Neutral Citation: [2015] IEHC 91

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 72 J.R.]

BETWEEN

K. H. A.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 23rd day of January, 2015

Introduction
1. This is a telescoped hearing in which the applicant seeks an order of *certiorari* by way of judicial review in respect of a decision of the first named respondent (hereinafter referred to as "*RAT*") dated 30th November, 2009.

Extension of Time
2. The letter notifying the applicant of the decision challenged herein was dated 7th December, 2009. The notice of motion herein was filed in the Central Office of the High Court on 26th January, 2010. This was after the expiry of the fourteen day time limit within which to bring these proceedings as stipulated by s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The matters giving rise to the deadline being missed and explaining the delay have been set out in an affidavit sworn by the applicant on 26th January, 2010.

3. The applicant states that following receipt of the letter of 7th December, 2009, she made contact with her present solicitors. She was extremely upset and distressed with the decision and its contents and wished, if at all possible, to challenge it and she conveyed this to her solicitors.

4. She was advised of the options available to her, one of which included the bringing of these proceedings. She states that she was advised by her solicitors that the delay in bringing the application herein arose solely in the following circumstances: it was necessary for her solicitors to request her file from the Refugee Legal Service which was done by letter dated 18th December, 2009. The Refugee Legal Service then sent a letter dated 22nd December, 2009, to her solicitors enclosing their file in the matter. This letter with the enclosed file was received by the applicant's solicitors on 5th January, 2010.

5. The applicant states that her solicitor sent a letter of 11th January, 2010, to the Refugee Legal Service requesting documentation which was missing from the papers furnished to the solicitors.

6. The applicant states that by letter dated 14th January, 2010, the Refugee Legal Service sent the missing documentation to her solicitors. They then sent the papers to counsel on 20th January, 2010. By email of 24th January, 2010, counsel advised the solicitors that he considered that there were substantial grounds for challenging the RAT decision by way of judicial review. In the email, counsel raised a query regarding certain documentation concerning her case. This query necessitated interaction between the solicitors and counsel on the following day.

7. The applicant states that she was advised by her solicitors that the papers for the application herein were drafted as soon as was practicable. She states that any delay in the bringing of the application herein did not arise through her fault and was occasioned solely for the reasons and in the circumstances she has outlined.

8. I am satisfied that the delay in this case was caused by the fact that the applicant had to change solicitors in relation to the bringing of these proceedings. Also, the time within which actions were to be taken coincided with the Christmas holiday period. The delay in the matter was not due to any fault on the part of the applicant. In addition, there does not seem to be any prejudice suffered by the respondents if an extension of time is given. In the circumstances, therefore, I will make an order extending the time for the bringing of these proceedings up to and including 26th January, 2010.

Background
9. The applicant is a married woman who was born in 1951. She has five children. She states that she is an Ethiopian national of Oromo ethnicity. She states that her husband was a prominent member of the Oromo Liberation Front (OLF).

10. The applicant states that in May 2006, her village in Yaballo was attacked by the Guijii militia who were acting as a proxy militia for the Ethiopian State. She states that in the attack she was raped by two soldiers and was shot in the stomach as she attempted to flee. She was rushed to hospital where she underwent surgery for removal of the bullet and a hysterectomy had to be performed. The applicant states that she was in hospital for three weeks and that while she was detained in hospital, her husband was arrested and taken away, and she has not seen him since that time.

11. When she returned home, the applicant claims that she was visited by the militia every second day and they questioned her about her husband's activities. In July, 2006, the applicant states that she escaped to another village, Moyaley, where her mother and sister were living. After ten days in that location, she claims that she was arrested by government forces and taken back to Yaballo where she was put in prison.

12. The applicant states that she was kept in prison for six months and that she was interrogated weekly and that this was followed by punching, kicking and beating with sticks. After those six months, the applicant says that she was released and asked to sign a document stating that she would not flee the country. After two days, she claimed that she escaped to Kenya by bus and stayed

there for four months with fellow villagers just across the border in Kenya. From there, she claims that she went to Nairobi where she stayed for two months and from there, with money from her sisters and from the sale of property, she was able to come to Dublin by plane. She states that she arrived in Ireland on 2nd August, 2007.

13. The applicant filled out the usual documentation leading to an asylum application. She was interviewed under s. 11 of the Refugee Act 1996 (as amended). In a report pursuant to s. 13 of the Refugee Act 1996 (as amended), the Office of the Refugee Applications Commissioner recommended that the applicant should not be declared a refugee. The applicant appealed this recommendation to the RAT and her case was heard on 30th July, 2009.

14. In a decision dated 30th November, 2009, the RAT affirmed the recommendation of the Refugee Applications Commissioner and declared that the applicant should not be deemed a refugee. The applicant has sought to challenge this decision in these proceedings.

Grounds of challenge to the RAT decision

(i) Failure to consider medical and psychological evidence
15. The applicant had no medical evidence from her time in Ethiopia. She stated that she had received a discharge note from the hospital when she was discharged in 2006, but that she did not bring this with her when she fled from Ethiopia. The applicant furnished a SPIRASI report dated 25th November, 2007. In the conclusion section of the report, it was stated as follows:-

> *"She was…very nervous and had difficulty in relating her story and often forgot to tell of important events or incidents that occurred to her. This was particularly noticeable in the episode when she related of her rape by two of the soldiers. This in fact often happens because a patient may have blocked out an incident and would try to forget it because relating the event is extremely painful.*
>
> *On physical examination, Ms. A's abdominal scar is highly consistent with her story of being shot and of the bullet lodging in her uterus, which was subsequently removed in a hysterectomy. On mental state assessment, her psychological symptoms are also indicative of Post Traumatic Stress."*

16. The applicant submitted that this medical report significantly supported her claim before the RAT.

17. The applicant complains that this medical evidence was not considered in depth by the RAT. The RAT made the following reference to the medical evidence in its decision:-

> *"The physical examination is to the effect that the abdominal scar is highly consistent with the applicant's story of being shot and that a bullet lodging in the uterus which was subsequently removed in a hysterectomy. The applicant has no medical evidence of any kind from Ethiopia to support the sequelae she presented with in Ireland and while she had received a hospital discharge notice relating to the treatment in hospital in Yaballo in June 2006, the applicant left this behind her prior to coming to Ireland."*

18. The applicant submitted that this passage was the only consideration of the medical evidence in the SPIRASI report. It was noted that the psychological symptoms indicative of Post Traumatic Stress were not mentioned at all. The applicant submitted that the Tribunal had failed to conduct a rational analysis of the medical evidence. No express reason was given for why the applicant's credibility could be rejected in spite of the very strong physical evidence of the applicant having been shot and having been subjected to a hysterectomy in order to have the bullet removed. Insofar as it could be inferred from the decision that a reason for rejecting the medical evidence in the SPIRASI report was that the applicant had failed to produce medical documentation from Ethiopia, the applicant submitted that any such reason would be wholly inadequate as a basis for doubting the expert evidence contained in the medical report.

19. The applicant referred to a line of cases in which decisions of the Tribunal have been found to be invalid (or leave has been granted to argue that they were invalid) for failure to explain adequately why medical evidence with a direct bearing on credibility was rejected, or why the applicant's account was not accepted in light of the medical evidence.

20. In *Khazadi v. Minister for Justice* (Unreported, Gilligan J., 19th April, 2007), the court came to the following conclusions:-

> *"Now, I take the view in the circumstances that arise that the Tribunal Member in considering any assessment of the applicant's credibility was required to consider, as part of his deliberations, the medical evidence in total that was before him and was obliged as part of a rational analysis to explain having considered the medical evidence along with the other evidence that was before him why in the view of the Tribunal Member, the applicant was not telling the truth and his credibility was undermined…*
>
> *I take the view that as regards the content of paragraph 36 of the decision where the member refers to the fact that the decision had been reached in the light of records and reports that were submitted to the Tribunal, it is not sufficient on the vital issue as to the applicant's credibility and the vital issue of the totality of the medical evidence that was before him for the member, simply to say without rationalising the basis of his decision that the decision was made in the light of certain reports which, in effect are unidentified.*
>
> *My overall conclusion is that the medical evidence that was before the Tribunal should have been considered, weighed in the balance and a rational explanation given as to why it was being rejected in circumstances where the Tribunal Member was making a finding that the applicant was not credible.*
>
> *Where had he conducted his reference to the medical evidence at the right forensic time it is, at least, possible that he would have come to a different conclusion."*

21. In *N.M. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 130, McGovern J. stated as follows in relation to the consideration of medical reports:-

> *"10. The Tribunal member is entitled to weigh up the account of the applicant and his credibility in deciding whether to accept medical reports. But where the medical reports appear to support the applicant's claim, I think that it is incumbent on the Tribunal member to specifically deal with the medical reports and state why he does not accept them.*

11. It is no doubt true that the applicant's anxiety or Post Traumatic Stress Disorder which was found by the doctors, could be due to reasons other than torture. But it seems to me that where the medical evidence is significantly supportive of the applicant's claim, that cogent reasons for rejecting it should be furnished and, in my view, the Tribunal member has failed to do this."

22. In *A.M.N. v. Refugee Appeals Tribunal* [2012] IEHC 393, McDermott J. stated as follows in relation to the consideration of medical reports:-

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

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

23. The applicant also referred to the cases of *TMAA v. Refugee Appeals Tribunal* [2009] IEHC 23, and *RMK (DRC) v. Refugee Appeals Tribunal* [2010] IEHC 367.

24. The applicant submitted that the cases outlined above were cases in which there was certainly material before the decision maker to ground an adverse finding on credibility, but in which the High Court took the view that the medical evidence was such that, had it been properly and fully considered, it could have tipped the scale in the applicant's favour. Thus, it should have been dealt with specifically; the decision maker should have been explicit about whether it was accepted and, if not accepted, why that was the case.

25. The applicant also submitted that there is a parallel line of cases in which decisions of the Tribunal have been upheld by the High Court despite the decision maker not engaging with medical evidence or summarily dismissing such evidence. In this regard, the applicant referred to *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 and J.L. v. Refugee Appeals Tribunal [2008] IEHC 254.

26. The applicant submitted that the obligation on the Tribunal to engage with medical evidence and set out a rational analysis of why a negative credibility finding is being made will depend on the overall quality (and, in some cases, the quantity) of the medical evidence in question. It may also depend on how strong the negative credibility findings are. It was submitted that in cases such as *N.M.* and *Khazadi*, the High Court found that the respective strength of the medical evidence as compared with the credibility findings was such that the decision maker was required expressly to give cogent reasons for not believing that the applicant had been tortured in the manner alleged. In other cases, such as *M.E.* and *J.L.,* the medical evidence was of rather less objective value and was not strong enough to warrant express consideration in the light of the factors cited against credibility, such that the decision maker was accordingly entitled to deal with it in a less reasoned manner or dismiss it summarily.

27. It was submitted that in the decided cases on medical evidence where applicants were successful, there was often some legitimate basis for the negative credibility finding, but the strength of the medical evidence was such that, had the Tribunal addressed it more fully, it could have tipped the balance. In the cases in which applicants were unsuccessful, the medical evidence was weaker, such that in the court's view a more extensive analysis of it would not have made any difference.

28. The applicant submitted that in this case, had the medical evidence been adequately considered in a reasoned manner, it could have tipped the balance in favour of the benefit of the doubt being applied. None of the findings pertaining to credibility was of such force to outweigh the very strong medical evidence (as well as the psychological evidence) to the extent that it could be dismissed in such a summary fashion. Having regard to the medical evidence in this case, and taking into account those adverse credibility findings which were made by the decision maker, this case falls on the side of the line of cases in which the decision maker was under an express obligation to deal specifically with the medical evidence and to give proper and adequate reasons for its rejection if it was not accepted. It was submitted that the Tribunal failed to discharge that duty in this case and that the applicant submitted that its decisions is thus unlawful.

29. The respondent submitted that in considering this challenge, the case made by the applicant must be borne in mind. She had alleged that she had a fear of persecution in Ethiopia on account of her husband's involvement with the OLF. That claim was not believed by the Tribunal and it was submitted that the SPIRASI report contained nothing capable of displacing that.

30. The respondent submitted that in *Pamba v. Refugee Appeals Tribunal* (Unreported, Cooke J., 19th May, 2009), an argument similar to that made by the applicant was rejected by Cooke J. who upheld the Tribunal's decision and assessment of the SPIRASI report contained therein. Thus, at para. 20, he stated:-

"Counsel for the applicant places emphasis on the fact that the assessment of the applicant in the report should have been considered and, if necessary, explained away as being incompatible with the weight placed in the contested decision on the demeanour of the applicant, her evasiveness, failures of recollection, and even petulance… The Court considers that there is no specific or concrete finding, assertion or opinion in that report which would run so counter to the Tribunal member's primary assessment of the applicant's personal credibility as to require distinct explanation or statement of reasons. The Tribunal member does not in that sense reject the Spirasi report as is suggested in the ground advanced, he simply considers that it does not weigh sufficiently in the balance to upset the appraisal of the fundamental lack of credibility in the applicant's own direct testimony."

31. Cooke J. went on to say at para. 22:-

"There is no necessary connection between the applicant's condition as presented to the medical expert and the events in her claim. The expert confirms that she is anxious, distressed, terrified of returning to Uganda and suffering from post-traumatic stress disorder, but the opinion is not so obviously or necessarily incompatible with the appraisal of credibility made by the Tribunal member as to require a distinct statement of reasons as to why it did not operate to change the Tribunal member's mind."

32. The respondents relied heavily on the decision of Clark J. in *N.R.M. (DRC) v. Refugee Appeals Tribunal & Ors.* [2014] IEHC 120. The respondent submitted that the facts in that case were very similar to the claim made by the applicant in these proceedings. In the *N.R.M*. case, the applicant was a national of the Democratic Republic of Congo (DRC) and applied for asylum in March 2008, claiming to have left Kinshasa two days earlier and travelled to Ireland. She claimed to fear persecution at the hands of the DRC Government by reason of her religion and political opinion. In relation to the religious aspect of her claim, she said that she was a long standing member of one Pastor Cutino's Eglise Armee de Victoire. Insofar as the political ground was concerned, she said that she was a member of the Movement for the Liberation of Congo ("*MLC*").

33. The applicant in that case stated that her problems began when Pastor Cutino was arrested in 2006. She was discovered by the soldiers who arrested him who then injured her with a knife in the stomach, resulting in significant abdominal scarring which was referred to in a number of medical reports and photographs furnished to the asylum authorities. By January, 2007, she had fully recovered and returned to her voluntary work with her church. Separately, she claimed that she had been persecuted in the DRC on account of her membership of the MLC, suffering assaults and abductions in 2007, during which she had been warned to give up her support for the MLC or face death. Lastly, she claimed that in 2008, two government agents came to her home and offered to pay her a sum of money to poison Pastor Cutino, who was by then in jail. She decided to flee but was apprehended, jailed and then tortured and repeatedly raped. A prison guard, who knew her father, arranged her escape and took her to Ireland using his wife's Portuguese passport.

34. The Commissioner considered her claim to lack credibility and recommended that she not be declared a refugee. She appealed that decision and submitted a SPIRASI medical report in which the doctor noted that her mood was subjectively and objectively depressed, that she was suffering with a depressive disorder, that she had an irregular abdominal scar which was highly consistent with her reported history of stabbing in 2006 and that she fulfilled the criteria for a diagnosis of PTSD. She also submitted photographs of her abdominal scarring and a discharge note from a Dublin hospital outlining a recent admission for acute abdominal pain and investigations which revealed the presence of fibroids and also extensive scarring from abdominal surgery post stabbing, allegedly with a machete.

35. The Tribunal upheld the Commissioner's recommendation on the basis of a number of adverse credibility findings. The applicant then sought to quash the Tribunal's decision by way of judicial review on the basis that, notwithstanding the credibility findings which were not challenged by her, the Tribunal had failed to properly to consider the SPIRASI medical report and also failed to explain why that evidence has not given any or any appropriate weight.

36. Clark J. held that the Tribunal's assessment of the SPIRASI report was lawful. The judgment noted that there was nothing to suggest that the applicant had been specifically targeted in 2006 or that members of her church were generally persecuted, or that, if she was returned to the DRC, she would be persecuted because she was a member of the Pastor's church. They pointed out that her claimed fear of persecution was based on her asserted refusal to poison the Pastor in March 2008 and the events which followed, over which it noted there was a great deal of scepticism. As the events of 2006 were not the cause of her asserted flight and were not the cause of the PTSD described in the SPIRASI report, then as serious as the scarring was to the applicant, it had no real relevance to her claim or to the SPIRASI report, except that it contributed to her low self-esteem.

37. The court took the view that it was difficult to understand what more a Tribunal was supposed to do with this objective medical report other than to note its content, especially when the balance of evidence was overwhelming in favour of a finding of a lack of credibility. It stated that it was absurd to suggest that the Tribunal's findings should be invalidated simply because the applicant's self-reporting of events to SPIRASI was consistent with her account to the Commissioner and Tribunal.

38. It was submitted that applying Clark J.'s analysis to this case, it was clear that the content of the SPIRASI report provided no basis for displacing the Tribunal's appraisal of the credibility of the applicant's claim to fear persecution on account of her husband's alleged involvement in the OLF which, she alleged, had led to her twice being arrested and detained by Ethiopian state agents in 2006 and 2007 and prompted her to flee to Ireland as per p. 8 of her s. 11 interview notes where she said:-

"I felt my husband's involvement in the OLF would place me at risk. That is why I fled Ethiopia and came to Ireland."

39. However, the Tribunal's decision records that she displayed no knowledge of the OLF, her husband's involvement in it or of Ethiopian politics generally. While she maintains that she had suffered injury in the 2006 attack on her village, it therefore had, in the words of Clark J. in *N.R.M.*, "*no real relevance*" to her claim and the manner in which the Tribunal dealt with the SPIRASI report was perfectly lawful, as it simply did not believe that her husband had any involvement with the OLF at all having regard to her ignorance of the OLF and politics in Ethiopia in general, meaning that she was not at risk of persecution on that account.

40. I am satisfied that the SPIRASI report was a significant piece of evidence which supported the applicant's core story. It deserved to be considered carefully. If the RAT was going to disregard or reject this evidence, there was a duty on it to give clear reasons why the report was being rejected. The RAT decision merely refers in passing to the wound to the stomach and does not deal with the psychological findings at all. In the circumstances, I am satisfied that in reaching its decision, the Tribunal erred in law in failing to consider the medical report adequately and failing to give any adequate reason or explanation for rejecting the probative value of the report. The decision of the RAT is thus unlawful on this account.

(ii) Risk based on Oromo ethnicity per se

41. The applicant submitted that the Tribunal failed to assess whether, even if the credibility of her narrative was not accepted, the applicant by reason of her Oromo ethnicity *per se* would be at risk of persecution in Ethiopia in light of the country information.

42. At the Tribunal hearing, the applicant's counsel had submitted to the Tribunal a collation of information regarding treatment of Oromo in Ethiopia compiled by the Refugee Document Centre. This document provided objective information in support of the proposition that an Oromo person would, simply on account of his or her ethnicity, face a risk of persecution in Ethiopia.

43. The applicant also submitted that a printout from the website of the OLF had been presented to ORAC, and had been accepted by it by a source of objective country information about Ethiopia. The documentation stated that the Oromo people had been subjected to gross discrimination, oppression, subjugation, exploitation and above all, extermination at the hands of the Ethiopian

authorities.

44. The affidavit from the OLF European Regional Office dated 10th August, 2008 and the letter from the Association of Oromo Community in Ireland dated 16th July, 2009, also provided evidence of persecution of Oromo in Ethiopia.

45. The applicant submitted that the Tribunal failed to assess the discreet aspect of the applicant's claim of entitlement to refugee status by reason of her Oromo ethnicity per se. It was submitted that in this regard, the Tribunal acted in breach of Regulation 5(1)(a) and (b) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), failed to have regard to relevant considerations and acted in breach of natural and constitutional justice.

46. The applicant submitted that given that authoritative country information was put before the Tribunal indicating that an Oromo is at risk of persecution in Ethiopia simply by reason of his or her ethnicity, on this basis, the applicant submitted that the Tribunal was under a duty to engage with the issue of whether she was entitled to refugee status based on her being an Oromo per se even if the Tribunal did not believe her account of events.

47. The applicant submitted that the decision herein was vitiated by a failure of the Tribunal to make clear whether or not it was accepting the applicant's claim to be an Oromo from Ethiopia. There was an obligation on the Tribunal in this case to give individual consideration to the applicant's potential entitlement to refugee status simply by reason of being an Ethiopian of Oromo ethnicity. The Tribunal Member in the decision herein failed to weigh the merits of this matter anywhere in the decision.

48. The applicant submitted in her submissions that the case law established the following principles:-

> (i) where country information indicates that there is a specific risk of persecution to a particular category of person simply by virtue of membership of that category, there is an obligation on the Tribunal to consider and make a specific finding on a claim by an applicant to belong to that group of persons;
>
> (ii) a failure to do so will invalidate the decision;
>
> (iii) it matters not that a claim to belong to the particular group is itself an assertion which could be said to be dependent on an applicant's personal credibility – rejecting the credibility of a specific account of events given by the applicant also claiming membership of the risk category does not obviate the duty to make a specific finding on the claim to belong to that particular class.

49. The applicant submitted that the principles set out above can be gleaned, *inter alia*, from the following cases: in *Salim v. RAT* (Unreported, Birmingham J., 15th September, 2010), it was held that if the applicant was accepted as being Somali of Bajuni ethnicity, this of itself may be sufficient to have him declared a refugee, even if his personal history was disbelieved. In the course of his judgment, Birmingham J. stated:-

> *"Overall and the view that I have formed is that the question of ethnicity and nationality was absolutely central to the case that the applicant was going to advance. If he was accepted as being of Somali nationality and Bajuni ethnicity, then even if the specific account that he gave of the events in 2003 on the island and of the circumstances in which his parents came to lose their lives was disbelieved, then the fact that, even though that was disbelieved, he was nonetheless of the claimed nationality and ethnicity would have provided a significant and substantial basis where his claim had to be considered and it seems to me that a decision that leaves one guessing as to whether or not that was the view of the Tribunal Member is arguably, in the sense that there are substantial grounds for contending such a decision is inherently flawed."*

50. In *M.T.T.K. (DRC) v. Refugee Appeals Tribunal & Ors.* [2012] IEHC 155, the applicant claimed that he was of Tutsi extraction or Rwandan affiliation and that that was enough to render him a subject of persecution in DRC. The court held, applying the judgment in *Salim* that the RAT did not weigh the merits of this claim. This was a matter that ought to have been considered by the RAT. The RAT failed to consider this issue and on that point alone, its decision could not stand. See also the decisions in *C.B. (DR Congo) v. Refugee Appeals Tribunal & Ors.* [2012] IEHC 487 and *A.A.S. v. Refugee Appeals Tribunal & Ors.* [2013] IEHC 44. The applicant submitted that the decision in this case breached these principles and was accordingly invalid.

51. The respondent submitted that the burden of proof rested on the applicant to show that she was a refugee: see in this regard the decision of McDermott J. in *E.O.I. v. Refugee Appeals Tribunal & Anor.* [2014] IEHC 107. It was submitted that if the applicant believed that she was at risk of persecution in Ethiopia solely by reason of her Oromo ethnicity, it was incumbent on her to make that case. She failed to put forward any cogent evidence to support such a claim. She therefore cannot impugn the Tribunal's decision on this basis.

52. It was submitted that a perusal of the country of origin information showed that the only members of the Oromo group that the Ethiopian authorities were concerned about, were those who were members or supporters of the OLF. It was therefore submitted that, as the applicant's claim to fear persecution as the wife of a member of the OLF lacked credibility, there was no further basis for contending that she was at risk, the country of origin information failing to support a claim that there was general persecution of the Oromo in Ethiopia.

53. The respondent submitted that a similar type of argument was rejected by Irvine J. in *F.V. v. Refugee Appeals Tribunal & Anor.* [2009] IEHC 268. In that case, the applicant had claimed that he would be subjected to persecution as a failed asylum seeker if returned to Togo. The Tribunal held that the assessment of such a claim did not fall within its remit and was properly a matter for the Minister. Irvine J. held that the Tribunal had erred in that regard but that the error was not material and would not lead to the decision being quashed, because the applicant had failed to show any evidential basis for the contention that failed asylum seekers were persecuted in Togo.

54. The respondents also cited the decision of Mac Eochaidh J. in *P.M. v. Minister for Justice, Equality, and Law Reform & Anor.* [2014] IEHC 9. In that case the applicant was a national of Zimbabwe who claimed to fear persecution there on the basis of her membership of the MDC opposition party. The Tribunal disbelieved her claim in that regard and considered that she could safely return to Zimbabwe. The applicant sought to impugn that finding on the basis of lack of reasons. The court, however, rejected her challenge. It recalled that the core of her claim was that her participation in opposition party politics caused her to suffer past persecution and to fear future persecution. It noted that the Tribunal simply did not believe that she ever had a well founded fear of persecution on that basis. Accordingly, her implausible claim was not capable of grounding a fear of persecution.

55. I am satisfied that the Tribunal Member ought to have made a finding as to whether or not the applicant was an Ethiopian of Oromo ethnicity. There was credible COI before the Tribunal that the Oromo suffer persecution in Ethiopia simply due to their ethnicity. In the circumstances, it was possible that the applicant could be found to be a subject of persecution simply by virtue of her membership of this ethnic group. This aspect should have been addressed by the Tribunal in its decision. Thus, even if her story that she feared persecution due to her marriage to a leading member of the OLF was not held to be credible, there could still have been a finding of persecution due to her membership of the Oromo ethnic group per se. This aspect should have been considered by the Tribunal in its decision.

(iii) The OLF Documentation
56. The applicant had submitted before the RAT an affidavit from the OLF European Regional Office in Berlin dated 10th August, 2008 and a letter from the Association of Oromo Community in Ireland dated 16th July, 2009. It was submitted that the said affidavit and letter provided material support for the applicant's claim of eligibility for asylum. These documents prove, or at least tend to prove, the applicant's Ethiopian nationality and Oromo ethnicity.

57. The applicant submitted that the first named respondent erred in law in failing to conduct a rational analysis of the said documents and failed to explain on the basis of cogent and adequate reasons why, in the light of those documents, the applicant's credibility was not accepted or why the said documentary evidence was rejected. The applicant submits that the decision's deficiency in this regard invalidates it. Where an adverse credibility finding involves discounting or rejecting documentary evidence which is *prima facie* relevant to a fact pertinent to a material aspect of the credibility issue, the reasons for that rejection must be stated: see *I.R. v. Minister for Justice, Equality and Law Reform & Anor.* [2009] IEHC 353.

58. The respondent submitted that it was clear that the Tribunal was simply unable to place any real weight on these documents. The OLF affidavit simply described her as an Oromo national and an active supporter of the OLF. However, it did not say what prompted its issue, nor specify the deponent's means of knowledge.

59. In *A.I.M.Z. v. Refugee Applications Commissioner & Ors.* [2008] IEHC 420, the applicant had a letter from a Swedish official of the opposition party in Iran saying that the applicant was a member of that group. Clark J. upheld the decision of the Tribunal in declining to give any weight to the contents of the letter. She held that this was correct as the content of the letter had been written by someone who seemingly did not know the applicant.

60. The respondent submitted that in this case there was no evidence at all before the court, nor was there any evidence before the Tribunal, that the deponent knew the applicant as might have entitled him to describe her as an "*active supporter*" of the OLF organisation. Indeed, it was pointed out that the Tribunal noted that its description of her ran counter to her own account of having nothing to do with the OLF, a further factor which meant that little weight could be placed upon the affidavit.

61. The respondent submitted that the letter from the Association of Oromo Community in Ireland added nothing to the applicant's claim, save to vouch for her Oromo ethnicity. The writer states that he knows her only from the time she came to Ireland and appears to be dependent on her for the assertions made as to her background. In the circumstances that letter does not impinge in any way on the Tribunal's appraisal of credibility.

62. I am of the view that the respondent's submissions in this regard are correct. The documentation was not of any great probative value, due to the fact that the deponent of the affidavit does not say that he knows the applicant, or how he can make the averment that she was an "*active supporter*" of the OLF. This runs counter to some of her own statements to the effect that she personally had nothing to do with the OLF.

63. The letter from the Association of Oromo Community in Ireland adds nothing save to vouch for her Oromo ethnicity. The writer of the letter was clearly reliant upon what he was told by the applicant for the content of the letter. In the circumstances, it does not add anything to the Tribunal's assessment of her credibility. The Tribunal cannot be faulted for the manner in which it dealt with this documentation in its decision.

(iv) Differential Risk
64. The Tribunal held that the attack on the applicant's village in which the applicant claimed to have been shot and wounded, could not amount to past persecution of the applicant as the attack was indiscriminate; the applicant had not been specifically targeted and she was at no greater risk than others caught up in the attack. The Tribunal stated as follows:-

> *"Country of origin information available to the Tribunal supports the applicant's claim that an attack did indeed occur on the village at this time. However, the applicant on her own testimony to the Tribunal made no claim that she, or her husband or her family home had been targeted specifically by the militia at this time. The applicant told the Tribunal that other neighbours' houses and neighbouring villages were burned by the militia. From the applicant's own account and country of origin information available, it seems to be the case that the attack was indiscriminate and whilst it is most unfortunate that the applicant may have been raped and wounded in the attack, the Commissioner was of the view, as is the Tribunal, that the applicant was not at greater risk than the many others caught up in the incident."*

65. In relation to the issue of deferential risk, the applicant had regard to a document published by the UN High Commissioner for Refugees entitled "*Interpreting Article 1 of the 1951 Convention relating to the status of Refugees",* (1st April, 2001), where it was stated at paras. 20 and 21:-

> *"20. It is sometimes argued that the 1951 Convention does not provide a suitable legal framework for addressing present-day refugee problems, as these often occur in the context of war and armed conflicts. In a similar vein, national jurisprudence in some countries has developed criteria arguing that in order for it to be said that an asylum-seeker is persecuted, he or she must be 'singled out' or in some way 'individually targeted'. Courts in yet other States, while accepting that civil war as such neither rules out nor suffices to found refugee status, use criteria such as a 'differential risk' or 'differential impact'. These criteria tend, however, to obscure two key facts: i) even in war or conflict situations, persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons; and ii) war and violence are themselves often used as instruments of persecution. They are frequently the means chosen by the persecutors to repress or eliminate specific groups, targeted on account of their ethnicity or other affiliations.*
>
> *21. It should be recalled that the Convention was drafted in the aftermath of World War II, at least in part as a means of protecting victims of persecution in that war. Where conflicts are rooted in ethnic, religious or political differences which specifically victimise those fleeing, as is so often the case today, persons fleeing such conflicts would qualify as 1951 Convention refugees. The Executive Committee has reaffirmed this on a number of occasions, most recently*

during its 1998 session. Likewise, on a proper interpretation of Article 1, it is not relevant how large or indeed how small the affected group may be. Whole communities may risk or suffer persecution for Convention reasons, and the fact that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim. On the contrary, such facts should facilitate recognition, as the sociological process of marginalisation that such stigmatisation engenders is a powerful archetype of persecution. This approach, counselled by the Handbook and in various Executive Committee Conclusions, has also been adopted by refugee scholars and in well-reasoned jurisprudence."

66. It was submitted that when considering the applicant's evidence of a politically-motivated and/or ethnically-motivated attack on her village, the RAT erred in law and acted *ultra vires* the 1996 Act and the 2006 Regulations by applying a "*differential risk*" test and thereby, in effect, imposing additional criteria for the applicant to satisfy beyond the definition of a "*refugee*" under s. 2 of the 1996 Act and the 2006 Regulations.

67. The applicant conceded that her submissions in this regard are made notwithstanding the leave judgment in *A.M.S.J. v. Refugee Appeals Tribunal* [2010] IEHC 144, in which Clark J. considering principles at the leave threshold, appeared to accept as good law the decision of the House of Lords in *Adan v. Home Secretary [*1999] 1 A.C. 293. The applicant submits that *Adan* was wrongly decided. In support of this contention the applicant relied on an extract from Prof. Goodwin-Gil's work on "*The Refugee in International Law*", 3rd Ed. (2007) at pp. 127-128 as well as the above extract from the UNHCR document of 1st April, 2001.

68. The applicant also placed reliance on the Australian case of *Minister for Immigration and Multicultural Affairs v. Abdi* [1999] FCA 299.

69. The respondent also submitted that *Adan* is not authority for the proposition that one cannot be a refugee where one faces a risk of persecution as a member of a group of persons who face a shared risk for a convention ground; the principle in *Adan* is confined to situations of civil war. The applicant's village was targeted by government backed militia for reasons of ethnicity and this was not in a situation of civil war.

70. The respondent submitted that the "*differential impact*" test derives from the decision of the House of Lords in *Adan v. Secretary of State for the Home Department* [1998] 2 WLR 702 and it was submitted as authority for the proposition that the killing, torture and ill treatment inherent in a civil war situation, particularly a clan based civil war, will not give rise to a well founded fear of persecution and, hence, to an entitlement to refugee status, where the asylum seeker is at no greater risk of such ill treatment by reason of his clan or sub-clan membership than others in the war situation. *Adan* requires the consideration be given to the distinction between the ordinary risks of civil war on the one hand and cases involving a "*differential impact*" on a convention ground.

71. The respondent submitted that the legitimacy of the *Adan* test had been confirmed by the Qualifications Directive (implemented in the State by the EC (Eligibility of Protection) Regulations 2006 and the EU (Subsidiary Protection) Regulations 2013, which provides for the conferral of subsidiary protection on persons who do not qualify as refugees. One of the three bases upon which subsidiary protection may be conferred is where there is a "*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*". This makes clear that being caught up in such violence, whether in a situation of clan warfare or otherwise, will not result in the conferral of refugee status.

72. The respondent submitted that this ground had not been made out by the applicant. The Tribunal simply noted in its decision that it seemed to be the case that the attack was indiscriminate and that the applicant was not at greater risk than many others caught up in the incident.

73. I am satisfied that while it is possible to establish a right to refugee status by virtue of an attack, it is not necessary for an applicant to establish that they were targeted specifically in some way over and above the other persons in the attack. In any event, the applicant had not made the case that she or her husband were specifically targeted in the attack by the Guijii militia in May 2006. The extract from the Tribunal decision was not a finding that the applicant had to establish that she was singled out for treatment by the militia in 2006, but was merely a statement of the evidence as given by the applicant before the Tribunal. The applicant does not have any legitimate ground for complaint on this aspect.

Conclusions

74. For the reasons set out herein, I will quash the decision of the RAT for failure to pay proper heed to the medical evidence in this case and for failing to make any finding as to whether the applicant would be capable of being declared a refugee due to her Oromo ethnicity per se. The matter will be referred back to the RAT for reconsideration by a different Tribunal Member.