THE COURT OF APPEAL

IN THE MATTER OF SECTION 21 OF THE REFUGEE ACT 1996

Birmingham P
Edwards J
Hedigan J

Neutral Citation Number: [2018] IECA 303

[107/2017]

S.A.S

Appellant

And

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Respondent

AND

[108/2017]

A.A.S

Appellant

And

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Respondent

JUDGMENT of Mr. Justice Hedigan delivered on the 2nd day of October 2018

The Appeal
1. This is an appeal against a judgment of Stewart J in the High Court dismissing the appellants' statutory appeals against the Minister's decision to revoke their refugee status. The Minister's decisions, issued on the 13th July 2012 were made pursuant to section 21 (1) (h) of the Refugee Act, 1996 (as amended) on the basis that the appellants had provided information during the asylum process that was false or misleading.

Background
2. The appellants were both aged 16 years when they arrived in Ireland in December 2005. They applied for asylum as unaccompanied minors on the 9th of December 2005. They originally described themselves as brothers. They now describe themselves as cousins.

3. The appellants filled out questionnaires as part of their asylum application. S.A.S., the first-named appellant, claimed that he was a Somali national from Ras Kamboni, born on the 31st of January 1989. He claimed that his parents were killed when he was a child and that he moved to Koyama, where he lived with his uncle and cousin, the latter being the second-named appellant, A.A.S.

4. A.A.S. stated that he was a Somali national from Koyama and was born on the 12th of December 1989. By way of background, Koyama is a Somali island and the second largest island of the Bajuni Islands archipelago in the Indian Ocean, situated 1.5 km from the mainland coast of Somalia.

5. Both appellants stated that they had travelled from Koyama and arrived in Mombasa, Kenya on the 26th of November 2005, with A.A.S.'s father and younger brother. They stayed with a friend of A.A.S.'s father in Mombasa. Both appellants referred to an incident in which they were arrested in Mombasa - they stated that their family was arrested by police for failure to produce documents. They were all detained for a few days and released upon the payment of a bribe by a friend of A.A.S.'s father. The appellants, through A.A.S.'s father, organised travel to Ireland with the assistance of an agent. A.A.S.'s father and brother returned to Koyama.

6. The appellants did not recollect much detail of their journey to Ireland, however they both stated that they had spent a few hours in an unknown country. They stated that they travelled by airplane from Nairobi through an unknown country to Ireland.

7. Having applied for refugee status on the 9th of December 2005, an interview was conducted with each of the appellants on the 2nd of June 2006. They were questioned about their knowledge of Koyama. In both appellants' cases, the Office of the Refugee Applications Commissioner (hereafter "ORAC") recommended that the appellants not be granted refugee status, on grounds of credibility, relating to their lack of knowledge of the Bajuni Islands. This ground of refusal is set out in section 11B of the Refugee Act, 1996 (as amended). In short, the Commissioner did not believe that the appellants were from Somalia. The appellants appealed to the Refugee Appeals Tribunal, both contending that they should be given the benefit of the doubt. The Refugee Appeals Tribunal decided that the appellants should be given refugee status, stating in one case: "[t]he Tribunal accepts that the applicant is probably Bajuni. He may or may not be from Somalia".

8. A series of e-mails (exhibited in the course of the High Court proceedings) showed that the Investigations Liaison Unit of the ORAC had provided A.A.S.'s fingerprints to the UK Border Agency when he applied for Irish citizenship in 2011 as part of a background check. This was stated to be done through Eurodac procedures. This check resulted in a fingerprint match with a person stated to be a Tanzanian national. As a result of the match, S.A.S.'s fingerprints were also checked and they also matched another Tanzanian national according to the UK records.

9. Eurodac is a European Union database which allows for the comparison of fingerprints of asylum seekers in each Member State. When a person applies for asylum in the EU, a copy of their fingerprints is stored on the Eurodac system. Eurodac's primary objective is to serve the implementation of Regulation 604/20133 ("the Dublin Regulation") and together these two instruments make up what is commonly referred to as the Dublin system. The Dublin Regulation is a European Union regulation that determines the Member State

responsible for examining an application for asylum seekers seeking international protection under the Geneva Convention and the EU Qualification Directive.

10. The information provided by the UK authorities stated as follows: A.A.S. and S.A.S. applied for a UK visit visa on the 29th of April 2005, using Tanzanian passports, with their father named as their sponsor. Their father was also applying for a visit visa and listed the appellants as his son and nephew. The visas were refused due to discrepancies between the father's application and a previous application made by him. The appellants made another application for UK visit visas on the 30th of June 2005, using the same Tanzanian passports. The applicants' interviews were stated to be a Tier 1 interview in the case of A.A.S. and a Tier 3 interview in the case of S.A.S. Both appellants were issued visas in Dar es Salaam at the British High Commission (BHC), where both appellants were interviewed and fingerprinted. The stated purpose of the visa was to enable both appellants to visit the UK with their father. The visits were valid from the 30th of June 2005 to the 30th of December 2005. Neither of the appellant's visas was ever used.

11. Following discovery of the matching fingerprints, in correspondence dated the 25th of January 2012 from an official of the Ministerial Decisions Unit of the Irish Naturalisation and Immigration Service, both appellants were informed that the Minister proposed to revoke their declaration of status as refugees. This proposal was based upon the above information obtained from the UK Border Agency through the Eurodac procedures. In both letters, the appellants were informed that it appeared that they had given false and misleading information during the course of their asylum applications, in that they had not disclosed that they had applied for and had been granted visas to the UK with Tanzanian passports at Dar es Salaam in Tanzania. They were both given the opportunity to make representations. It is important to note that the appellants were not informed at this stage that the Irish authorities were aware of both appellants having been fingerprinted in the BHC in Dar es Salaam (this Court's emphasis).

12. The appellants' solicitors replied by letters respectively dated the 2nd and 7th of February 2012, advising that they were awaiting copies of their clients' asylum files from their previous solicitors, and seeking a copy of the Tanzanian passport with visas referred to in the Minister's correspondence. The copy Tanzanian passports provided by the UK Border Agency were provided in each case, and by letter dated the 21st of February 2012 the appellants' solicitors made identical representations for each.

13. The appellants' solicitors in correspondence set out reasons why the revocations should not occur. They contended that the obtaining of the Tanzanian passports and the UK visas was done fraudulently by an agent on the appellant's behalf. The correspondence stated that because the appellants are Somali nationals, they had no choice but to travel on fraudulently obtained documents procured from an agent in Kenya with their family's help.

14. The letters stated as follows:

> "Our clients contracted an agent in Kenya who did all the necessary arrangements for their travel to Europe. This must have included applying for a Tanzanian passport and for the necessary visas, including a UK visa. […]
>
> Our clients could not have travelled abroad and seek and obtain international protection, without internationally recognised passports and visas. The fact that the agent who arranged for our client's travel applied for and obtained a Tanzanian passport and UK visas does not necessarily of itself prove that our clients are nationals of Tanzania. This is particularly the case in circumstances where the Tanzanian passports and UK visas used to travel do not appear to be bio-metric passports, which means they did not have a computer chip embedded in them and therefore could easily have been forged. It is our understanding that the UK authorities did not require fingerprinting evidence in relation to visa applications made in Tanzania at the time our clients obtained such visas (2005)".

15. Further enquiries were made with the UK authorities as a result of the appellants' solicitors' correspondence. It emerged that the appellants had in fact been part of a trial in which their fingerprints had been taken and their passports checked in the BHC in Dar es Salaam.

16. By letter dated the 4th of April 2012, the official at the Ministerial Decisions Unit wrote the following to the appellant's solicitors:

> "In your letter dated the 21st of February 2012, you stated that your clients contacted an agent in Kenya who did all the necessary arrangements for their travel to Europe, including the procurement of a Tanzanian passport and UK visas.
>
> As a result of these representations further enquiries were made with the UK authorities regarding the procurement of visas in Tanzania. Please find enclosed copy of letter received which confirms that at the time of your clients' application for a UK visa, all visa applicants were required to attend in person in order to receive their visa. This clearly contradicts your clients' testimony. The submission of the birth certificate does not negate these facts.
>
> In addition, the following questions were put to the UK authorities regarding your client in particular:
>
> - Would checks have been done at the time on passports for possible forgeries particularly in cases where the passports were non-biometric passports?
>
> A. Yes, there would have been checks. Also, both applicants were interviewed as part of the process. A.S. had a Tier 1 interview and S.S. had a Tier 3. The latter would have been more rigorous than the former, but all the basic stuff would have been covered in person.
>
> - Was fingerprinting required by the UK in 2005 for visa applicants applying in Tanzania?
>
> A. No, as per original letter it commenced in 2007.
>
> - If so, can the UK confirm whether the fingerprints for both these applicants were taken in Tanzania?
>
> A. We did some trialling of fingerprints in Tanzania, commencing in 2004/05, but it became mandatory in 2007. It does look as though prints may have been taken as part of the trial activity as there is nothing else recorded against which such a match could have been made.
>
> - In 2005 did visa applicants have to present themselves at the BHC in Dar es Salaam either to apply or to collect visas?
>
> A. Yes, and as above, both were interviewed at this time. They also both made visa applications on 29th April, 2005 – both refused – using the same passports."

17. A letter from the UK Border Agency was enclosed with the letter setting out details of the above, dated the 4th of August 2011, predating the above correspondence by some eight months.

18. The appellants' solicitors replied by letter dated the 4th of May 2012, requesting copies of all enquiries made to the UK Border Agency in respect of the appellants. The letter stated that because the UK had initiated the biometric passports after the appellants' visas were procured, there were failures in the process and the system was open to fraud at the time that the visas were granted. The letter also states that it may not have been the appellants but other persons that attended the BHC that day.

19. The official at the Ministerial Decisions Unit responded by letter dated the 17th of May 2012, enclosing therewith e-mails from the UK Border Agency confirming that the appellants' fingerprints were taken at the BHC in Dar es Salaam in 2005, as part of a trial process. The appellants' solicitors responded by letter dated the 5th of June 2012, wherein it was stated that the appellants had no recollection of attending said office or being in Dar es Salaam. It was suggested that the unknown location which the appellants stopped in while travelling from Nairobi to Dublin could have been Dar es Salaam, where the visas may have been organised. The letter also stated that the appellants were very young at the time, and were following the instructions of their father, and later the agent, and if they had a valid visa for the UK, they would have gone there to claim asylum instead of illegally entering Ireland. The appellants then submitted letters from the Somali Association of Ireland attesting to their nationality as Somali, and their active participation in the Somali community in the State.

20. On the 13th of June 2012, the Ministerial Decisions Unit's Higher Executive Officer prepared two documents setting out her recommendation that both appellants' refugee status be revoked. These documents were then signed and approved by an Assistant Principal Officer on the 28th of June 2012, a Principal Officer on the 22nd of July 2012, and the Minister's secretary on the 4th of August 2012.

21. The appellants in the High Court appealed the respondent's decision to revoke their refugee status, as notified to them by letters dated the 13th of July 2012. The reasoning was identical in both revocations. The letter(s) set out the following:

> "I am directed by the Minister for Justice and Equality to refer to your declaration as a refugee in accordance with s. 17 of the Refugee Act 1996 (as amended). I refer also to the Minister's earlier proposal to revoke your refugee status in accordance with the provisions of s. 21 of the same Act. For the reasons set out in his proposal to revoke letter, dated 25th January, 2012, the Minister has decided in accordance with s. 21 of the Refugee Act, 1996 (as amended) to revoke your declaration as a refugee. Specifically the Minister is invoking s. 21(1)(h) of that Act to revoke the declaration on the grounds that you a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular.
>
> 1. You failed to disclose the fact that you were granted a visa for the UK.
>
> 2. You provided false or misleading information in a material particular during the course of your asylum claim stating that you are a national of Somalia when in fact all credible evidence indicates that you are in fact a citizen of Tanzania.
>
> 3. You were granted refugee status on the basis of your assertion that you were a Somali national of Bajuni ethnicity.
>
> 4. No credible evidence has been provided to indicate that you are other than a Tanzanian national.
>
> You provided false and misleading information in a material particular during the course of your asylum claim stating that you are a Somali national of Bajuni ethnicity.
>
> All credible evidence available to the Minister indicates that you are in fact a Tanzanian national.
>
> Before making his decision, the Minister took into account all information on file, including all representations received by or on your behalf.
>
> As your refugee status is now revoked, the letter issued to you on 31st August, 2006 declaring you to be a refugee is no longer valid. Please return the original document post haste. Please return any Convention travel documents issued to you, as you are no longer entitled to hold same.
>
> You may appeal to the High Court under s. 21(5) of the Refugee Act 1996 (as amended) against the decision of the Minister within 15 working days of the date of this notice. The United Nations High Commissioner for Refugees, Daly Lynch Crowe & Morris, your solicitors and the Garda National Immigration Bureau have been informed of the Minister's decision and of the reasons for it."

The appellants availed of this right of appeal to the High Court. Having heard that appeal, the High Court dismissed it in a judgment delivered on the 20th of January 2017.

Decision of the High Court

22. In the High Court Ms Justice Stewart delivered judgment as follows:

> *"35. In arriving at its decision, the Court has paid particular regard to the applicants' failure to disclose details of the passport visas they had used to travel, which they now say were fraudulently obtained and are in some way irrelevant to the matters which the Minister had to decide. In the course of their asylum application, they provided no identity documentation whatsoever. It is also of relevance to the Court's decision that the applicants gave different accounts of their involvement with the UK Border Agency during the revocation process. The decision-makers were satisfied that they had withheld information and had only seen fit to divulge that information when faced with unequivocal proof of their applications for UK visas and the fingerprinting that had taken place at the British High Commission in Dar es Salaam. The appellants produced Somali birth certificates during the revocation process. This contradicted the position they adopted during the asylum process, in which they indicated that they had no identity documents whatsoever.*
>
> *36. This appeal falls to be determined on the basis of the Court reaching a conclusion as to whether or not the asylum application would have been decided differently if the information which is now before the Minister had been before the Tribunal Member when the RAT decided to afford the benefit of the doubt to the appellants in respect of ORAC's refusal*

of their application for refugee status. I am satisfied that the content of this new information and, in particular, the appellants' failure to disclose information during the asylum process related to the Tanzanian passports is and would have been central to their application for refugee status. If the appellants are not Somali nationals, their claims during the asylum process of persecution based on that nationality are simply untrue. In my view, the appellants have not discharged the burden of proof needed to warrant this Court's interference with the Minister's decision to revoke the appellants' refugee status. It must be borne in mind that these events were triggered by an application for citizenship by A.S. and that the information contained in the passports suggests that the appellants are in fact brothers (rather than cousins). The evidence can lead to no other conclusion than that the Tribunal member would have decided the appeal against ORAC's decision differently, had all the information been put before them.

37. For the reasons outlined above I would refuse reliefs sought."

Relevant Statutory Provisions

23. Section 11B of the Refugee Act 1996 (as amended) sets out the following relating to the credibility of those seeking asylum:

"Credibility.

11B.—The Commissioner or the Tribunal, as the case may be, in assessing the credibility of an applicant for the purposes of the investigation of his or her application or the determination of an appeal in respect of his or her application, shall have regard to the following:

(a) whether the applicant possesses identity documents, and, if not, whether he or she has provided a reasonable explanation for the absence of such documents;

(b) whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence;

(c) whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State;

[....]

(f) whether the applicant has adduced manifestly false evidence in support of his or her application, or has otherwise made false representations, either orally or in writing;

[....]

(m) whether, in the case of an application to which section 16 applies, the applicant has furnished information in relation to the application which he or she could reasonably have furnished during the investigation of the application by the Commissioner but did not so furnish."

24. Section 21 of the Refugee Act 1996 (as amended) sets out the conditions for the revocation of refugee status:

"Revocation of declaration.

21.-(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—

[…]

(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular,

the Minister may, if he or she considers it appropriate to do so, revoke the declaration.

[…]

(3) (a) Where the Minister proposes to revoke a declaration under subsection (1), he or she shall send a notice in writing to the person concerned of his or her proposal and of the reasons for it and shall at the same time send a copy thereof to the person's solicitor (if known) and to the High Commissioner.

(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the issue of the notification, make representations in writing to the Minister and the Minister shall—

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) send a notice in writing to the person of his or her decision and of the reasons for it.

(4) (a) A notice under subsection (3)(a) shall include a statement that the person concerned may make representations in writing to the Minister within 15 working days of the issue by the Minister of the notice.

(b) A notice under subsection (3) (b) (ii) shall include a statement that the person concerned may appeal to the High Court under subsection (5) against the decision of the Minister to revoke a declaration under subsection (1) within 15 working days from the date of the notice.

(5) A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration.

(6) A person concerned shall not be required to leave the State before the expiry of 15 working days from the date of

notice of a proposal under subsection (3) and, if an appeal is brought against the decision of the Minister, before the final determination or, as the case may be, the withdrawal of the appeal."

Submissions of the Appellants

25. The appellants raise the following issues:

I. What is the meaning and significance of evidence, including evidence of a 'fingerprint' hit with UK visa applications made in Tanzania, tendered against the appellants by the respondent? Does this evidence necessarily outweigh other evidence that the Appellants are in fact Somali, including Somali birth certificates and that, at all stages in the Refugee Application process, it was acknowledged that they communicated in the Bajuni dialect, used by people originally from the Bajuni islands off Somalia?

II. On which party does the burden of proof rest in these appeals? Does the approach of the respondent in disclosing evidence selectively, deprive the respondent of any right which might otherwise exist to place the burden of proof on the Applicant?

III. Does the approach of the respondent in disclosing evidence selectively, deprive the respondent of any right which might otherwise exist to place the burden of proof on the applicant?

IV. Was the evidence relied upon by the respondent, which was sourced using the EU Eurodac system for establishing which Member State has responsibility for assessing an asylum claim, lawfully or fairly obtained, and should the Court set aside the revocation in the event that it was not?

Evidence Tendered Against Appellants by Respondent

Birth certificates of parties

26. The birth certificates provided by the appellants after the revocation procedure had commenced were found not to be of strong evidential value by the respondent and the High Court.

27. It is submitted that it was wrong of the High Court to cast doubt over the merits of the appellants' claims by questioning why they did not provide birth certificates in the first instance, and noting that the birth certificates were only provided after the commencement of the revocation procedure. Due to the lack of a state administration in Somalia, it was impossible for the appellants to procure official documents at the time of their asylum applications. Counsel for the appellants submitted that it is easier now for Somalians than it was before to procure birth certificates, and that the appellants have done so through contacting family members still present in Somalia. The appellants were required by the respondent to prove that they were Somalian after the revocation procedure commenced, and they used the resources available to them to do so.

Biological relationship of the parties

28. The High Court incorrectly found that the information received from the UK indicated that the appellants were brothers, meaning that their initial claim to be cousins was false.

Probity of the evidence of the UK visa application

29. Counsel for the appellants highlight how emails from UK officials sent to the respondent contained numerous peculiarities. In the appellants' first visa applications, dated the 29th of April 2005, the applications of the appellants as children accompanying the visit visa of A.A.S., the father and uncle of the appellants, were refused. The refusal letter refers to the appellants as A.A.S's son as A.A.S., and his nephew as S.A.S. The UK official's description of the application stated that "they named their father as A.A.S", inconsistent with the original decision.

30. In the second visa applications, dated the 30th of June 2005, A.A.S. and S.A.S. applied for visit visas two months after the previous refusal, and most unusually, the appellants were granted visas on the same date. The fact that the application, interview and decision all occurred on the same day suggests that the decision was made in breach of the intended rules and procedures for visa applications in Dar es Salaam.

31. It appears perverse for the respondent to be able to successfully rely on the proposition that a bona fide visa application based upon a genuine passport has occurred, when the information suggests that two children were given 'unskilled worker' and 'skilled worker' interviews respectively (no record of interview or summary is kept), and are sponsored by a company for a one week visit visa to the UK with a person whom the UK refers to as the father of each appellant, which is disputed.

32. The respondent and the High Court paid no heed to the obvious peculiarities with the visa process in this case. The appellants maintain that they are Somali, that the passports in question are not genuine and are not proof that they are Tanzanian citizens.

Validity of passports

33. The granting of a visa per se does not indicate the validity of the passport in which it is placed. No enquiries were made by the respondent in respect of the Tanzanian authorities to ascertain whether the appellants may be citizens of that state. It is also important to note that the fingerprints given for the visa applications are not linked in any way to the passports used. The passports were not biometric, i.e. not electronic and did not have fingerprints included with them. The fingerprints can only be said to be associated with the visas, and therefore it cannot be proven that the Tanzanian passports are genuine, and that the appellants are Tanzanian.

34. Counsel for the appellants submit that there is rife governmental corruption in Tanzania, which supports the contention that the Tanzanian passports in question could have been fraudulently obtained. There is no conclusive evidence before the Court that either appellants are the holders of valid Tanzanian passports.

Language

35. It is crucial to note that in the course of both appellants' asylum interviews, they spoke Bajuni (Kibajuni). There was clear evidence from two independent interpreters employed by ORAC that both appellants spoke and understood Kibajuni, a language or dialect used by a very limited number of people from Somalia (the Bajuni), living in Kenya as Somali refugees or in Somalia.

36. It is not disputed that the appellants in this case speak Bajuni (Kibajuni) and have a knowledge of the coast of Somalia. The Refugee Appeals Tribunal was satisfied in respect of this. Further, a Tanzanian would not speak Bajuni as a first language. The appellant submits that the Refugee Appeals Tribunal would not have altered its decision to grant the appellants refugee status, in deciding that the appellants were probably Bajuni and from Somalia.

Materiality of Failing to Disclose Travel Details

37. In the event that it is the intention of the respondent to suggest, notwithstanding that the respondent cannot prove that the appellants are in fact Tanzanian, that the non-disclosure of the route actually travelled by the appellants would have resulted in a different decision being arrived at by the Refugee Appeals Tribunal, it is submitted that this proposition is unsustainable. The information that the respondent has obtained from Dar es Salaam does not directly or indirectly conflict with the appellants' accounts of their travelling through Mombasa. In fact, it tends to support it, because the UK have confirmed that the visas were not used to enter the UK. Even if the information given was inaccurate, it is submitted that this would not have altered the outcome of the decision of the Refugee Appeals Tribunal.

38. Further, even if the Refugee Appeals Tribunal had not believed the appellants' account of travel to Ireland, they would nonetheless have been declared refugees based on the other findings of the Tribunal.

On which party does the burden of proof rest? Does the approach of the Respondent in disclosing evidence selectively, deprive the Respondent of any right which might otherwise exist to place the burden of proof on the Applicant?

39. The power of the High Court in this type of appeal is described by section 12(5) of the Refugee Act 1996, as follows:

> "(5) A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration."

40. Section 21(h) of the Refugee Act, 1996 (as amended) which is relied upon by the respondent in this case states that:

> "a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular, the Minister may, if he or she considers it appropriate to do so, revoke the declaration."

41. Counsel for the appellant states that the terms of section 21 (h) are similar to the requirements of Article 14.3 of the Council Directive 2004/83/EC ("The Qualification Directive"), which refers to, "misrepresentation or omission of facts…decisive for the granting of refugee status." Article 14.2 states that "..the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee…".

42. The appellants and the respondent differ as to where the burden of proof lies in the present case. In light of the wording of the Directive, the appellants are correct in stating that the respondent bears the burden of proof.

43. However, counsel for the appellants submit that the disagreements as to who bears the burden of proof may be inconsequential, if the Court accepts that there is no material evidence that the appellants can provide as to their nationality, because, as the respondent has pointed out, no material evidence of Somali nationality is possible to obtain.

44. Further, the appellants cannot access the underlying documentation held by the UK and have no capacity to deal directly with Tanzanian authorities on their case. All of the available evidence is only within the capacity of procurement of the respondent, and only an exceptionally slim amount of evidence has actually been sought. It is submitted that the utmost good faith is required of the respondent, and obtaining evidence unlawfully or withholding evidence in the respondent's possession could not be permitted, even if done inadvertently.

45. The decision to revoke the appellant's refugee status was based on undisclosed information to which the appellants had no access nor an equality of arms in respect thereof. Following the proposals to revoke the appellants' refugee status, the appellants' legal representatives, through a series of letters in reply, sought the communications between the respondent and the UK. This gave rise to the evidence which the respondent was relying upon for the purposes of revocation being disclosed. The respondent in each case provided redacted information. It was only on appeal to the High Court, that some redacted information was provided by the respondent. The respondent discovered through correspondence with the UK that A.A.S was not the father of S.A.S., and their response was not to seek clarification from the UK as to the probity of the case – instead, they redacted the crucial passage when sending on documentation to the appellants. The respondent proceeded to rely on the accuracy of the now disproven allegation that A.A.S. was father of both appellants.

46. It is submitted that ORAC targeted the appellants after they were given refugee status on a discriminatory basis based on their nationality, and was part of a broader operation designed to discredit Somali asylum applicants generally. An email put before the High Court dated the 16th of November 2011 (disclosed in unredacted form) stated that action was undertaken by ORAC as:

> "In recent years we have been sending the fingerprints of people who claim to be from Somalia to the UK for checking against their asylum and immigration database and have had a lot of success in that over 60% of those who claim to be Somali here are known in the UK under completely different nationalities, e.g. Tanzanians, Kenyans etc."

47. The respondent held all power to obtain the above information from the UK and the Tanzanian authorities. However, the respondent relied on passports without having communicated with the Tanzanian authorities, and placed reliance on hearsay accounts of documentation held by the UK. In effect, the respondent has made use of selective scraps of information to revoke the refugee status of the appellants.

48. If it is correct that the burden of proof rests on the appellants in this type of appeal, either on the facts of this particular case or applying the principle of *res ipsa loquitur*, it is the respondent that ought prove the validity of the Tanzanian passports which the respondent relies upon in this case. To prove the information received from the UK in respect of the appellants was wrong is beyond

the appellant's capacity.

Was the evidence relied upon by the respondent lawfully and fairly obtained, and should the Court set aside the revocation decision if it was not?
49. The High Court wrongly did not consider the appellants' contention regarding the legal basis of the original requests made of the UK for information now relied upon by the respondent. The acts of ORAC were in breach of the provisions of The Dublin Regulation. Moreover, The Data Protection Act, 1988 was breached.

50. It is not permissible for the respondent to seek to rely on unlawfully obtained evidence in the manner which has been done in the present case. In summary, this Court should direct the respondent to withdraw the revocation of the refugee declarations made in respect of the appellants herein.

Submissions of the Respondent

Evidence tendered by respondent against the appellants: meaning and significance

Physical examination of passports and visas

51. The appellants complain that the respondent does not have possession of the Tanzanian passports to facilitate checking the passports by 'physical examination'. The appellants also complain that the respondent has not had sight of the visas issued to the appellants. It is submitted that any allegation that the Tanzanian passports and visas should have been procured or physically examined by the respondent was not pleaded in the Statements of Grounds, nor was it pleaded before the High Court. The allegation is entirely lacking in bona fides as both the visas and passports were uniquely within the appellants power of procurement and have never been produced to the respondent since the appellants first applied for asylum. Regarding the passports in particular, the appellants disclosed during these proceedings that they in fact used these passports to facilitate their travel to Ireland and such passports were never produced by the appellants and given to the respondents at any stage of these proceedings.

Redacted and inconsistent matters

52. The appellants refer to matters of redaction and inconsistency in documentation received from the UK authorities, which contained inconsistencies as to whether or not A.A.S was the uncle of the appellant S.A.S, or his father. The foregoing does not go to the core issue of these proceedings, namely the possession of Tanzanian passports, the making of UK visa applications, the fingerprint matches, and the acceptance of travelling on these documents to the State. The foregoing, combined with the conduct of the revocation process, including wholly incomplete and contradictory information provided by the appellants, goes to the core of the issue.

Lack of contact with Tanzanian authorities

53. The appellants further complain that the respondent has never made any enquiries of Tanzanian authorities as to whether the passports in question were issued from the Tanzanian government. The appellants have provided no explanation as to whether they made any attempt to contact the Tanzanian authorities and seek confirmation of whether or not the passports were forged or genuine. Copies of these passports were provided to the appellants' solicitors.

54. The allegation that the respondent failed in this regard is entirely lacking in bona fides. The information the respondent had received from the UK authorities was sufficient to demonstrate that the appellants were Tanzanian nationals and their lack of candour in the representations they made led inexorably to the conclusion that the passports were genuine.

55. The respondent reached a decision on objectively verified information that demonstrated that the appellants applied for UK visas on foot of Tanzanian passports and were present in the BHC in Dar es Salaam. These are facts that they have declined to explain or engage with. Without prejudice to this, the respondent replies to the issues raised by the appellants as follows:

What is the probable meaning and significance of the evidence tendered against the Appellants by the Respondents?
56. The appellants complain that the High Court should not have held it against the appellants that they did not have birth certificates when applying for asylum, as Somali nationals simply cannot prove their nationality with any official documentation - to place a burden on these Somali nationals to do so, is to seek for them to prove the impossible.

57. Counsel for the respondent refers to the finding of the High Court that "the appellants produced Somali birth certificates during the revocation process. This contradicted the position they adopted during the asylum process, in which they indicated that they had no identity documents whatsoever."

58. The High Court judge examined in considerable detail the circumstances surrounding the production of the birth certificates during the revocation process on the 21st February 2012. It was not that the High Court found against the appellants for not having birth certificates initially – the court noted the context in which the appellants later produced the birth certificates after the revocation procedure had begun. The appellants ignore the fact that when asked in their initial application for asylum, both appellants stated that they did not have identity documents. A.A.S stated that he did not have any identity documents, and S.A.S. stated: "No. I did have a small piece of paper with my name and d.o.b. It was a b.cert. It got lost but I don't know when." When the birth certificates were examined, it was noted by an official that "the document appears to have been issued in 1990 and appears to be in remarkably pristine condition for a 22 year old document".

59. It appears that not only did the appellants fail to disclose the truth concerning their Tanzanian passports and UK visas in the asylum process but, prima facie, they submitted forged or fraudulently obtained birth certificates to the Minister in opposing the revocation proposal.

Biological relationship of the parties

60. The appellants seek to put new DNA evidence before the Court to support a submission that the appellants are 'second cousins'. The DNA evidence establishes that the appellants do not have the same mother, but it is inconclusive as to whether they are half-brothers or second cousins. Furthermore, whilst there is inconsistent evidence tendered by the appellants to both the British and Irish authorities as to whether they are half-brothers or second cousins, this did not form the basis for the revocation.

61. The appellants further complain about the 'probity of the evidence of the UK visa application'. Questions are raised regarding the reliability of the evidence provided by the UK Border Agency. The appellants complain 'the respondent and the Court paid no heed to

the obvious peculiarities with the visa process in the particular case'. It is submitted that the grounds of appeal relating to the peculiarities identified by the appellants with the information provided by the UK are wholly divorced from the facts upon which the revocation decisions were based. The appellants applied for asylum in 2005 and provided no documentary evidence of identity, nationality, passports, visas and/or travel. The respondent became aware that they had made multiple visa applications for the UK in the BHC in Dar es Salaam in April and June 2005 and had presented Tanzanian passports. The appellants filed representations on the 21st February 2012 in which they maintained that: -

> "[O]ur clients contacted an agent in Kenya who did all the necessary arrangements for their travel to Europe. This must have included applying for a Tanzanian passport and for the necessary visas, including a UK visa…the fact that the agent who arranged our client's travel applied for and obtained a Tanzanian passport and UK visas does not necessarily or of itself prove that our clients are nationals of Tanzania."

62. It was submitted to the respondent that the passports were not biometric and could easily have been forged. It was also stated by the appellants' solicitors that the BHC in Dar es Salaam did not require fingerprinting at the time these visas were issued in 2005. It was advised that it would be a dramatic step for the respondent to rely in an 'absolute manner' on the fact of the passport and the visas to conclude that their clients were Tanzanian nationals.

63. The respondent carried out enquires specifically in the light of these representations and a series of emails sent to the UK authorities were exhibited where it was sought to address the representations that were made by the appellants. It was confirmed that: both appellants had attended personally for interview at the BHC; that S.S. had attended for a Tier 3 interview; that A.S. had attended for a Tier 1 interview; that fingerprinting did not become compulsory until January 2007 but a trial was carried out in 2004/2005 during which their fingerprints were taken; that both appellants would have presented themselves at the BHC to collect the visas; that both the appellants had previously applied for visas using the same passports on the 29th April, 2005 and that these applications were refused.

64. The appellants were notified that the appellants had attended at the BHC by letter dated the 4th of April 2012. The appellants **were not informed** at this stage of the fact that the appellants had been **interviewed and fingerprinted** in Dar es Salaam (emphasis added). The appellants' solicitor responded by letter dated the 4th of May 2012, and launched an attack on the letter of the 4th of April 2012, stating *inter alia* that "anyone could have attended the said office and purported to be our clients." It was also submitted that "as for the interviews - if any ever took place - such interviews could have taken place with anybody and there is no way to prove that it was our clients who were interviewed." In this letter, the appellants' solicitors quote certain material dealing with forged Tanzanian passports and corruption in Tanzania, implying that Tanzanian passports might be fraudulently obtained from corrupt public servants.

65. The contention of the appellants' that Tanzania is a country rife with governmental corruption and that the passports were probably obtained fraudulently is significantly misleading. There was no evidence presented by the appellants as to the fraudulent use or obtaining of Tanzanian passports.

66. By letter dated the 17th of May 2012, the respondent forwarded extracts from the UK email correspondence. This correspondence from the UK confirmed that the appellants had attended in person for an interview and had been fingerprinted. In a further letter dated the 5th of June 2012**, faced with the evidence of fingerprints** (emphasis added), the appellants' solicitors then stated: -

> "Our clients do not remember attending the Office of the British High Commission in Dar es Salaam, nor being interviewed or having their fingerprints apprehended, but they do not deny that it could have happened. They were very young at the time and extremely stressed, scared and confused. They were not fully aware of what was going on…they were following the instructions of their father first and the agent later."

It was reiterated that "the fact that someone applied for and obtained Tanzanian passports and UK visas on behalf of our clients does not itself prove that this is their nationality".

67. Whilst the appellants seek to carry out a critique of the information provided by the UK authorities, they fail to note that their clients were part of a trial that was undertaken in Dar es Salaam in 2005. The appellants' solicitors' responses to the various emails shows that the appellants provided misleading information at every stage – initially, they denied ever being at the BHC, and when they were told of the fingerprints, their response was that they could not remember this occurring, but that it could have happened. The fact the appellants continue to avoid is that they obtained visas to enter the UK applying twice presenting Tanzanian passports. They have declined to explain the circumstances in which this occurred, and accordingly, it is submitted that the respondent was correct and certainly entitled to come to the conclusion that he did.

Bajuni Ethnicity of the Appellants

68. Counsel for the appellants submits that "it is not disputed that these appellants speak Bajuni (aka Kibajuni) and have knowledge of the coast of Somalia. The Refugee Appeals Tribunal was satisfied in respect of these issues" and that the respondent should have balanced this evidence in the context of the revocation applications. The respondent disputes that the appellants have knowledge or sufficient knowledge of the Bajuni Islands. ORAC did not find that either appellants had sufficient knowledge of Bajuni. Further, the appellants fail to address the fact that knowledge of the Bajuni language does not in fact assist them in light of the number of persons of Bajuni ethnicity who are nationals of and live on the coast of Kenya and Tanzania.

Materiality of failing to disclose travel details

69. Counsel for the appellants states that 'in the event that it would be the intention of the respondent to suggest that notwithstanding that the respondent cannot prove that the appellants are in fact Tanzanian, that the non-disclosure of the route actually travelled would have resulted in a different outcome, it is submitted that this proposition is unsustainable.' The appellants made a similar submission to the High Court which was rejected. This is unsurprising for two reasons. Firstly, the appellants were successful on their appeal to the Refugee Appeals Tribunal on the basis that they were given the benefit of the doubt regarding their country of origin, which they claimed was Somalia, in circumstances in which the ORAC had found they lacked credibility. The fact that they had twice applied for UK visas in the Dar es Salaam BHC, a place that they could not have attended had their applications been truthful, is plainly material to that issue. Objectively, once it was known that they had withheld information of the possession of Tanzanian passports, genuine or otherwise, on foot of which they had obtained UK visas, having personally presented themselves for interview there, which facts they had withheld from the ORAC, it is submitted that they could not have been given the benefit of the doubt. There was already a sizeable doubt having regard to their lack of knowledge of Somalia and the Bajuni Islands.

70. Furthermore, the Tribunal could not have ignored this issue having regard to the express provisions of Section 11B of the Refugee

Act, 1996 (as amended). This provides that in assessing credibility, the Commissioner or Tribunal shall have regard to a number of matters, including "whether the applicant has adduced manifestly false evidence in support of his or her application, or has otherwise made false representations, either orally or in writing."

71. This provision, introduced by the Immigration Act, 2003, was one of a number of measures which placed honesty at the centre of the refugee application process, as reflected in the standard form questionnaire that advises applicants of the importance of telling the truth. The suggestion that even if the appellants were not Tanzanian nationals, which is not accepted, that they had not been guilty of a material misrepresentation regarding their travel route is denied.

On which party does the burden of proof rest? Does the approach of the Respondent in disclosing evidence selectively, deprive the Respondent of any right which might otherwise exist to place the burden of proof on the Applicant?
72. The law is well settled in this respect. The burden of proof rests upon an appellant to satisfy the court that the minister was incorrect in his decision to revoke. Thus the High Court was correct in its finding that the burden of proof rested upon the appellants. The court relied upon the decisions in *Hussein v Minister for Justice & Law Reform* [2014] IEHC 130 and *T.F. v Minister for Justice & Equality* [2016] IEHC 551.

73. The appellants have comprehensively failed to demonstrate the burden of proof was on the respondent during the course of the appeal.

74. The appellants allege that they "have been targeted by ORAC after they were given refugee status on a discriminatory basis based on their nationality, and were part of a broader operation designed to discredit Somali asylum applicants generally…it is noted that the respondent bears the practical advantage of being able to effect a 'war of attrition' against the appellants in a case such as this. Following the Minister's selective use of scraps of information, the revocation has lead to the loss of all the benefits associated with refugee status for the appellants as they prosecute the within appeal." These are serious and wholly unsubstantiated allegations. The appellants complain that they were not given all the information the Minister had received from the UK in the first instance, and given the opportunity to consider it in detail and frame their responses around it. In fact, they were caught out, because on foot of the appellants' initial response, (which was to deny that the appellants had been present at the BHC at all) the appellants were provided with further information from the UK authorities that proved by their fingerprints that they had been in the BHC in Dar es Salaam in 2005.

75. The appellants' approach in these appeals is to seek to hide behind the burden of proof. They have not been candid and have no intention of informing the Court of the truth. This in itself is a reason why the burden of proof fairly falls on their shoulders, as indeed has been held in the case law referred to above.

Was the evidence relied upon by the Respondent lawfully or fairly obtained, and should the Court set aside the revocation in the event that it was not?
76. The appellants wish to argue that evidence relied upon by the respondent during the course of the revocation process was unlawfully and/or unfairly obtained, such that the High Court should have set aside the revocation decisions. The High Court judge refused to permit the appellants to argue this ground for good reason. The appellants never raised this allegation in extensive correspondence with the respondent during 2012 and 2013. The appellants did not raise this allegation in their pleadings and did not apply to amend their pleadings at any stage. The respondent filed a comprehensive Statement of Opposition addressing the grounds of complaint that were actually pleaded. Further, the appellants did not issue proceedings seeking to quash the reliance on alleged unlawfully obtained evidence. The complaint in relation to the Eurodac system was raised for the first time in written legal submissions by the appellants which were served days before the High Court hearing and which the Central Office declined to accept due to late filing. This issue was therefore not before the High Court.

77. It is further significant that the ORAC was never a party to these or any other proceedings and there was never a complaint under the Dublin Regulation as to the sharing of information by the ORAC. Furthermore, there was never a complaint to the Data Protection Commissioner notwithstanding allegations now made in the legal submissions (but never pleaded) as to breaches of the Data Protection Act, 1988.

78. Therefore, the appellant is engaged in a manifest abuse of the process of this Court and has no *locus standi* whatsoever to pursue these legal submissions.

79. In conclusion, the central thesis of the appellants' case does not have any basis in fact. They used Tanzanian passports to obtain UK visas and that is prima facie proof of their Tanzanian nationality. Irrespective of same, they provided information in the asylum process concerning their travel to Ireland that was misleading. They were given the benefit of the doubt where plainly it should not have been given, having regard to what is now known concerning their visa applications in the Dar es Salaam BHC in 2005.

The Decision of the Court
80. The first issue that logically arises is as to where the burden of proof lies in an application such as herein. It is clear that at High Court level the law is now well established. The burden of proof lies upon the appellant. He must satisfy the Court that the Minister could not correctly have decided that it was appropriate for him to revoke the appellant's refugee status. In considering whether to revoke pursuant to s. 21(h) of the 1996 Act, the Minister has to satisfy himself that the information furnished to the asylum authorities was false or misleading in a material particular. The appellant must show that the Minister's decision was flawed or incorrect in this consideration. In *Hussein v. Minister for Justice & Law Reform*, cited above, Mac Eochaidh J. stated as follows;

> *"33. The respondent submits that he does not bear the onus of proof in respect of the matters relied on to revoke the appellant's refugee status. Rather, the respondent contends that it is for the appellant to persuade the court that it is appropriate to direct the Minister to withdraw the revocation of refugee status. Further, the respondent states that in similar statutory appeals the onus lies on an appellant to establish that the decision subject to the appeal is flawed or incorrect per Ulster Bank v. Financial Services Ombudsman [2006] IEHC 323. However, in any event, counsel submits that owing to the fact that the appellant provided false and misleading information in the course of his application for refugee status, the issue of the onus of proof may be academic."*

And later Mac Eochaidh J. continued:

> *"41. The appellant can only succeed if he persuades the court that the Minister must withdraw the revocation of refugee status because he incorrectly decided to revoke that status. The burden is on the appellant to demonstrate that the Minister's conclusion is incorrect. I reject the appellant's argument that the Minister bears a burden to establish that his decision is correct. In any event, this debate about where the burden lies is somewhat artificial in view of the*

fact that the appellant went into evidence and in view of the findings I make. If I am mistaken as to who bears the burden, I find that the Minister has, in any event discharged that burden."

81. In *T.F. v. Minister for Justice and Equality* [2016] IEHC 551, Stewart J. held as follows:

> *"I am satisfied as a matter of law that the burden of proof in relation to establishing the case for a direction that the Minister withdraw his or her decision rests with the appellant. While the Minister, when dealing with the decision at the administrative level, had to satisfy herself pursuant to s.21 (h) of the 1996 Act that the information furnished to the asylum authorities was false or misleading in a material particular, the burden of proof rests on the appellant who brings the proceedings before the High Court and is in effect the applicant in the proceedings before the High Court. As with all such applicants, she must discharge the burden of proof resting on the person who brings the case before the Court."*

I agree with the statement of the law as outlined above by these two learned judges.

82. With regard to the scope of an appeal such as herein, Clark J. dealt with this in her decision in *Nz.N. v. Minister for Justice and Equality* [2014] IEHC 31 where she stated at para. 34:-

> *"It is not the function of the Court to determine whether the appellant is a refugee or whether she should have been declared a refugee. The issue is whether the Minister correctly revoked that status because she provided false and misleading information to the Commissioner which was instrumental in her recognition as a refugee."*

83. Whilst much is made in the written submissions of the appellant of the significance of the birth certificates now produced, of the biological relationship of the appellants, of the peculiarities involved in the granting of the visas and in the Bajuni language issue, in reality, these are all peripheral. They do not bear on the central question that faced the respondent: Did the appellant give false and misleading information to the asylum authorities in 2005 in their asylum applications. As to these peripheral issues, it may be noted that there are suspicions expressed as to the birth certificates dated 1990, now produced but seeming to be in remarkably pristine condition. There is also evidence that just because they can speak the Bajuni language, that it is not conclusive as many who can speak that language live in Tanzania, Kenya and Somalia. Moreover, the issue as to whether the evidence of the Tanzanian passports and the visas stamped thereon was properly raised, was not considered by the learned High Court judge as it had never been raised before, either in correspondence or in the pleadings. As it was not dealt with on the pleadings in the appeal to the High Court, this Court cannot consider these arguments either. Finally, there is the allegation that the asylum authorities are engaged in an "operation" to discredit Somali asylum applicants and is engaged in a "war of attrition" against the appellants. This allegation does the appellant's case little credit. The allegation is entirely unsubstantiated save for reference to an e-mail dated the 16th November 2011. This noted that fingerprint checking with UK authorities show that 60 % of those in Ireland claiming to be Somalis are known in the UK under completely different nationalities. This is a statement of fact which is not denied in any of the pleadings herein. It must be noted that it is the role of the asylum authorities to search out and to detect fraudulent asylum applications. Findings such as the above are a sad reflection of the number of fraudulent applications that are made by people seeking to trade on the justifiable sympathy generated by the tragic recent history of that unfortunate country in order to obtain an asylum status to which they are not entitled.

84. The real question for this Court is whether the learned High Court judge was right when she decided that the appellant had failed to satisfy her that the respondent was incorrect when he decided that false and misleading information was given by the appellants to the asylum authorities when they were considering their application and that, had the true situation been known, they would not have been given the benefit of the doubt and ultimately refugee status.

85. The learned High Court judge, in a careful and comprehensive judgment, dealt with all the issues that were raised by the appellants before her. She indicated that she relied upon the judgment of Clark J. *in Nz.N. v. Minister for Justice and Equality*, cited above, in determining the scope of the appeal before her. That succinct statement of the law correctly outlines the scope of the appeal with which she was dealing. She then went on to consider the evidence produced to her by the appellant. They had stated in their affidavits to the court that they had little choice but to travel to Ireland using Tanzanian passports with visas albeit those were for the United Kingdom. They asserted the passports were fraudulent but were their only means of travelling to Ireland. She noted that they asserted that they do not have to prove they are not Tanzanian. However, the judge noted that they were holders of Tanzanian passports which were accepted as valid by the BHC in Dar es Salaam and upon which visas for the UK were stamped and that they entered Ireland illegally in December 2005 and applied for asylum claiming to be Somalian. She noted that in their application they failed to disclose details of the passports and visas they used to travel. They provided no identification documents whatever. In his consideration of the proposal to revoke, the respondent was satisfied that they withheld information and only revealed the Tanzanian passports and their presenting themselves in the BHC when they were confronted with proof of that fact in the course of the revocation proceedings. The judge considered whether if the information now discovered by the respondents had been before the Refugee Appeals Tribunal, the decision would have been different. She took the view that such information would have been central to their application and that the decision made would have been different. The same may be taken for the decision by the ORAC. For these reasons the learned judge refused the relief sought.

86. It is not possible to find any error in either her decision on where the onus of proof lay, on the scope of the appeal, or her assessment of the facts. The reality of the case is that the appellants gave false and misleading information in their application for asylum. By dint of careful checking by the Irish authorities, the falsity of their applications was discovered. Even then, within the revocation process itself, they tried again to mislead the authorities by stating that the passports and visa were obtained by an agent and that they never were in the BHC in Dar es Salaam. They were forced to retreat from this latest attempt to mislead when it turned out that they had been included in a trial project of fingerprinting visa applications in the BHC in 2005. It could thus be proved that they had attended there and been interviewed. It turned out that they had in fact presented themselves twice to the BHC. The first time in April 2005 for their failed application for visas, the second time in June 2005. On both occasions they presented Tanzanian passports. Faced with proof of this, their somewhat limp explanation was that they could not recall being in the BHC. Regrettably, this stretches credulity beyond breaking point. It is impossible to believe that within six months in 2005 they would have forgotten these traumatic events. It is thus quite clear that the appellants provided false and misleading information to the asylum authorities in their 2005 application. The Minister had ample grounds upon which to revoke the declaration of refugee status. I would affirm the judgment of the High Court and dismiss this appeal. his appeal.