THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 1001 J.R.]

BETWEEN

M.A. (NIGERIA)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 12th day of January, 2016

1. This is telescoped hearing for judicial review seeking certiorari to quash a decision of the Refugee Appeals Tribunal dated 1st October, 2012, and remitting the appeal of the applicant for *de novo* consideration by a different tribunal member.

2. The applicant was outside the fourteen-day time period allowable in cases of this nature. The reason for the delay was explained on affidavit by the applicant, and the respondents did not raise an issue at hearing with the extension of time. In the circumstances, and in light of the explanation provided by the applicant, I granted the necessary extension.

Background

3. The applicant is a Nigerian national, born on 19th July, 1978, and is a single man. The alleged persecution that the applicant claims gave rise to his claiming international protection is as follows. The applicant survived a violent attacked on his church in Maiduguri in September, 2011. He states that he had previously inadvertently witnessed the attackers unload their explosives in August, 2011 and reported the incidents to the elders of the church. The applicant maintains that he was seen and identified by the assailants and, therefore, believes that his life would be in danger if he were to be located by the group. He states that the attackers are associated with the so-called Boko Haram militant group and are extremely violent. He states that he was in hiding before he left that city in March/ April, 2012, and moved to the city of Benin before departing for Ireland.

4. The applicant arrived in Ireland on 5th June, 2012, using a false or fraudulently obtained South African passport. Upon detection, immigration officials at Dublin airport questioned the applicant regarding his intentions in visiting Ireland. The applicant initially maintained that he intended to stay for a six day holiday, that he had a booking at the Ibis hotel and planned to visit tourist attractions in the city. When informed by immigration officials that he would be refused entry to the State pursuant to s.4(3)(a)(k) of the Immigration Act, 2004, the applicant then stated that he was a Nigerian national and intended to claim asylum because he was a homosexual persecuted in Nigeria. His details were forwarded by the border management unit of the Irish Naturalisation and Immigration Service at Dublin airport to the Refugee Applications Commissioner (RAC). The applicant completed an ASY1 form on 18th June, 2006, wherein he stated that his fear of persecution stemmed from a fear of the militant group, rather than from his sexual orientation. The applicant completed a questionnaire on 20th June, 2012, and attended at the RAC for an interview pursuant to s.11 of the Refugee Act, 1996 (as amended) on 4th July, 2012.

5. The RAC issued a negative recommendation in respect of the applicant's claim dated 9th July, 2012. The applicant's claim was rejected based upon credibility findings; the authorised officer made further findings, namely, that state protection would be available to the applicant and that internal relocation was a feasible option available to the applicant. The applicant's legal advisors issued a form one, notice of appeal to the first named respondent dated 9th August, 2012.

Impugned decision

6. The decision of the Refugee Appeals Tribunal dated 1st October, 2012, the impugned decision in these proceedings, affirmed the negative recommendation of the RAC, that the applicant not be declared a refugee. The tribunal member sets out perceived issues with the applicant's claim under the heading 'analysis of the applicant's claim', which is exhibited from pg. 107 of the booklet. The section may be summarised as follows:-

> 1. The first time that the applicant mentioned that the men carrying barrels had guns was at the interview with the tribunal member;
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> 2. The applicant was asked how many people were killed and injured in the church attack, to which he gave no reply;
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> 3. Because the applicant had not reported his alleged fears to the authorities, it was not open to him to claim that state protection was unavailable;
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> 4. Nothing happened to the applicant while he was in hiding for six months;
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> 5. The applicant claimed to have no formal education; however, when asked how he had filled in the asylum questionnaire, he replied that an ex-girlfriend had taught him basic literacy skills;
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> 6. The applicant had claimed to be a persecuted homosexual at Dublin airport, and later changed his claim. When questioned regarding this, he said that he had lost his mind;

7. There is no indication that the people unloading the barrels intended to specifically attack the applicant;

8. Internal relocation is open to the applicant, as he had lived in Benin, Nigeria, for two months prior to his departure to Ireland;

9. The tribunal member states in the penultimate sentence of the analysis section, "[h]aving had the opportunity to observe the applicant acutely throughout the hearing nothing the applicant has told me has convinced me that he has a well founded fear of persecution on any Convention ground".

7. The decision then goes on to conclude:-

> "The Tribunal has considered all relevant documentation in connection with this appeal including the Notice of Appeal, country of origin information, the Applicant's Asylum Questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to section 13 of the Act.
>
> Accordingly, pursuant to section 16(2) of the Act, I affirm the findings of the Refugee Applications Commissioner made in accordance with section 13 of the Act."

Applicant's submissions
8. Counsel for the applicant Mr. Mark de Blacam, S.C., appearing with Mr. Garry O'Halloran, B.L., submitted that notwithstanding the discourse in the decision on credibility, it is unclear whether the applicant's narrative has been accepted. Counsel relied upon the decision of MacEochaidh J. in *B.O.B. v. Refugee Appeals Tribunal & ors.* [2013] IEHC 187.

9. The applicant argued that in making the credibility findings, and thereafter the state protection and internal relocation findings, the first named respondent failed to have proper regard to country reports pertaining to the activities of Boko Haram and the performance of the state authorities in providing that protection. The applicant submitted that this was in breach of the requirements of fair procedures pursuant to regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006.

10. In relation to state protection, the applicant argued that the test for state protection is set out by Clarke J. in *Idiakheua v. Minister for Justice, Equality and Law Reform & anor. [*2005] IEHC 150. Further, the applicant submitted that when the tribunal member relied upon country of origin information to substantiate a finding that state protection existed; this involved selective reliance on country of origin information without appropriate reasons being given for the preferment of certain pieces of information over other such information, supportive of the applicant's position. Here, the applicant pointed to the decision of *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor*. [2007] IEHC 305.

11. The applicant submitted that the tribunal member erred in law in finding that the applicant could not claim a lack of state protection when he had never sought that protection. Moreover, the applicant contended, the internal relocation findings fell short of the principles established by Clark J. in *K.D. [Nigeria] v. Refugee Appeals Tribunal & anor.* [2013] IEHC 481.

Respondent's submissions
12. Counsel for the respondents, Ms. Emma Doyle, B.L., submitted that the applicant was not believed either by the authorised officer of the RAC or the tribunal member. Notwithstanding the credibility findings, the respondents argued, the onus is on the applicant to show that state protection is not available, as per *P.O. (Nigeria) v. Minister for Justice and Law Reform & anor.* [2010] IEHC 513, at para.4. [quote]

13. In regard to the internal relocation assessment, the respondents submitted that the tribunal member considered that the applicant previously safely relocated to another part of the country. The respondents further argued that the country of origin information was considered and therein it states that there is freedom of movement and religion in Nigeria; therefore, the applicant could safely relocate away from the perceived danger safely and freely practice his religion.

14. Counsel for the respondents submitted that the tribunal member's reasoning was adequate and this was clear from the final page where the tribunal member stated:-

> "Having had the opportunity to observe the applicant acutely throughout the hearing nothing the applicant has told me has convinced me that he has a well founded fear of persecution on any Convention ground."

The respondents stated that a cumulative analysis of information before the tribunal member was carried out, in accordance with law. The respondents relied upon the decision in *S.A. & ors. v. Refugee Appeals & anor*. [2012] IEHC 101, wherein Cross J. states that demeanour findings are necessary when assessed with all other evidence before a tribunal member.

Decision
15. The applicant herein raises complaints regarding the manner in which the tribunal member assessed the applicant's claim and a lack of clear findings in relation to the applicant's narrative of persecution in his country of origin. A tribunal member is obliged, as part of her role as decision-maker, to present a clear and reasoned decision to an applicant. MacEochaidh J. in *B.O.B. (supra)* states the following at para. 8 to 10, as follows:-

> In *Meadows v. The Minister for Justice, Equality and Law Reform,* Murray J. said as follows:
>
> > 'An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
> >
> > Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced.'
>
> In view of that statement, it seems to me that a Tribunal Member should express conclusions on an applicant's claim

clearly. In this case, for instance, it was open to the Tribunal Member to accept that the applicant had converted to Christianity but to reject the assertion that his father was persecuting him. No finding is made as to whether the applicant had converted to Christianity. This of itself is not fatal to the Tribunal's decision. The Tribunal might make multiple credibility findings in relation to a part of an applicant's account, which, read cumulatively, might adequately express rejection of that part of the claim. The fact that no express finding is made on a separate part of the same claim might not vitiate the decision.

In this case, it seems to me that the Tribunal Member may well have accepted that the applicant converted to Christianity. But if the reason for the rejection of the applicant's claim was difficulty believing the tale of persecution by the father, this should have been stated in terms. The standard required of a decision maker on an asylum claim as to the expression of a rejection of a claim and the statement of reasons therefore has been elaborately addressed by Irish courts, not only in the passage quoted from Meadows above but also in *I.R. v. The Refugee Appeals Tribunal* [2009] IEHC 353 and in *R.O. v. The Refugee Appeals Tribunal [*2012] IEHC 573."

16. An applicant is entitled to a clear and reasoned decision, wherein the claim presented is assessed and, if the claim is rejected, the reasons for that rejection stated clearly. General statements are not sufficient to ground rejection of a claim for international protection. I am satisfied that the tribunal member's decision did not state clearly whether the core claim was accepted, and if it was rejected, the reasons for that rejection.

17. Next I turn to deal with the complaint that the applicant's credibility was negatively affected by an unreasoned assessment of demeanour. The decision, as cited by the respondents, *S.A. & ors. (supra)* highlights that demeanour assessments do form part of the overall assessment of an applicant's claim for international protection. It would be worthwhile setting out the relevant part of that judgment, where Cross J. states as follows:-

"27. An ancillary but related issue of credibility was the Tribunal Member's reliance upon the demeanour of the first named applicant. This Court accepts the necessity for a decision maker to rely upon demeanour when assessing the credibility of an applicant. However, this reliance, particularly in the asylum process must be approached with caution. In *H.R. v. RAT* (Unreported, High Court, Cooke J. 15th April, 2011), Cooke J. in his judgment at para. 7 stated in the context of reliance on demeanour by a Tribunal Member the following:

> 'There is not doubt, of course, but that the Tribunal member is perfectly entitled to base a finding as to lack of credibility and plausibility upon the manner in which an asylum seeker gives evidence and on his or her demeanour when answering questions in relation to the details of facts and events which form the basis of the claim. Indeed, in many cases where such facts and events are incapable of any independent corroboration, the personal credibility of the claimant may be crucial. At the same time, however, the decision-maker must be careful not to misplace reliance upon demeanour and risk construing as a deliberate lack of candour a demeanour which may be the result of nervousness, of the stress of the occasion and even of the embarrassment of being an asylum seeker. An apparent hesitation and uncertainty may well be attributable to difficulties of language and comprehension. In the judgment of the Court, before a decision maker in the asylum process bases a rejection of a claim upon lack of credibility based mainly on the personal appearance and demeanour of the claimant, the decision-maker ought to be fully confident that the basis of the claim and all relevant facts and circumstances recounted have been fully and correctly understood and that there is no possibility that the decision-maker and claimant have been at cross purposes on any material point."

28. It remains, of course, that it is for the Tribunal Member to determine credibility and he may do so based upon demeanour. In coming to such a conclusion based on a demeanour, the decision maker must bear in mind the strictures of Cooke J. in *H.R.* (above) but such a demeanour based decision cannot of itself be said to be irrational or unreasonable. Indeed, in our system of laws, the vast majority of decisions in witness based actions are based upon credibility and frequently upon demeanour. As someone who learnt my trade as a barrister on circuit under an excellent judge, the late Judge Séan Fawsitt, who would hawk like observe the demeanour of witnesses before, during and indeed after they had given evidence, criticism of demeanour based findings do not sit lightly with me. Findings based upon demeanour are, in truth, usually based upon 'gut instincts'. This is not to undermine such findings. It is the expertise of decision makers in our system whether they be Tribunal Members or High Court Judges in witness actions that they must assess whether the person giving evidence before them is speaking the truth or not. Due deference must be given in our system to such decision makers making such decisions. These findings, of course, must not alone bear in mind the words of Cooke J. (H.R., above) but they are clearly open to judicial review and must not stand if they are based upon erroneous factual assumptions (Cooke J., D. (above))."

18. A decision-maker is entitled to take demeanour into account when assessing an applicant's claim. However, this must be undertaken with care. Here, I would refer to the decision in *F.O.O. (Nigeria) v. Refugee Appeals Tribunal & anor*. [2012] IEHC 46, where from para. 8 to 12, Hogan J. sets out as follows:-

"The first thing to note about the Tribunal member's decision is that one cannot readily discern the reasons given for the conclusion reached. As we have seen, the Tribunal member expressed the view that the applicant's demeanour was 'lacking in credibility' and that his evidence was 'quite unbelievable'. Passing over the fact that the description of a witnesses' demeanour as being 'lacking in credibility' is itself an uncertain expression, the truth of the matter is that an assessment of demeanour in itself can rarely be a sure ground for dismissing the cogency of a witnesses' evidence by reason of that fact alone.

As Atkin L.J. so memorably observed in Lek v. Matthews (1926) 25 Lloyds Reports 525:-

> 'The lynx-eyed judge who can discern the truth teller from the liar by looking at him is more often found in fiction or in appellate judgments than on the bench.'

This is perhaps especially true in the context of asylum claims, not least that allowance will often have to be made for translation difficulties and different cultural norms in terms of the assessment of the demeanour of any witness. As Cooke J. observed in IR v. Minister for Justice, Equality and Law Reform [2009] IEHC 353:-

> 'In most forms of adversarial dispute the assessment of the credibility of oral testimony is one of the most difficult

> challenges faced by the decision-maker. The difficulty is particularly acute in asylum cases because, almost by definition, a genuine refugee will be someone who has fled home in circumstances of stress, urgency and even terror and will have arrived in a place which is wholly strange to them; whose language they do not speak and whose culture may be incomprehensible. Inevitably, many will have fled without belongings or documentation from areas in a state of anarchy or from the regimes responsible for their persecution so that obtaining any administrative evidence of their status and even identity may be impractical, if not impossible.'
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> Cooke J. then went on to articulate nine guiding principles which have been consistently followed by this Court. It is sufficient for present purposes to refer to principles 4, 5 and 9:
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> '(4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.
>
> (5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding …
>
> (9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.'
>
> It seems to me that the applicant can establish substantial grounds for contending that the Tribunal member violated these principles, not least in the absence of any reasoned dialogue to explain his conclusions. Why, for example, was the applicant's demeanour lacking in credibility? Did he hesitate to answer difficult questions? Did his answers give the impression that he had been coached or that his answers had been pre-prepared according to a set script? Did he unnecessarily avoid eye contact? Absent an explanation- which would not have to be discursive or lengthy - this Court might be coerced to conclude that the Tribunal member elected to disbelieve his evidence for purely subjective reasons, contrary to the fourth principle articulated by Cooke J. in *IR*."

19. The tribunal member states, at p. 110:-

> "Having had the opportunity to observe the applicant acutely throughout the hearing nothing the applicant has told me has convinced me that he has a well founded fear of persecution on any Convention ground."

If an applicant is to be disbelieved, and one of those findings is based upon demeanour, then the decision-maker should set out the reasons for that finding. It is not clear what affect the applicant's demeanour, and the tribunal member's 'acute' observations have had upon his credibility, and, if this is a negative credibility finding, the basis of same is unknown to the reader. The reasons should be readily available to the applicant upon reading the decision. I am not satisfied that any specific reasons were provided, or even if the applicant's credibility was in fact adversely affected by his demeanour at interview.

20. In regards to the complaint that the availability of state protection was improperly assessed, I would refer to the decision in *Idiakheua v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 150, where Clarke J. held "the true test is whether the country concerned provides reasonable protection in practical terms". This is in line with article 7(2) of the Qualification Directive, which provides the following guidance as to the standard of protection that states are expected to provide:-

> "Protection is generally provided when the actors [of protection] take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."

The tribunal member in her decision states at p.108 of the booklet as follows, in regard to state protection:-

> "Not having reported his alleged fears to the police it is not open to the applicant to claim that state protection was not available to him."

The tribunal member states on p.108:-

> "In the instances of the applicant's case, not having accessed state protection it is not open to the applicant to claim, as he did in the course of his hearing before the Tribunal, that state protection is not available to him."

21. There is no rule in law that requires an applicant to report fears to the state authorities. The applicant must provide reasons for not having recourse to state protection given the facts of the particular applicant's case. It is open to a decision-maker to decide on the probative value of evidence submitted by an applicant and country of origin information in support of his claim; however, reasons should be given for the preferment of certain country of origin information over other such information. It would appear that the applicant is discounted for a failure to approach the police without engagement by the decision-maker with the applicant's claim that state authorities in Nigeria would have been unable and/or unwilling to assist him.

22. The finding in regard to internal relocation was made without proper regard to the principles set out by Clark J. in *K.D. (Nigeria) (supra)*. The tribunal member associated the applicant's safety for a sustained period in another part of Nigeria as indicative of the applicant's ability to internally relocate. However, this misses a central part of the applicant's evidence. The tribunal member states that the applicant was safe, when in fact it is recited as follows, at p.14 of the decision:-

> "Nothing untoward befell the applicant at any time for the six months which he claimed to be in hiding in Maiduguri. He left there to live in Benin for some 2/3 months again nothing ever happened to the applicant. He did not come into contact with anyone at any time and his subjective fears are not supported by any objective facts or information."

In relation to this point, the decision continues at p.15:

> "The option of internal relocation is also available to the applicant. Having relocated to Benin for some two months, nothing untoward ever befell the applicant."

23. The applicant was allegedly hiding from Boko Haram before fleeing to Benin state. This cannot amount to the applicant being described as having successfully internally relocated previously without a proper analysis being carried out, as per the principles enunciated by Clark J. in *K.D. (supra)*, which provide as follows:-

> "The following principles can be said to apply to an assessment of the internal relocation alternative:
>
> (1) An inquiry into the availability of internal relocation is only appropriate where a protection decision-maker accepts that the applicant has a well-founded fear of persecution for a Convention reason in his country of origin but that risk is localised and does not extend to the whole of the state.
>
> (2) Internal relocation has no logical part to play in a decision if no well-founded fear of persecution is accepted or if it is found that the persecution feared has no Convention nexus;
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> (3) A large number of decisions refer to the relocation option notwithstanding a finding that there is no well-founded fear of persecution on credibility grounds. In such cases, what the decision maker really means is, 'if what you say is true, which is not accepted, you have given no credible explanation for coming to Ireland instead of moving elsewhere away from the claimed danger'. These 'even if' findings are not internal relocation alternative findings requiring adherence to Regulation 7 but are part of a general examination of whether an applicant has a well-founded fear of persecution.
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> (4) Localised Risk: Where it is accepted that an applicant has a well-founded fear of persecution for Convention reasons but that fear is localised and confined to a particular area, it is relevant to consider the possibility of internal relocation as an alternative to refugee status. In such cases, Regulation 7(1) of the Protection Regulations requires the protection decision maker to identify (if only in general terms) a place or area within the country of origin where the risk of persecution does not exist and where the applicant might reasonably be expected to stay. Security from persecution or serious harm and meaningful state protection in the proposed area of relocation are key.
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> (5) Where there is a well-founded fear of persecution and a general area has been identified as an alternative to refugee status then the protection decision-maker must pose two questions: (i) is there a risk of persecution / serious harm in the proposed area of relocation? If not, (ii) would it be reasonable to expect the applicant to stay in that place?
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> (6) Absence of Risk: Where the persecution feared is of a general or public character such as a religious or tribal conflict or oppression by a political regime which controls a particular region or city, it will be necessary to consult appropriate up-to-date COI to determine whether the risk of persecution / harm is genuinely absent from the proposed area of relocation. In such cases the decision maker must engage in a detailed and careful enquiry as to the general circumstances prevailing on the ground in the proposed area, in accordance with Regulation 7(2).
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> (7) If the persecution feared emanates from private or domestic actors, such as a threat from a particular family member, and a Convention nexus has been established, the protection decision-maker must make an objective, common sense appraisal of the reality of whether the risk faced by the applicant could be avoided by moving elsewhere, having regard to the applicant's own evidence.
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> (8) Reasonableness: It is not enough for the protection decision-maker to determine that the risk of persecution is absent from the proposed area of relocation. He or she must go on to consider whether it would be reasonable to expect the applicant to stay in that place, having regard to his / her personal circumstances and the general conditions prevailing on the ground, in accordance with Regulation 7(2) of the Protection Regulations. The reasonableness assessment is not concerned with assertions such as 'I won't know any one' , but rather with matters of substance such as whether the applicant is old, infirm, ill, has many small children or is without family support and other real issues.
>
> (9) The UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative (2003) indicate that consideration should be accorded to whether the applicant could lead a relatively normal life in the selected place of relocation without undue hardship, in the context of the country concerned. Unless there is objective evidence that the general circumstances prevailing in the proposed area are harsh – for example if the proposed area is the site of a conflict or a humanitarian crisis – there is in general no obligation to seek out a specific town or detailed information on economic and social conditions in the proposed location. However, if a specific objection is taken by the applicant to the location this objection must be examined.
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> (10) Burden of Proof : There is a shared burden of proof. The protection decision-maker who accepts a well-founded fear of persecution but determines that refugee status is not appropriate because internal relocation is available must conduct a careful enquiry to identify a safe relocation area, having regard to up-to-date objective evidence about that area and also to the applicant's own evidence in that regard.
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> (11) Fair procedures: As a matter of fair procedures the proposed safe area should be notified to and discussed with the applicant to establish whether he/she could reasonably be expected to stay there. The applicant is obliged to cooperate, to answer truthfully, to provide all relevant information available to him / her to determine the reasonableness of the relocation area and to provide information on any personal factors which would make it unreasonable or unduly harsh for him / her to relocate rather than being recognised as a refugee;
>
> (12) No state is obliged to consider the internal relocation alternative even when the Convention-related persecution feared is confined to a particular part of the applicant's state. States can recognise an asylum seeker as a refugee solely on the basis the criteria under Section 2 of the Refugee Act 1996, without ever turning to the relocation alternative.
>
> (13) The threshold to be reached before internal relocation is considered is high. The applicant would be recognised as a refugee but for the fact that he can safely relocate. The inquiry is commensurately careful."

Upon reading the decision under challenge, and applying the above principles, it is unclear to me that the Tribunal Member found that internal relocation was open to the applicant, or if this was part of the evidence that affected the applicant's general credibility.

24. For the reasons outlined above, I am not satisfied that the applicant's claim was given proper and due consideration in the process of the appeal before the Refugee Appeals Tribunal. I therefore propose to grant leave and to grant an order of *certiorari* quashing the decision of the tribunal member and further remit the matter for *de novo* consideration by a different tribunal member.