supply the "*true version*" of events he continued to lie about his travel arrangements and how he arrived in the State. The applicant was given an opportunity to provide his excuse and it was within the jurisdiction of the first named respondent not to consider the excuse or reason to be acceptable.

49. I am satisfied that the findings made by the first named respondent were supported by the evidence. It was open to the first named respondent to conclude that the applicant only gave the true version about his travel details when he was informed of the UK border authority's information on the basis of the fingerprints. Given that he only told this version on the eve of s. 11 interview in February 2010, it was reasonable to conclude that this was not due to the continued effect of the coaching by the traffickers in the months prior to December 2007. Furthermore, the respondent was entitled to have regard to the fact that even the "*new version*" of his travel to Ireland had inconsistencies which could not be explained. The Commissioner was entitled to the view that these further untruths further contributed to a negative credibility finding against the applicant.

Visa Applications
50. The applicant complains that the Commissioner made a finding that it was not possible for the applicant to acquire a UK Visa using a false passport. The Commissioner *stated "it is not credible that the agent could arrange a false document and the applicant would be granted a UK Visa on this false document"*. Further he stated:-

> *"It is not credible that the applicant could gain a Visa for UK while using a false or altered passport."*

51. The applicant maintains that a cursory look at country of origin information revealed that the problem of people obtaining Visas on false documents was something that the British High Commission in Tanzania had taken steps to address. In support of this assertion, the applicant pointed to an article on the African Press International website which revealed that in a four month survey by the British High Commission in Tanzania that 22% of the applicants used false documents. Furthermore, the applicant pointed to another website which stated that the British High Commission in Dar es Salaam stopped accepting Visa applications in December 2008 and from that time onwards, Tanzanian Visa applications were processed by the British High Commission in Nairobi, Kenya.

52. The applicant submitted that the Commissioner had been wrong to come to the conclusion that it was not possible to acquire a Visa for the UK on a forged passport. In reaching such a conclusion, it was submitted that the s. 13 report was unsafe and based on speculation and a major error of fact.

53. The respondent submitted that a reading of the first newspaper article referred to by the applicant, shows that the problem of the issuance of Visas based on fake documents (some 22% of all visas issued) arose from "*drop-by*" applicants made on Fridays and that the practice was being discontinued and such "*drop-by*" applications would have to be made between Monday to Friday. The respondent submitted that in circumstances where this applicant presented in person at the British High Commission and was fingerprinted, the chance of such fraudulent behaviour occurring and succeeding would seem to be unlikely.

54. The respondent further submitted that the second newspaper article referred to by the applicant, was part of the UK Government's plan to restructure its operations known as "*Hub and Spoke Visa Processing"* and was not, as seemed to be implied in the submissions related to fraudulent applications in Tanzania.

55. The respondent rejected the suggestion that the Commissioner's view that it was not credible that the applicant could get a UK Visa on a fake passport, was based on speculation or conjecture. The respondent pointed to the case of *Adekunle v. Refugee Appeals Tribunal* (Unreported, High Court, 8th October, 2009), where Clark J. held that:-

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

56. The respondent submitted that the principle of curial deference can be afforded to specialist bodies such as the RAT or RAC. This principle allows the affording of curial deference to the first named respondent in relation to UK Visa applications and the procedure involved in the making of same, given the volume of claims dealt with by the first named respondent.

57. The first named respondent had raised the issue of the obtaining of the UK Visa with the applicant and had given him an opportunity to respond to the doubts held by the first named respondent in relation to this part of his claim. It was submitted that it was open to the respondent to reach the conclusion that he did.

58. Given that the article relied upon showed that the false documentation only arose in a minority of applications in Dar es Salaam and given the circumstances of the Visa application by the applicant it cannot be said that there was no or very slim evidence to support the view taken by the first named respondent.

59. I agree with the submissions of the respondent on this aspect. It was open to the first named respondent to reach the view that he did in relation to the issuance of the UK Visa, having regard to the applicant's own account as to how he came to obtain it.

Language Analysis
60. The applicant attended for a language analysis interview on 24th September, 2009. He had a recorded conversation on the telephone with an analyst working for the Swedish company Sprakab. A report was subsequently issued on 5th October, 2009. The applicant takes issue with this report in a number of respects. Firstly, it is argued that the analyst in purporting to comment on the applicant's knowledge of Bajuni custom and culture, were going into an area in respect of which they had no expertise or competence. This approach was criticised by the Scottish Court of Session in *MAbN v. Advocate General for Scotland* [2013] CSIH 68, in the following terms:-

> *"I find it convenient to deal first with the criticism made by the appellants concerning the inclusion in respect of 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. I consider that counsel was right to make that concession…the fact that the Swedish company thus issued reports containing such expressions of opinion for which, as counsel for the Attorney General properly accepted, there was no valid expert basis appears to me to call into question, to some extent, the faith which the Upper Tribunal in R.B. placed in the evidence of Fru Fernqvist as to the reliability and integrity of the company and which appears to have prompted that Tribunal to give any future or other Sprakab reports the badge of authority and validity which it did."

61. The applicant further points out the linguist in this case did not appear to have a bachelor's degree in linguistics as required by Sprakab's own literature. The biographical details given for the linguist in the case did not appear to have a bachelor's degree in linguistics nor was their background in African languages. The biographical information on the two anonymous analysts showed that their academic background was in sociology and political science. It was submitted that it would be unsafe to rely on a report where the analysts and linguist did not conform to Sprakab's own criteria in this regard.

62. The applicant cited the following passage from the MAbN decision in relation to the expertise of the Sprakab analyst:-

"A fundamental criticism is that nothing is contained in either report to indicate that either analyst EA17 or EA20 had any expertise in the identification of Somali dialects, or importantly, their geographical and social distribution. Being a native speaker of a language does not confer expertise in the identification of dialects within that language, their particular features, or the geographical or social distribution of the dialect."

63. The applicant accepts that following on the decision of *FMJ v. RAC* [2010] IEHC 251, that Sprakab reports are admissible in evidence. However, given the frailties in relation to the personnel conducting the test and the methodology used, it was submitted that the Commissioner should have given the report very little or no weight at all.

64. The respondents submit that the applicant was given the opportunity to make submissions on the Sprakab report and he made detailed submissions in a letter from his legal advisers dated 3rd November, 2009. The respondent considered this submission and gave a response by letter dated 17th December, 2009. Further submissions and documentation were provided by the applicant by letter dated 26th January, 2010, prior to the s. 11 interview.

65. The respondent points out that it was open to the applicant to obtain his own language analysis report based on the CD of his original interview which had been furnished to him. He did not avail of this opportunity. The respondent submitted that the language analysis report was only one piece of evidence which would not be considered in isolation, but would form part of the overall evaluation of the evidence in the case. The respondent made six separate credibility findings against the applicant before even addressing the language analysis report. The findings of the language analysis report were put to the applicant in the s. 11 interview and he had replied that as he had friends from Kenya, Tanzania and Congo, there was a possibility that he could be influenced in taking on their accent.

66. In the circumstances, it was submitted that the applicant was given the opportunity to answer the issues raised in the Sprakab report. He made extensive submissions in relation to the language analysis report. He was given a fair opportunity to make representations in relation to the report. He could also obtain his own report if required.

67. The respondent noted that the applicant's legal advisers relied heavily on *MAbN* decision which was strongly critical of Sprakab reports and their methodology. That case is under appeal to the United Kingdom Supreme Court. Reference was made to the decision of *R.B. v. Secretary of State for Home Department* [2010] UKUT 329. In that case, the following endorsement of Sprakab reports were given:-

"Linguistic analysis reports from Sprakab are entitled to considerable weight. That conclusion derives from the data available to Sprakab and the process it uses. They should not be treated as infallible but evidence opposing them will need to deal with the particular factors identified in the report."

68. Having considered the submissions made, I have come to the conclusion that the applicant was given a fair opportunity to deal with the language analysis report. He made extensive written submissions through his lawyers, and he was also given the opportunity to comment on the findings in the report in his s. 11 interview. In the circumstances, he was given every opportunity to make his views known on the language analysis report.

69. The weight to be given to the report by the RAC was a matter for the Commissioner. I am satisfied that the Commissioner acted within jurisdiction when he had regard to the language analysis report. He treated it as one aspect of the evidence and considered it in a fair and reasonable manner. The Commissioner's report cannot be faulted on account of the way that he dealt with the Sprakab report therein.

Availability of Appeal

70. The applicant argues that as his claim turns on an assessment of credibility, an assessment of his age and an assessment of the way he speaks and the knowledge that he holds regarding the Bajuni people and Chula Island, the finding of the Commissioner on these issues would be very difficult if not impossible to challenge by way of a non-oral appeal. It is submitted that in these circumstances it is appropriate to proceed by way of judicial review of the RAC decision rather than by appeal to the RAT. In the s. 13 report, the first named respondent had recommended that s. 13(6)(b) of the Refugee Act 1996, is appropriate to this application. On that account, the applicant's appeal to the RAT would be a non-oral appeal.

71. The applicant submitted that it is clear from the authorities that the availability of an appeal is not a bar to relief by way of judicial review. In *Tomlinson v. Criminal Injuries Compensation Tribunal* [2005] 4 I.R. 321, Denham J. stated as follows:-

"The existence of the alternative remedy does not prevent the Court from exercising its discretion as to whether or not to grant judicial review. While a court would lean towards requiring that the remedies available under the scheme be exhausted, the ultimate decision depends on the circumstances of the case."

72. Denham J. made similar comments in *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 2003, where the Supreme Court granted *certiorari* of a first instance refugee status determination notwithstanding the availability of an appeal. A number of High Court decisions have stressed that a grant of *certiorari*, where a statutory appeal is available, should be the exception rather than the rule. Thus, in *BNN v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 719, Hedigan J. held as follows:-

"An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the Refugee Appeals Tribunal.

By way of example, I would note that a clear and compelling case that an injustice at the Office of the Refugee Applications Commissioner is incapable of being remedied on appeal to the Refugee Appeals Tribunal might be demonstrated where the Office of the Refugee Applications Commissioner officer's findings include one or more of the findings specified in s. 13(6) of the Refugee Act 1996, as inserted by s. 7(h) of the Immigration Act 2003. These findings include, inter alia, that the applicant failed to show a minimal basis for the contention that he or she is a refugee; made false, contradictory, misleading or incomplete statements leading to the conclusion that the application is manifestly unfounded; or failed to make an application as soon as reasonably practicable after arrival in the State, without reasonable cause. Any appeal against an Office of the Refugee Applications Commissioner report that includes such findings must be determined without an oral hearing, in accordance with s. 13(5) of the Act of 1996. As noted by Clarke J. in Moyosola v. Refugee Applications Commissioner [2005] IEHC 218, (Unreported, High Court, Clarke J., 23rd June, 2005) at p. 6, '[t]he combined effect of s. 13(5) and 13(6) is to impose significant limitations on the extent of the appeal that will be available to an applicant to the Refugee Appeals Tribunal'. For that reason, an injustice complained of may be incapable of being remedied on appeal and this may constitute one of the rare and limited circumstances where the applicant may be entitled to judicial review of an Office of the Refugee Applications Commissioner decision."

73. The applicant accepted that the availability of an oral appeal will not justify judicial review over appeal in every case. In *P.S. (A Minor) v. RAC* [2009] IEHC 298, it was stated as follows:-

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

74. The applicant drew a distinction between this case and the circumstances in the *P.S.* case where the issue turned on a consideration of country of origin information. In the present case, it was submitted that the applicant's credibility had been fundamentally called into question and it was submitted that his only way of overturning this would be by expressing in person his age, level of maturity, Bajuni accent, knowledge of Bajuni customs and culture and explanations for initially withholding details from the first named respondent. He submitted that the profound problems that existed in relation to the s. 13 report, were of a type that was incapable of being remedied by way of an non-oral appeal.

75. The respondent argued that no demeanour or findings relating to the manner in which the applicant gave his evidence were made by the first named respondent. All of the findings related to the content of the evidence and the reason why the applicant has not been afforded an oral hearing at the Tribunal relates to the logical connection between the applicant providing false and misleading information to the first named respondent and his credibility.

76. The respondent submitted that the Sprakab report was only one element in the overall finding of lack of credibility relative to the applicant. In the instant case, a full response was made by the first named respondent to the submissions made by the applicant criticising the Sprakab report and the process used by Sprakab. The CD at the Sprakab interview was supplied to the applicant.

77. The respondent submitted that it was open to the applicant to address in writing all of the findings of the first named respondent, the age and nationality issues arising out of the existence of the information from the UK BA and the applicant has already set out herein written arguments and country of origin information which he considers can counter that information, he can provide written explanations as to why he did not have particular knowledge of Bajuni customs and cultures. The written criticisms of the applicant in relation to Sprakab can be put before the Refugee Appeals Tribunal which may form different views to those expressed by the first named respondent and a contra language analysis report can be obtained. In these circumstances, the first named respondent submitted that the applicant was not unduly prejudice by only having a non-oral appeal to the RAT.

78. I am satisfied that in this case where the appeal to the RAT would be a non-oral appeal, it is reasonable for the applicant to seek judicial review of the RAC report rather than proceed by way of appeal to the RAT. Where the applicant feels that his chances of being successful would be severely curtailed due to the non-oral nature of the appeal. In these circumstances, the existence of a non-oral appeal is not a bar to proceedings by way of judicial review. Accordingly, the applicant may proceed by way of judicial review notwithstanding the existence of an appeal to the RAT.

Conclusion

79. For the reasons set out herein, I am satisfied that the applicant has failed to establish that there are good grounds to quash the report and recommendation of the first named respondent dated 22nd February, 2010. Accordingly, I refuse the applicant's claim to relief in these proceedings.