Neutral Citation: [2014] IEHC 572

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 419 J.R.]

BETWEEN

S. K. T. [DRC]

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE CHAIRPERSON OF THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 27th day of November, 2014

1. This is a telescoped judicial review application seeking, *inter alia*, an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal ("the RAT") dated 3rd March, 2011, affirming the recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that the applicant not be declared a refugee. The applicant is also seeking a declaration that she was deprived of an effective remedy before a court or tribunal against the first instance determination of her application for refugee status, in compliance with the requirements of Chapter V, Article 39, of Council Directive 2005/85/EC ("the Procedures Directive").

Background

2. The applicant, who is a national of the Democratic Republic of Congo ("the DRC"), was born on 6th June, 1976. She is unmarried, and is a Muslim of Kasi ethnicity. She speaks French, Lingala, and Swahili. The applicant studied hairdressing at university in Kinshasa but after her father's death was unable to continue with her studies. Her brother subsequently introduced her to a man who was teaching hairstyling to orphans. The applicant claims that this man took her in in 2001/2002, when she was aged 26 or 27 years. She initially worked teaching hairstyling to the orphans but later became a secretary. She remained working for this this man until November 2006, and referred to him in her application as her boss.

3. The applicant claims to have been arrested on 10th September, 2006, as a result of her expression of her political opinions during an election in the DRC. She said that as part of the political process, politicians were sending letters around looking for votes. Some such letters were sent to her place of work. The leading political party was the PPRD, led by President Joseph Kabila, and the opposition party, the MLC, was led by Mr. Bemba. The applicant stateed that the names of all the political leaders appeared on the letters that had been sent to her workplace.

4. The applicant claimed that she replied to the letters with the consent of her boss. In her letters, she stated that she was opposed to what was contained in the political parties' letters. She stated that she was against the PPRD and their policies and said that President Joseph Kabila had "very obscure origins."

5. The applicant claimed that after this her boss was arrested, and he told the authorities that the applicant had written the letter. On 10th September, 2006, the applicant states that she was arrested by four men from the ANR (the government intelligence service) because of the contents of her letter, and because she was against the government's policies. She stated that the ANR men were not violent and spoke normally to her as they took her away. The applicant stated that she was helping orphans in her work and did not think that writing the letters would put her in danger.

6. The applicant claimed to have been taken very far away by car to an unknown location and detained there for two weeks. She said she was treated very badly and that on each occasion that her captors wanted information she was beaten and raped. There were some two-day intervals between the interrogations but when they resumed the applicant claimed to have been beaten, including with batons. She also claimed that a revolver was shown to her and she was told that she would be killed if she did not reveal what she knew.

7. The applicant stated that one of her interrogators became friendly with her. She said that they would speak when his colleagues were absent, and that she took advantage of this situation. She said that this man agreed to help her. He allowed her to use a telephone. Having tried and failed to reach her brother, she telephoned a lady who was one of her hairdressing clients and she asked this lady, whose husband held a government position, to help her. The lady spoke to her husband and he in turn spoke to one of the men who had arrested her, but she was not aware of what arrangements they made. In any case, this man helped her to escape.

8. On the night of her escape, the friendly guard woke the applicant, gave her her clothes, and took her out of the prison through the rear door. When she was outside the prison she saw a car owned by her client's husband. She went to their house in Kinshasa and during the three/four weeks that she lived there the applicant did not venture out of the house. The husband told the applicant that if she remained in the DRC her life would be in danger, and that he would help her get out of the country. The husband arranged her travel from the DRC. She claims to have fled on 6th November, 2006, and states that she travelled through Addis Adaba and Dubai before arriving in Dublin on 8th November, 2006.

Procedural background

9. The applicant applied for asylum in Ireland on 9th November, 2006, and completed an ASY 1 form. She claimed to have a fear of persecution at the hands of state actors arising out of her perceived political opinion in the DRC. The applicant completed her questionnaire on 13th November, 2006, and she was interviewed by ORAC pursuant on 2nd January, 2007. In its s. 13(1) report, ORAC recommended that the applicant not be declared a refugee.

10. The applicant appealed against this recommendation by way of Notice of Appeal dated 22nd February, 2007. Written submissions

were made to the RAT on the applicant's behalf and documentation was submitted in support of her claim. This included a birth certificate and newspaper reports that the applicant claimed related to her. While the newspaper reports appeared to refer to the applicant by name, the account they gave did not match that given by the applicant in the course of her asylum claim.

11. The applicant attended an oral hearing with the RAT on 17th November, 2008. The hearing was not completed on this day and was adjourned to an unspecified date to be scheduled by the RAT. However, the applicant's solicitors did not receive any further communication from the RAT until 18th June, 2009. On this date they received a letter from the RAT enclosing translations of documents which the Tribunal had requested from ORAC, pursuant to s. 16(6) of the Refugee Act 1996, as amended, on 18th November, 2008, which was the day after the oral hearing.

12. ORAC had responded promptly to the Tribunal's s. 16(6) request by letters dated 19th and 27th November, 2008. ORAC's letter of 19th November, 2008, acknowledged receipt of 5 documents for translation from French into English, and confirmed that the newspaper reports appeared to be authentic. The translated documents were furnished to the RAT by letter dated 27th November, 2008. By letter dated 29th June, 2009, the applicant's solicitors confirmed that they had no difficulty with the translations of the documents provided to the Tribunal pursuant to section 16(6),although they did complain about the 7 month delay in processing the applicant's case.

13. The RAT scheduled the hearing, which had started on 17th November, 2008, to resume on 26th January, 2010. However, due an oversight, a different Tribunal member was listed to hear the applicant's case on that date. Because the appeal had been part-heard by another Tribunal member, this hearing had to be adjourned. The applicant's appeal finally resumed before the correct Tribunal member on 18th February, 2010 – a year and four months after the original hearing had commenced. There was a further delay of over 12 months before the RAT finally issued its decision to reject the applicant's appeal, dated 3rd March, 2011. The applicant complains that the RAT has not proffered any explanation for these long delays.

Extension of time
14. The applicant instituted these judicial review proceedings challenging the RAT's decision, which was received by the applicant's solicitors on 15th March, 2011, by notice of motion dated 26th May, 2011. This was outside the statutory time limit laid down by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. However, the applicant has provided a satisfactory explanation for this delay at paras. 40 and 41 of her affidavit sworn on 23rd May, 2011, and the respondents are not pursuing this point. Accordingly, I extend the time for the bringing of the within judicial review proceedings up to and including 26th May, 2011.

15. I now turn to consider the main grounds of the applicant's case, as were advanced by counsel for the applicant at hearing.

Delay
16. The main ground upon which the applicant challenges the RAT's decision is that of delay. In this case, as stated above, the first oral hearing before the RAT took place on 17th November, 2008. This hearing was part heard and adjourned. It was not resumed until 18th February, 2010, one year and three months after the original hearing. The RAT then took over a year to deliver its decision, which was signed on 3rd March, 2011, and finally transmitted to the applicant by letter dated 14th March, 2011. The entire process from the date of the first oral hearing to the final decision took two years and four months.

17. The applicant submits that when determining asylum applications the RAT is implementing EU law and that the failure to conduct the hearing and give its decision within a reasonable time breaches Chapter II, Article 10 of the Procedures Directive. The applicant further contends that the RAT's delay in rendering its decision deprived the applicant of an effective remedy within the meaning of Article 39 of the Procedures Directive

18. The objective of the Procedures Directive is "*to establish minimum standards on procedures in Member States for granting and withdrawing refugee status*." It is clear from the terms of the Directive, that the provision of an early decision is an important part of good administration in the processing of asylum claims. Recital 11 of the Directive states that:

> *It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.*

19. Article 10 (d) provides that applicants for international protection:

> *"shall be given notice in reasonable time of the decision by the determining authority on their application for asylum."*

20. Article 2(e) provides:

> *'determining authority' means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I.'*

21. Annex I states that when implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17(1) of the Refugee Act 1996, as amended, continue to apply, consider that:

> *– 'determining authority' provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and*
>
> *– 'decisions at first instance' provided for in Article 2(e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.*

22. Article 23(2), which deals with procedures at first instance, provides that:

> *"Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.*
>
> *Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:*

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

23. This requirement was transposed into Irish law in s. 13 of the Refugee Act 1996, as amended by the EU (Asylum Procedures) Regulations 2011 (S.I. No. 51 of 2011), which provides:

"(12) If a recommendation under subsection (1) cannot be made within 6 months of the date of the application for a declaration under section 8, the Commissioner shall, upon request from the applicant, provide the applicant with information on the estimated time within which a recommendation may be made.

(13) The provision under subsection (12) by the Commissioner of an estimated time within which a recommendation may be made shall not of itself oblige the Commissioner to make a recommendation within that time."

24. It will be noted that the above provisions appear only to apply to the first instance decision maker, which, in Ireland, is the Refugee Applications Commissioner. Nevertheless, the court is mindful of the general applicability of the provisions of the Charter of Fundamental Rights to the implementation of asylum law. Article 41 provides that: "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union*." Article 47, which provides for the right to an effective remedy, states: "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*."

25. The applicants also cited the decision of Advocate General Bot in *MM v. Minister for Justice* Case C-277/11, where he stated at paras. 113-116 of his opinion:

113. It is clear from the documents on the file that the procedure for examining Mr M's asylum application took six and a half months and that concerning his application for subsidiary protection, 21 months. Mr M. was therefore informed about his situation on conclusion of a procedure that had lasted a little over two years and three months.

114. That length of time seems to me to be manifestly unreasonable. Although in Ireland examination of the application for subsidiary protection is not subject to the procedural rules mentioned in Article 23(2) of Directive 2005/85 – which provides that Member States must ensure that the procedure for examining applications for international protection is concluded as soon as possible and, where a decision cannot be taken within six months, that the applicant is either informed of the delay or receives information on the time-frame – the fact remains that the competent national authority is obliged to ensure, when it adopts a decision falling within the scope of EU law, observance of the right of the person concerned to good administration, which constitutes a general principle of EU law.

115. Applications for subsidiary protection, like applications for asylum, must thus be the subject of a thorough examination, taking place within a reasonable period of time, as the prompt dispatch of the proceedings contributes not only to the applicant's legal certainty but also to his integration.

116. It will therefore be for the referring court to consider to what extent the relatively long duration of the proceedings may have undermined the rights and safeguards afforded to Mr M. in the procedure for examining his application for subsidiary protection.

26. The court notes that although the Advocate General considered the time taken to determine the applicant's subsidiary protection application to be manifestly unreasonable, he recognised that it is a matter for the national court to decide whether the delay actually prejudiced the applicant. This view is supported by the decision of the Court of Justice in *Baustahlgewbe v. Commission* (1998) EUECJ 185/95P where the Court held, at para. 7 of its decision:

[I]n the absence of any indication that the duration of the procedure had any impact on the outcome of the proceedings, such a procedural irregularity cannot give rise to annulment of the contested judgment as a whole.

27. The respondent submitted that the Court of Justice was therefore of the view that in order for delay to render a decision unsafe, the applicant had to be able to point to some defect in the decision which arose as a result of the delay in the making of the decision.

Irish law on delay in the rendering of RAT decisions

28. In Irish law, the duty of the RAT to act expeditiously is set out in the Refugee Act 1996, as amended. Section 16(18) provides:

"The Tribunal shall ensure that an appeal against a recommendation of the Commissioner to which section 13(5) or 13(8) applies shall be dealt with as soon as may be and, if necessary, before any other application for a declaration."

29. Furthermore, s. 15(3) provides that the provisions of the Second Schedule of the Act apply to the RAT. Paragraph 14 of the Second Schedule states:

The chairperson shall endeavour to ensure that the business of the Tribunal is managed efficiently and that the business assigned to each division is disposed of as expeditiously as may be consistent with fairness and natural justice.

30. The decision of Dunne J. in *F.K.S. v. Refugee Appeals Tribunal* [2009] IEHC 474, offers useful guidance to an Irish court on the issue of delay in the rendering of RAT decisions. In that case, the applicants had complained that a delay of over 8 months in the making of the RAT decision rendered the decision unsafe. Dunne J. rejected this submission, stating:

In this case, a period of over eight months elapsed between the hearing of the appeal before the Refugee Appeals Tribunal and the delivery of the decision. The question raised is whether that delay is something that renders the decision of the Tribunal ultra vires the Refugee Act 1996 (as amended) or is a breach of natural and constitutional justice. I have referred previously to the authorities opened to me in this regard. I think that the first point of importance to note is that there is no suggestion whatsoever of any prejudice to the applicant as a result of the delay. This is a case which turned upon the credibility of the applicant and it is clear from the authorities that if the delay has caused any concern as to the safety of the decision by virtue of the gap between the oral hearing and the

determination of the appeal, then in such circumstances it may be open to either party to have the decision quashed as being invalid. Finlay Geoghegan J. in the case of Messaoudi referred to above made that clear. This is not such a case. It is clear from the facts of this case that no point whatsoever is taken by the applicant as to the credibility findings in this case.

I am not of the view that delay per se should, as a general proposition, give rise to the quashing of a decision of the Tribunal. There may be cases of such egregious delay that it would be untenable to permit the decision to stand but they must be farand few between. This is not such a case. There may be cases in which a change of circumstances occurs in the course of the period when a decision is awaited which would make the decision unsafe. It may be that in cases where credibility is in issue that the delay has led to a fear as to the accurate recollection of the evidence by a Tribunal member. To that extent, one would have to have regard to the facts and circumstances of any particular case. I am conscious of the fact that the hearings before the Tribunal have at their heart an individual's human rights and consequently it is important that decisions should be given within a reasonable period of time. However, I would be slow to indicate the level of delay which is unacceptable. In the circumstances of this case the delay was less than satisfactory. However, no prejudice of any kind was suffered as a result of the delay. In those circumstances I am not satisfied that the applicant is entitled to leave on this ground.

31. A similar view was taken by Cooke J. in *Q.F.C. v. Refugee Appeals Tribunal* [2012] IEHC 4, where the learned judge held:

19. In moving the present application for leave and in challenging the findings of lack of credibility, counsel for the applicants has relied particularly upon the element of delay in that the period which elapsed between the oral hearing on the 28th February, 2008, and the making of the report on the 24th September, 2008, is said to be so excessive as to warrant that the decision be quashed. In the judgment of the Court this submission raises no substantial ground which would warrant the grant of leave on that basis. It is well settled law that delay as such, does not necessarily invalidate an administrative or quasi judicial decision of this kind, unless the lapse of time is so egregious as to render it unjust that it be permitted to stand. (See for example the judgment of Finlay Geoghegan J. in Messaoudi v Refugee Appeals Tribunal (Unreported, High Court, 29 July 2004.) In F.K.S. v RAT (Unreported, High Court, 24 January 2005,) Dunne J. said: "I am not of the view that delay per se should as a general proposition, give rise to the quashing of a decision of the Tribunal. There may be cases of such egregious delay that it would be untenable to permit the decision to stand but they must be few and far between. This is not such a case."

32. In this case, the 15-month hiatus between the original hearing on 17th November, 2008, and the final hearing on 18th February, 2010, was excessive. The subsequent additional delay of 13 months in the delivery of the RAT's decision, giving rise to a gap of 28 months between the first hearing and the making of the RAT decision was also, in my view, most unsatisfactory. Such a prolonged delay must necessarily raise questions in the mind of the court about the soundness of a decision based on credibility findings, in which the applicant's demeanour was a factor in the Tribunal's assessment. As Clark J. observed in *R.A. [Nigeria] v. The Refugee Appeals Tribunal* [2013] IEHC 504, at para. 10 of her decision:

10. [...] A decision which may be clear and which has the appearance of being based on evidence and information put before the Tribunal may nevertheless be of doubtful validity where an excessive delay in providing those reasons has occurred. In the circumstances a ten-month delay in arriving at the decision must raise issues of general fairness as the passing of time undoubtedly affects memory and fades impressions.

33. It is stretching belief that the Tribunal Member would be able to recall the demeanour of the applicant when giving her answers 13 months and 28 months previously. The time period was simply too long to expect that the impressions made by the applicant in her evidence would not have faded considerably, if not completely, in the period which had elapsed. With a delay of such magnitude, particularly where the Tribunal's findings turned on the applicant's credibility and demeanour, it is understandable that she should feel that she did not get a fair hearing and determination of her asylum application.

34. I am satisfied that the delay in this case between the time when the appeal hearing began in November 2008 and the final delivery of the decision in March 2011, was too long, such that there must be valid concerns as to the fairness of the decision which emerged at the end of this process. I consider that the delay herein falls within that exceptional category of cases, as referred to by Dunne J. in *F.K.S. v. Refugee Appeals Tribunal* [2009] IEHC 474, and approved by Cooke J. in *Q.F.C. v. Refugee Appeals Tribunal* [2012] IEHC 4, where the delay is so egregious that it would be untenable to permit the decision to stand. In the circumstances, the applicant is entitled to an order of *certiorari* in respect of the decision of the first named respondent dated 3rdMarch, 2011.

35. The court now turns to consider the alleged defects in the RAT's decision.

Failure to carry out a proper credibility assessment
36. In this case, the applicant's claim for asylum was rejected solely on credibility grounds. The RAT found that the applicant's story was not plausible, that it lacked credibility and coherence, and that she was not, therefore, to be afforded the benefit of the doubt. The applicant contends that the Tribunal Member erred in his assessment of her credibility and that this renders his decision unsafe. The court shall consider each of the applicant's complaints in respect of the credibility assessment in turn. In doing so, I am guided by the principles set out by Cooke J. in *I.R. v. The Refugee Appeals Tribunal* [2009] IEHC 353.

Discrepancy in applicant's explanations as to why she left the DRC
37. Counsel for the applicant submitted that the Tribunal Member erred in finding that the applicant's answer to question 21 of her questionnaire, which asked why she had left her country of origin, was sparse and differed from her answer at interview. The relevant portion of the applicant's response to question 21 states that she was arrested by the ANR for having written the letters,

"...and as to the rest – well you know the song ... torture, rape, etc. I will fill you in with the details at my interview. After losing consciousness as a result of the blows I received I was taken straight away to the National Intelligence Agency (ANR). It was from there that Mr XXX extracted me from the claws of those hoodlums (the ANR).

38. At her hearing before the RAT, the applicant recounted her arrest by the ANR in the following terms:

One man who entered her compound was not violent and spoke normally as they walked out of the compound. She was then told she was being arrested, that they wanted information from her and she was shown their ANR identity cards. The applicant was taken "very far away" by car to a place she is unaware of and detained for two weeks. She was treated very, very badly and on every occasion they wanted information she was beaten and raped.

39. The RAT decisionstates:

> *The applicant was told that her answer at page 9 of her questionnaire that, "...after losing consciousness as a result of the blows received I was taken straight away to the National Intelligence Agency (ANR). It was from here that Mr. XXX extracted me from the claws of these hoodlums (the ANR)", which differed from her testimony today. She replied that she thought she had said she was ill treated and she had explained that the people who took her away were from the ANR.*

40. The RAT decision continues:

> *I told the applicant she had not answered the question which would be asked once again. She replied that in her testimony today she states she was ill-treated and her loss of consciousness was part of her ill-treatment. She claims she stated today she did not know where she was taken but stated in her questionnaire she was taken to the ANR because the ANR is not a prison but is made up of people going around gathering information. When asked why then did she say she was extracted from there, the applicant replied that all she can say is these intelligence people have private places to deal with people they are after.*

41. On the basis of this evidence the RAT found that the applicant's response to question 21 was "*sparse and differed from her answer at interview*" and concluded that "*her claim in her questionnaire that she was taken after losing consciousness to the ANR contradicts her testimony at her appeal*." Counsel for the applicant took issue with this finding and submitted that at interview the applicant had merely offered more detail as to what had happened to her, including that she was taken by agents of the ANR (intelligence services) to one of their private places of detention and was tortured and raped.

42. In the court's view, there is a significant discrepancy in the applicant's evidence about this incident. In her questionnaire she described her arrest by the ANR as being violent such that she was knocked unconscious as a result of blows received. At her appeal hearing, however, she describes her arrest as having been peaceful. Furthermore, in her interview she said she was taken to the National Intelligence Agency, but at her appeal hearing she stated that she was taken to a place unknown to her. These discrepancies are important since they relate to a core aspect of the applicant's asylum claim. The court is of the view that the RAT's finding that these discrepancies undermine the credibility of the applicant's account was reasonably open to the Tribunal in the circumstances.

Applicant's failure to answer questions in questionnaire
43. The applicant submitted that the RAT erred in attributing too much weight to the fact that the applicant failed to answer various questions in her questionnaire, and in concluding that these omissions on the applicant's part undermined her credibility. The applicant submitted that her omission does not undermine the core of her claim and she further stated that the RAT member failed to explain why her reasons for not having answered the questions were lacking in credibility.

44. The applicant failed to respond to numerous questions in her "Application for Refugee Status Questionnaire", despite specific instructions at the start of the questionnaire that it is important to answer all questions truthfully. The questionnaire also warns applicants that providing false or misleading information or withholding information at this stage "*may affect your credibility and disadvantage your claim*". The Tribunal member found that the applicant's reasons for not answering numerous questions in the questionnaire were wholly lacking in credibility. The applicant failed to answer a number of basic questions including, for example, question 27(a) which asked the applicant to *"state by whom and how long you were detained" and question 38 "Who accompanied you on your journey?"* The applicant's explanation in each case was that she had not understood the question.

45. I am of the view that the RAT's reason for rejecting this explanation is self-evident – these are clearly not questions that any reasonably intelligent person, such as this applicant, could fail to understand. The questions were intelligible to her since they were in French, a language in which this applicant is fluent. This complaint is therefore without substance and must be rejected.

The Applicant knew that sending the letters would place her in danger
46. The applicant submits that the Tribunal member erred in his finding that the applicant,

> *"was aware of the government's attitude to its citizens who opposed its policies and the functions of the ANR. The applicant's allegation that she did not think that she was putting herself in danger by writing the letter is disingenuous and wholly lacking in credibility."*

47. The applicant states that the RAT member failed to explain why her claim that she did not realise writing the letter would place her in danger lacks credibility.

48. The applicant did not give detailed evidence as to the content of the letters; she merely described them as not being "*soft letters*". It was credible that the applicant did not think that by writing such letters, she would get into difficulty with the ruling party. I am of the view that the Tribunal, in omitting to say why this assertion was lacking in credibility, failed in its duty to give any or adequate reasons for its decision on this issue.

The Applicant did not, in fact, write the letters as claimed
49. Counsel for the applicant took issue with the Tribunal member's conclusion that the applicant did not in fact write the letters as claimed. In this regard, the applicant referred to the decision of Peart J. in *Memishi v. Refugee Appeals Tribunal & Ors* [2003] IEHC 65, where the learned judge set out the principles that should be applied when considering credibility findings. Peart J. stated as follows at p. 23 of his judgment:-

> *"The principles which emerge from these decisions are that a Tribunal is not entitled to make adverse credibility findings against an applicant without cogent reasons bearing a nexus to the decision, that the reasons for any such adverse finding on credibility must be substantial and not relating only to minor matters, that the fact that some important detail is not included in the application form completed by the applicant when he/she first arrives is not of itself sufficient to form the basis of an adverse credibility finding, and finally that the fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient. Mere conjecture on the part of the authority is insufficient, and that corroboration is not essential to establish an applicant's credibility. As general principles I agree."*

50. The applicant also referred to the decision of Mac Eochaidh J. in *R.O. (An Infant) v. Minister for Justice and Equality & Ors* [2012] IEHC 573, where the learned judge reviewed the relevant authorities and then stated as follows:-

30. In view of the foregoing, I approach the review of the adequacy of reasons in this case by asking the following questions:

(i) Were reasons given or discernible for the credibility findings?

(ii) If so, were the reasons intelligible in the sense that the reader/addressee could understand why the finding was made?

(iii) Were the reasons specific, cogent and substantial?

(iv) Were they based on correct facts?

(v) Were they rational?"

46. The first reason stated by the Tribunal for not accepting that the applicant had written the letters as alleged, was that the applicant could not recall the addresses to which she claims to have sent the letters. The applicant said that she could not remember these addresses, although they were the local offices of the political parties. The finding that this affected her credibility as to the writing of the letters is, it seems to me, unreasonable conjecture on the part of the Tribunal Member.

51. The second credibility reason was that since the applicant alleged that the letters gave rise to her arrest, her failure to give details of their contents in her questionnaire, where she refers to "*those letters of refusal*", undermined her credibility. The applicant submitted that she did explain at interview that they were refusals of the "demands" of the parties to vote for them. The applicant submitted that this finding offended the principles set out in *R.O.* by Mac Eochaidh J. and in *Memishi* by Peart J.

52. The third reason was that the applicant categorically stated in her questionnaire and at interview that she would submit copies of the letters, which she claimed were in her work locker, to ORAC, and that it was not plausible that those letters, which would substantiate her allegation, were missing from her locker. The applicant indicated that she would ask her friend to send her the letters. It was submitted that it was contrary to the principles set out by Mac Eochaidh J. in *R.O.* to impugn her credibility on account of her inability to obtain letters in circumstances beyond her control; and that it was not implausible that the letters were not in her locker and, since the applicant could not know what happened at her former workplace after her departure, it was unreasonable and unfair for the first named respondent to find that this undermined her credibility.

53. The fourth finding was that the fact that the applicant was unaware that the elections in June 2006 were also for the national parliament undermined her credibility. The applicant stated that what she knew was that it was the presidential elections and these were the elections that caused her the troubles. The applicant submitted that this finding that her evidence was not plausible was irrational, did notbear a legitimate nexus to the decision, and was based on conjecture and gut feeling, contrary to the requirements in *R.O*. and *Memishi*.

54. The fifth finding was that the applicant was unaware of what PPRD and MLC stands for and that her answer at question 26 clearly indicated that she was not interested in the electoral process or the two parties' policies. This was not the core of the applicant's claim, which was based on imputed political opinion, as her persecutors perceived her as anti-Kabila because of the views she expressed. It was based on her personal views of the personal attributes, origins, and political actions of President Joseph Kabila. It was submitted that her views in this regard were supported by COI which indicated that this was a real concern and political issue for people in Western DRC, including Kinshasa. The applicant said that life had been difficult and conditions had not improved and they had been let down by politicians. The COI concerning the actions of the security forces including the ANR and their activities during the electoral process, including serious human rights abuses against those perceived as anti-Kabila, the political violence associated with the presidential elections in 2006, the impunity for the security forces' actions, and President Kabila's reaction to political opposition to his election, were consistent with the applicant's evidence as to what occurred to her. It was submitted that the findings of the first named respondent on this ground were contrary to the requirements of *R.O*. and *Memishi*.

55. The final finding was that if the applicant was the author of the alleged letters, which she claimed to have signed, it was not credible that her boss was arrested or that she was subsequently arrested for the reasons alleged by her, and that it would be expected that if the letters were written on the company's letter headed paper, it would have had the address, telephone, and fax number printed thereon and her testimony that her boss had stamped the letter with the name, address, and telephone number was disingenuous and wholly lacking in credibility. The applicant submitted that this finding was not cogent, substantial, or rational. The applicant consistently stated throughout the asylum process that she signed this letter in her capacity as secretary. It was submitted that it is normal custom and practice in business and administration that the person in authority in whose name a letter was signed by a secretary on his behalf, would be viewed as the author of the letter. I am of the view that the applicant's evidence that the ANR agents arrested her boss, who then told them that it was she who drafted the contents of the letter, and who then subsequently arrested and detained and ill-treated her, is consistent, coherent and plausible.

56. The court is satisfied that, in these circumstances, the Tribunal Member failed to carry out a rational analysis of the evidence and his conclusion that the applicant did not write the letters is unsound. The reasons stated by the respondent did not flow from the evidence before the Tribunal.

Absence of a supporting medical report

57. The applicant complains that the RAT erred in finding that her account of being arrested, detained, tortured, raped, and freed from prison was undermined by the fact that she had not produced a supporting medical report. In this regard, the RAT observed at p. 24 of its decision: "*...a medical report was not submitted to substantiate her allegations of torture and rape*." Counsel for the respondent concedes that this was an unfair finding on the part of the Tribunal. I am of the view that the Tribunal member erred in finding that the applicant should have produced a medical report to substantiate her account.

Discrepancies in applicant's account of her escape

58. The applicant complains that the Tribunal erred in finding that there are discrepancies between the applicant's account of her escape as given in her s. 11 interview and that given at the RAT hearing. The RAT gave the following account of the applicant's evidence at hearing:

One of the applicant's interrogators got friendly with her and from time to time they would speak when his colleagues were not present and she took advantage of the situation. This man asked the applicant her ethnicity and who her parents were and he said he would help her.

The applicant and the guard formed a friendship and she asked him to permit her to telephone a family member which he promised to do when his colleagues were not present. She telephoned her brother, whose number she had in her head, but she did not get a connection. She then tried the telephone number of a lady who was one of her clients in the hair salon and she asked this lady, whose husband (the husband) held a position in the government, to help her. The lady spoke to her husband and he in turn spoke to one of the men who had arrested her but she is unaware of the arrangements they made. This man assisted her to escape.

On the night of her escape the friendly guard woke her up, gave the applicant her clothes, got her out of prison through the rear door and when she was outside the prison she saw a car owned by her client's husband. She went to their house in Montngafula, Kinshasha and during the three/four weeks she lived there the applicant did not venture out of the house. The husband told the applicant that if she remained in the DRC her life would be in danger and he would try and help her get out of the country.

59. At her s. 11 interview with ORAC, the applicant had given the following account of her escape. She said she was taken to jail and detained there for a while. She then stated that:

> *"...one of my clients, a lady who I had worked for when she was getting married, told her husband to try to help me out. Because of the contact that her husband had he helped me to get out of that jail. But he gave me the condition that I do not reveal his name as he was taking a very huge risk. He took me to his house where I stayed for a while and he arranged my travel out of the country. This is how I got out."*

60. The applicant added later in her s. 11 interview: "*As I said before, I was helped by a husband of one of my clients. He came to the detention in the evening. I don't know if he bribed the guards. I was let out and went with him*."

61. The RAT put these issues to the applicant at hearing. The Tribunal member records that he asked the applicant about why she had not given details at her s. 11 interview about her friendship with the guard and her use of the telephone. Her response is recorded in the following terms:

> *She replied that her mind was in disarray, she could not give all her details and in her questionnaire she wrote what she could remember. When asked would the details of her alleged escape not be fresh in her mind when completing her questionnaire at her interview the applicant replied she only gave details of the events she could remember.*

62. The RAT reached the following conclusions on this issue:

> *The applicant failed to state in her interview that she befriended a guard in prison or that he permitted her to use a telephone. Her account at her appeal of how she managed to engineer her alleged escape from prison contradicts her account in her questionnaire and her interview. I believe that the applicant has embellished her account throughout the asylum process.*

63. The Tribunal held that the applicant's account at her appeal as to how she managed to engineer her escape contradicted her account in her questionnaire and at interview. It was submitted on behalf of the applicant that she had given a summary in her questionnaire of the events that led to her fleeing persecution in the DRC. She indicated that she would give further details at interview. She did so in answer to questions she was asked. While the applicant did not mention the guard at interview, she explained that one of her hairdressing clients told her husband to try to help the applicant get out. Because of that contact, he helped her to get out of detention. No information was sought by the authorised officer as to how she was able to contact her client and ultimately leave detention with the assistance of her client's husband.

64. At her appeal hearing before the first named respondent, she was asked specifically how she was able to leave the place of detention. She gave detailed information about the circumstances as to how she left detention. There was no contradiction in the applicant's evidence between her questionnaire, her interview, and her appeal hearing. In the circumstances, the finding of the first named respondent was unreasonable.

The newspaper report

65. The applicant complains that the RAT ignored the newspaper article in his decision, despite its having been found to be authentic by ORAC. The applicant says that in doing so the RAT ignored information from ORAC that was favourable to her. However, the newspaper report, while referring to a person who bears the same name as the applicant, gives a markedly different account of her activities. It states that she was arrested and taken away by the authorities for having switched from supporting one political party to another. The newspaper report refers to her as a young girl and states that she was involved in political marches.This issue was put to the applicant at the RAT hearing, which the Tribunal records in the following terms at para. 16(a) of its decision:

> *The applicant was told that the news report submitted by her headed "Political Intolerance in DRC" does not describe her story as she has done today. The fourth paragraph refers to a young girl, whereas she was aged 30 years, and that she changed parties in the second round. The applicant replied that she does not know how to explain the discrepancy in her story. She was asked the reason the article refers to her campaigning for the PPRD and then changed camps. The applicant replied that all she can say is that she is a true daughter of the Congo, she is not for or against the PPRD, her main concern is to be governed by somebody who can be a good leader for the country and whose origin is known.*

66. The RAT made the following finding: "*The [newspaper report] is undated, cannot be authenticated, refers to a young girl and states that she was actually involved in the election which contradicts her account at her interview and appeal*."

67. It is evident that the facts as set out in the newspaper report bear little relation to the applicant's account to the RAT. The RAT was thus entitled to draw conclusions from this and while the Tribunal did perhaps fall into error in noting that the newspaper report could not be authenticated, when ORAC had in fact previously informed the RAT that it appeared to be authentic, it is clear that this document was rejected primarily on the grounds of its inconsistency with the applicant's story in her asylum claim. Because the account in the newspaper report differs significantly from applicant's account to the Tribunal it was, consequently, of no corroborative value and the RAT was therefore entitled to reject it for the reasons stated in its decision.

Credibility finding based on speculation and conjecture

68. The applicant submitted that the RAT's finding that it was not credible that the applicant was not searched and that her birth certificate and card were in the clothes she was wearing is based on speculation and conjecture. In this regard the RAT stated, at para. D of its decision:

It is not credible that if the applicant was detained as she alleges that she was not searched and her account that a card and her birth certificate were in the pocket of the clothes she was wearing is not credible... Her account that she had her birth certificate with her when she was arrested contradicts her testimony at her appeal that her friend sent it to her.

69. At para. 14 of the RAT decision, it is recorded:

The applicant claims that her hairdressing diploma, photographs, the letter from her employer, her birth certificate and a certificate from the centre for orphans which were kept in her locker at her place of work, were sent by the lady she worked with.

70. At para. 24, the Tribunal noted:

The applicant was referred to her answer at paragraph 3, 3 above and she was asked did she have to return home to get her clothes. She replied that she registered the first day she arrived in Ireland and she was asked to return. The question was again asked and in response the applicant claims that when in prison the card was in the clothes that she was wearing.

The applicant was asked that after escaping from prison and being taken to another place how did she manage to retrieve her birth certificate and the two cards. She replied she did not return to her home to collect the documents, in the DRC a person must carry an identity card and her friend sent her birth certificate which she found in her locker at her place of work.

When the applicant was beaten, questioned and raped she had the two cards on her person but her interrogators did not touch the cards which were in her clothes and she claims she was not searched.

71. At para. 3, the RAT stated:

In 2005 people who knew her boss called to the premises looking for the names of the children she was training and their dates of birth. Her boss gave her and each of the children referendum cards. When she arrived in Ireland the applicant had her identity, election and other cards. I asked the applicant the reason she had not listed the referendum card at paragraph 8 in her questionnaire. Ms Costello replied that the referendum card does not verify her identity as the other documents mentioned in the same paragraph do.

72. The applicant stated that her card was not taken from her. The applicant submitted that it was speculation and conjecture on the part of the Tribunal to suggest that the card would have been removed from her and she further submitted that there is no evidence to support that finding. The applicant did not say at any stage that she had her birth certificate on her when she was detained. This was an error of fact by the Tribunal member and undermined his findings in this regard. Accordingly, I am satisfied that his finding cannot stand.

Applicant shown to be lying under cross-examination

73. The applicant took issue with the RAT's finding that her assertion that people are still looking for her was shown to be a fabrication during cross-examination. The relevant portion of the RAT decision, at para. 13, states as follows:

She has been in contact with a friend who she worked with, who told the applicant that the authorities are still looking for her and her friend who went to the family home, at the applicant's request, realised that the family were not living there anymore.

The applicant when asked how did her friend know she was still being sought replied that she was told that people were looking for her. When asked the question again the applicant replied that her friend:

(a) Vaguely told her about the situation but did not elaborate how she obtained the information, and

(b) Some people went to the applicant's place of work but her friend did not say if they were from the ANR or family members.

The applicant in response to Ms. Walsh's question replied that it is correct she does not know who is looking for her, nor does her friend know if these persons were family members or not. Her friend did not know these people because people would normally introduce themselves, she was not interested, she was not at the applicant's place of work and she was given information by a third party.

The RAT concluded at para. E:

I have no doubt that the applicant's initial allegation that the authorities were still looking for her was demonstrated to be a fabrication when cross examined further and is, therefore, wholly lacking in credibility (13 above).

74. Having considered the applicant's testimony as recounted above, the accuracy of which the applicant has not sought to question, I am satisfied that it was reasonably open to the RAT to reach the conclusion that it did. This is not, therefore, a finding which this court should disturb.

Direct flight issue

75. The applicant complains that the RAT drew unfair conclusions from the fact that she did not seek asylum in the first safe country she reached. The RAT found as follows at para. F:

I am satisfied from the facts before me that the Applicant's failure to seek asylum in any other country than Ireland, is not consistent with persons seeking to flee their pursuer and, therefore, it is imperative to seek asylum wherever one can. It is reasonable to expect persons to seek help at the first safe venue if one is in the grip of fear and thereby eradicate their fear when the opportunity first arises, and her reasons for not so doing is disingenuous and wholly lacking in credibility. I have had regard to Section 11B(b) of the Act which is relevant to this application. From the evidence before me I do not accept that the Applicant has provided a full and true explanation of how she travelled and arrived in the State.

76. The applicant submitted that the direct flight principle has been expressly disapproved in Irish law. In *AMK (A Minor) (Afghanistan) v. Refugee Appeals Tribunal* [2012] IEHC 479 O'Keefe J. held:

> *"39. As a matter of basic principle, the failure of an asylum seeker to apply for asylum in the nearest safe country or in the first safe country to which he flees is not a bar to refugee status per se and is not necessarily inconsistent with a genuine fear of persecution. In theory, asylum seekers are entitled to choose their country of asylum... The assessment of an applicant's credibility may, however, include an assessment of the reasonableness of any explanation given for passing through safe third countries without applying for asylum there."*

77. In *FT v. Refugee Appeals Tribunal* [2013] IEHC 167, Mac Eochaidh J. held:

> *9. The terms of s. 11B(b) of the Refugee Act 1996, are worth bearing in mind. The section requires that a decision maker "shall", when assessing the credibility of an applicant for international protection, have regard to: "…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."*
>
> *10. It seems to me that it was not open to the Tribunal Member to state that he did not accept the explanations given by the applicant for his failure to claim asylum in France "per the terms of s. 11B of the Refugee Act 1996" where no 'first safe country claim' had been made by the applicant. (I understood the reference to section 11B to mean s. 11B(b) and this was not disputed at the hearing.) There is a suggestion in the statement made by the Tribunal Member that the law requires an applicant for asylum to provide an explanation why asylum was not claimed in the first safe country encountered by the person in flight. There is no such rule of law. The provisions of s. 11B(b) of the Act are applicable where a claim is made by an applicant that Ireland was the first safe country encountered after he or she departed his or her country of origin. No such claim was made by the applicant in this case. It is, of course, perfectly permissible for a decision maker on an application for international protection to have regard to the failure of an applicant to seek refuge in a safe country encountered en route to Ireland. However, given the mandatory terms in which s. 11B of the Act is expressed ("The Commissioner or the Tribunal … shall have regard to the following …") it seems to me that the provision should only be cited in the connection with a credibility finding where its strict terms are met. In these circumstances I find that the Tribunal Member erred in making the above finding in respect of the credibility of the applicant.*

78. In her evidence to the RAT, the applicant claimed that she travelled from the DRC to Dubai. She states that she did not claim asylum in Dubai because her client's husband had instructed her not to, and to travel on to Ireland instead. At no time does it appear that the applicant stated that Ireland was the first safe country she travelled to. It is clear in light of Mac Eochaidh J.'s remarks in relation s. 11B(b) that this section only applies in circumstances where a "first safe country" claim has been made. I am, therefore, satisfied that the Tribunal fell into error in making the above finding.

False passport

79. The applicant takes issue with the following finding of the RAT as set out at para. G of its decision:

> *The applicant's account of her journey and her entry into Ireland using a passport which did not bear her photograph is not credible. It is not credible that a trained immigration official at Dublin Airport would not detect that the passport was false. Clarke J in IMOH v. RAT stated that the practice of the immigration authorities at Dublin Airport was "based on a common sense approach as to the procedures which any person travelling through Dublin Airport would be aware of such matters are therefore such may be taken as common knowledge rather than matter that would require evidence (sic).*

80. In support of her complaint about this finding, the applicant referred the court to the decision of Mac Eochaidh J. in *R.R. [No. 2] v. Bernard McCabe (Acting as the Refugee Appeals Tribunal)* [2013] IEHC 468. In that case Mac Eochaidh J. considered the RAT's assessment of the applicant's account of his travel to the State on a forged passport via Paris. The Tribunal member had regard to s. 11B (b) of the Refugee Act 1996 in making his assessment, and he concluded that the applicant had not provided a plausible or reasonable explanation as to how he travelled to the State. Mac Eochaidh J. held at para. 13 of his decision:

> *This particular finding is also peripheral to the applicant's core claim. There was no evidence as to the quality of the fake passport. Nor was there any evidence as to the rigour with which passports are checked. Thus the implausibility assumes a low-grade fake passport and a careful document check at the Irish border. This credibility finding is overly reliant on speculation.*

81. In this case, the applicant does not claim to have used a false passport. She claims to have used a genuine French passport belonging to her hairdressing client whose husband assisted her flight from DRC. There was, therefore, no question of the Tribunal member speculating as to the quality of the passport. Rather, the RAT concluded that it was unlikely that a trained immigration official at Dublin airport would not have noticed that the applicant was using a passport with another person's photograph. The Tribunal member said he was using a common sense approach based on his awareness of how the immigration authorities work which, as Clarke J. accepted in *Imoh v. Refugee Appeals Tribunal & Anor* [2005] IEHC 220, may be taken as a matter of common knowledge rather than something requiring evidence. However, in the absence of any evidence as to whether the applicant was similar in appearance to her client, whose passport she used, this finding cannot be supported as it was based on speculation and conjecture.

The Irish authorities' inability to authenticate the applicant's cards

82. The applicant takes issue with what she sees as the Tribunal's questioning of the applicant's credibility based on the Irish authorities' inability to verify the authenticity of the documents submitted. In this respect, the RAT noted:

> *"The applicant submitted various documents to the Tribunal none of which can be authenticated. Her account that she had her birth certificate with her when arrested contradicts her testimony at her appeal that her friend sent it to her."*

83. The documents submitted to the Tribunal were as follows: her hairdressing diploma, photographs, a letter from her employer, her birth certificate, and a certificate from the centre for orphans. She states that she kept these documents in a locker at her place of work and that they were sent to her by a lady she worked with.

84. As can be seen from the above extract, the RAT merely notes that these documents could not be authenticated; the Tribunal did not find that this undermined her credibility. While it is unfortunate that ORAC was unable to authenticate the documents, I note the documents were not of such central significance to the applicant's claim such that if authenticated they would by themselves have

rendered the RAT's conclusions unsound or untenable. Therefore, this is not an argument which, even if it succeeded, would greatly assist the applicant's case.

Failure to inform the applicant of the making of a s. 16(6) request to ORAC to translate and authenticate documents submitted by the applicant

85. The applicant submitted that the RAT neglected to inform the applicant of its s. 16(6) request to ORAC to translate and authenticate documents that the applicant had submitted to the Tribunal. The applicant does not specify why this was objectionable. By letter dated 18th June, 2009, the applicant was informed of the s. 16(6) request to ORAC and was provided with copies of the translations. The applicant's solicitors, in their letter of reply dated 26th June, 2009, stated that while they had not been informed by the RAT of its intention to seek further information by way of a s. 16(6) request to ORAC, they had no difficulty with the translations of the documents provided to the Tribunal.

86. It is therefore clear that the applicant did not take any issue with the RAT's request to ORAC when first informed of it. Moreover, the applicant has not pointed to any provision which requires the Tribunal to inform the applicant in advance of its intention to make a s. 16(6) request to ORAC; nor is it clear what difference informing the applicant of this request would have made to the course of the applicant's claim or how failing to do so in any way affects the validity of the Tribunal's decision. This submission, therefore, appears to be misconceived and must be rejected.

Failure to consider the core of the applicant's claim and past persecution

87. The applicant submitted that the RAT failed to consider the core of the her claim, namely that she was arrested, unlawfully detained, beaten, and raped during her detention by the DRC government intelligence service, the ANR, as a result of her having expressed anti-President Kabila views in a letter she wrote at the time of the 2006 elections.

88. The applicant stated that the essential aspects of her claim and her reasons for seeking refugee status were not addressed at all by the first named respondent, let alone in the context of the known country conditions in the DRC. Indeed, the Tribunal member stated that he would not go on to consider the likelihood of the applicant facing arrest and imprisonment on her return to the DRC. The Tribunal therefore foreclosed a proper assessment of the core of the applicant's claim for refugee status.

89. In *MAMA v. Refugee Appeals Tribunal* [2011] IEHC 147, Cooke J. stated:-

> *"The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation."*

90. The applicant submitted that Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006) sets out the matters which a decision maker must take into account for the purposes of making a protection decision. Regulation 5 states that a number of factors shall be taken into account by a protection decision maker for the purposes of making a protection decision, including guidance as to when the benefit of the doubt should be given. Regulation 9 defines acts of persecution, and the ill treatment which the applicant suffered clearly falls within that definition.

91. The applicant submitted that Regulation 10 provided that the protection decision maker shall take into account when assessing the reasons for persecution:

> *"(e) the concept of political opinion which shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not that opinion thought or belief has been acted upon by the protection applicant."*

92. Regulation 10(2) provides that when assessing a well-founded fear of persecution, it is immaterial whether the applicant actually possesses the "*political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by an actor of persecution*." In Regulation 2 ("actors of persecution") includes a State.

93. The applicant submitted that, in relation to the applicant's claim for refugee status based on political opinion, Hathaway states that any action that is perceived to be a challenge to governmental authority is appropriately considered to be the expression of a political opinion. This is reflected in Regulation 10(1)(e) and (2). It was submitted that it was clear that the applicant's actions were perceived as a political opinion by her persecutors.

94. In these circumstances, it was submitted that the first named respondent erred in law and acted *ultra vires* in failing to engage with the above mentioned provisions in the assessment of the applicant's claim to refugee status. The court is of opinion that these criticisms are well made against the RAT decision.

Conclusion

95. For the reasons set out herein, the court has come to the conclusion that the decision of the RAT must be quashed due to the inordinate delay in holding the hearings before the RAT and the lengthy delay in the delivery of its decision. In addition, a number of the Tribunal's findings have been found to be unsound and have also been struck down. In the circumstances, I will quash the decision of the first named respondent dated 3rd March, 2011, and direct that the matter be referred back to the RAT to be heard by a different member of the Tribunal.