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THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1520 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, THE REFUGEE ACT 1996 (AS AMENDED) AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

P. M.

APPLICANT

AND

NEHRU MORGAN PILLAY ACTING AS THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

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

Background

1. The applicant was born on 6th July 1979 in Blantyre, Malawi. He is a member of the Ngoni ethnic group and is a Catholic. He speaks Chickewa and English. It is the applicant's case that he is a homosexual. He claims that on account of his sexual orientation he has suffered persecution in Malawi.

2. The applicant states that when he was 17 years old, he kissed another man. He went to the United Kingdom in April 2004 on a six-month visitor's visa. He overstayed his visa and remained in the UK until 2006. He obtained work in that country. He states that he was not aware of his sexual orientation until he had a sexual relationship with a French man for six months while he was in the UK. He left that country voluntarily in 2006. He says that he did not run into any difficulties on leaving the country. He was just told that if he wanted to

return he would need to get a visa.

3. The applicant stated that he was aware that homosexuality was a taboo subject in Malawi, but he says that he did not know that it was illegal and punishable as a crime. He only became aware of this when he returned to Malawi.

4. In November 2008, the applicant says that he met a man through a friend of his and they had a relationship which lasted until approximately December 2009. He could only meet this homosexual friend in his house as they could not be openly gay. In December 2009, he was in a nightclub when a man came up to him and put it to him that he was gay. The applicant denied this. He went outside for a cigarette. He was followed outside and was beaten up by some men. He suffered broken teeth and some scarring to his face.

5. In early 2010, neighbours of the applicant found out that he was gay. He received a number of threatening letters telling him to leave his home due to his sexual orientation. In February 2010, he went to Balaka where he remained until early May 2010. However, on his return to his home in Blantyre, he received an anonymous letter threatening to report him to the police.

6. The applicant left Malawi on 17th May 2010. He flew, first to Kenya and then to Holland where he had a stopover for a number of hours. He arrived in Ireland on 18th May 2010. He said that he did not claim asylum in Kenya because it was a Muslim country where he would not be tolerated. He did not claim asylum in Holland because the man who had advised him in relation to his travel arrangements had said to him that he should come to Ireland. Shortly after his arrival in Ireland his bag, which contained his passport and other documents, was stolen. He applied for asylum in Ireland on 19th May 2010. His application for asylum was refused by the Refugee Applications Commissioner, and on appeal, to the Refugee Appeals Tribunal (hereinafter "RAT"). His appeal was turned down in decision dated 23rd November 2010.

Grounds of Challenge
7. Essentially, the RAT found the applicant's story to be lacking in credibility. The applicant has claimed that this decision is deficient in a number of respects.

8. The applicant submits that the RAT erred in fact and in law in failing to make any finding in the decision in relation to the applicant's identity and nationality. The applicant submitted that this was a central issue on which there should have been a definitive finding made by the RAT. The respondents argue that the RAT effectively accepted that he was from Malawi when it gave the following biographical details in its decision:

> *"The applicant was born on 6th day of July 1979 and is a single man. He is a Catholic of the Ngoni ethnic origin from Lilongwe, Malawi. His first language is Chichewa and he can speak English. His mother is living in America."*

9. In the circumstances, I am satisfied that the RAT did make what was effectively a clear finding that the applicant was from Malawi. This was a significant finding in view of the fact that the applicant maintained that his passport and travel documents had been stolen from him shortly after his arrival in Dublin.

10. The second matter complained of by the applicant is that the RAT erred in fact and in law in failing to show in his decision where the credibility issue lay in respect of the applicant kissing a man when he was 17 and realising that he was a homosexual in the UK in 2004. The applicant referred to the decision of Mac Eochaidh J. in *E.R. v. RAT* [2013] IEHC 165, where the Court stated:

> *"It is well established law (see Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3 and Rawson v. Minister for Defence [2012] IESC 26) that decisions and reasons for them must be clearly stated. I find it difficult to discover in the passage quoted a clear and reasoned response to the claim made on behalf of the girls that they would suffer gender-based violence on their return to the DRC . . . on the core claim advanced on behalf of the girls . . ."*

11. The applicant stated that it was not clear whether the Tribunal was in fact making an adverse credibility finding in respect of this matter. In the RAT decision, the matter was stated as follows:

> *"The applicant claims 'I am homosexual. It all started when I was 17 but people started persecuting me when I was 28 years old'. (See Questionnaire, Q. 21). The applicant claims he first realised he was homosexual while in the UK in 2004, not 2003 (see section 11 interview, Q. 30-Q. 35). This inconsistency was put to the applicant. He stated 'no, that was a mistake'. 'Actually, when I was 17 I kissed another guy. But it was in the UK that I realised I was gay'. (See section 11 interview, Q. 71). The Presenting Officer informed the applicant it is difficult to understand how he could have made that mistake. The applicant did not respond."*

12. While there may have been some confusion as to when the applicant first realised he was gay, it does not appear that any adverse finding was made on this account. It seems to have been accepted by the Tribunal that the applicant was a homosexual at the time that he received the threatening letters in 2010, which prompted his departure from Malawi.

13. The next issue raised by the applicant was in relation to the threatening letters. It was submitted that the RAT made a significant factual error in finding that the applicant received threatening letters in early 2010 which led to his flight to Balaka. The applicant had stated in his questionnaire that:

> *"I was homosexual then I ran away to Balaka so that I could hide from them. On my return, I found an anonymous letter saying that I was going to be reported to the police."*

14. The RAT seems to have conflated the issue in relation to the receipt of the threatening letters, coming to the conclusion that the letters were all received prior to the applicant's departure to Balaka. This was an error on the part of the RAT. It was a significant error, as the main reason why the applicant left Malawi was due to the fact that not only had he received threatening letters in early 2010, but also due to the fact that he received a further anonymous letter on his return from Balaka, threatening to report him to the police. It was as a result of this further letter that he decided to leave Malawi and to seek asylum in Ireland.

15. The applicant's response to Q. 21 of the Questionnaire has been given above. At Q. 44 of his s. 11 interview, he stated:

> *"At the beginning of this year, January 2010, people in my neighbourhood found out. I got letters from my neighbours. They said, move out. They did not want people who were gay."*

16. Later, at Q. 49, he was asked:

> *"Was there anything in particular that prompted you to leave Malawi?"*

17. The applicant replied:

> *"I was afraid after the letters. I thought I might be reported to the police."*

18. The applicant submitted that the interviewer had failed to ask any questions directed to the anonymous letter that the applicant found on his return from Balaka, mentioned specifically in both the ASY1 Form and the Questionnaire. It was submitted by the applicant that his response to Q. 49 was equally consistent with him referring to the earlier letters from the neighbours and the anonymous letter found in his house, or indeed to all the letters. Accordingly, it was submitted that there was no sound basis for this finding of "*inconsistent testimony raising credibly concerns*".

19. The applicant's argument in this respect is well-founded. However, not every error will lead to a decision being struck down. This aspect will be addressed more fully at the conclusion of this section.

20. The applicant claims that the Tribunal erred in law and in fact in failing to make any finding in relation to the assault at the nightclub in December 2009. The failure of the respondent to make an assessment of the applicant's past persecution meant that the respondent could not have taken into account all relevant evidence and materials as they related to the applicant.

21. In the decision, the assault is dealt with in the following terms:

> *"At the hearing, the applicant claimed he went to a nightclub in December 2009 and some guy called him outside and told him he believes he was gay. The applicant claims he denied it but he pushed and beat him. At the interview, he said 'I was beaten up once in a nightclub. I was with my boyfriend and a guy came up to me and said he heard I was gay. I denied it. Then I went outside for a cigarette and they followed and started beating me' (see s. 11 interview, Q. 45, p. 6). As a result of the assault, the applicant claims he lost his front tooth and has a mark on his forehead. At the interview, he said 'my front tooth was knocked out and I had marks on my face' (see s. 11 interview, Q. 48, p. 6). The applicant claims he received treatment in the hospital the same night and he told them at the hospital he fell down."*

22. The respondent argued that it was well-established that the decision of the RAT did not need to refer to every argument raised so long as the rationale for the refusal is clear and there are no matters omitted which properly demand or call for a specific refutation, for example, documentary evidence which is definitively in support of the claim.

23. In its submissions, the respondents accepted that the impugned decision does not specifically address the physical injuries which the applicant stated he received during a homophobic attack outside a nightclub (which injuries were evidenced during the course of the hearing, as opposed to being raised by way of a medical report which identified a likely or possible source). The respondents conceded that it might have been preferable if this particular submission had been referred to in the decision, but the respondent submitted that the injuries, as described, would appear to be extremely non-specific and could, conceivably, have arisen out of a multitude of causes. They are not such as would have called for a detailed or reasoned refutation, as would be the case for specific or unusual injuries with a particular nexus to the persecutory acts that were asserted.

24. The respondents submitted that the *dicta* of Cooke J. in *I.R. v. RAT & Anor.* [2009] IEHC 353 was a leading authority with regard to the issue of when a failure to refer to a specific item of evidence in a reasoned written decision might be fatal to the integrity of the conclusion. In particular, paras. 30 to 31 thereof, where the learned judge said as follows:

> *"30. In the Court's judgment, the process employed by the Tribunal member in reaching the negative credibility conclusion as disclosed in the Contested Decision was, therefore, fundamentally flawed because the documentary evidence which had been expressly relied upon before the Commissioner and in the notice of appeal and which was on its face relevant to the events on which credibility depended, was ignored, not considered, and not mentioned in the Contested Decision. It is correct, as counsel for the respondents submitted and as is confirmed by the case law summarised at the beginning of this judgment, that a decision-maker is not obliged to mention every argument or deal with every piece of evidence in an appeal decision at least so long as the basis upon which the lack of credibility has been found can be ascertained from the reasons given. However, in the view of the Court, that proposition is valid only when the other arguments and additional evidence are ancillary to the matters upon which the substantive finding is based and could not by themselves have rendered the conclusion unsound or untenable if shown to be correct or proven.*
>
> *31. That cannot be said to be the case here. When the Tribunal member says in the decision, 'He claims to have spent six months in prison on account of his political activities', and then finds that the applicant lacks the political knowledge one would expect from someone with that commitment, the Tribunal member is clearly indicating that he believes the applicant was never in prison*

or, at least, never imprisoned for the political offences he claimed. But if the documents are authentic and are correctly translated, the applicant was indeed in prison and the premise on which the conclusion has been made is therefore no longer tenable. The process is, therefore, flawed and the analysis incomplete."

25. The respondents submitted that it was apparent from the extract quoted above that an important premise the principles confirmed by Cooke J. in *I.R.* was the contingent fact that if the documents in question therein were genuine, then necessarily, and as a matter of logic, it would have followed that an otherwise doubted aspect of the applicant's account was in fact true - he was either imprisoned or he was not, both of these possibilities could not co-exist - and if the document was not a forgery it unambiguously confirmed what he had claimed. For this reason, the matters addressed in the documentation had to be brought into the decision and accepted or rejected, as the case may be.

26. The respondents submitted that the same cannot be said of the injuries which the applicant displayed. Certainly, the fact of the applicant having suffered some injury was evident from his scarring - this was a matter which was beyond any doubt. What was at issue in the context of the asylum process was the question of who had inflicted these injuries and the related question of why they had done so. General enquiries could not advance these matters in a way which was probative or reliable, and it was only tangential to the evidence which could - the oral evidence of the applicant as to the episode which gave rise to the injuries. The respondents contrasted the facts in this case with those described by MacMenamin J. in *Khazadi v. The Minister for Justice, Equality and Law Reform & Anor.* [2006] IEHC 175, where the overlooked medical evidence was compelling and such as to require specific attention.

27. The Court is satisfied that the submissions of the respondents are well-founded on this issue. The existence of the injury to the tooth and the face would not establish that the applicant had been assaulted or the reason why he may have been assaulted. In the circumstances, the existence of the injuries was not that relevant to the consideration of the applicant's claim to asylum.

28. The applicant submitted that the respondents erred in law and breached national and constitutional justice requirements in making a credibility issue in relation to the applicant's returning to his country of origin from the United Kingdom when his visa had expired. In fact, his visa had expired in approximately October 2004 and the applicant stayed on in the United Kingdom until 2006.

29. The Tribunal had relied on reports from the UK Border Agency for the period 2000 to 2005. The Tribunal noted that the system detecting immigration offenders attempting to leave the UK was still in force. When this was put to the applicant, he had claimed that he had no difficulty leaving the UK, and he stated that he was told that if he wanted to return to the UK he should apply for a visa.

30. The Tribunal stated that a request was made to the UK Home Office for information pertaining to any type of immigration history which the applicant may have in the UK. According to the UK Home Office, there was no trace of the applicant in their immigration records. The Tribunal concluded:

> *"Given the applicant's account on departure from the UK, it is difficult to understand that the UK Border Agency have no record of him. Therefore, the applicant's account is neither plausible nor credible."*

31. The applicant submitted that it was irrational to make any such finding based on the UK Border report covering the period 2000 to 2005, and in the absence of any evidence from the UK Border Agency as to the reliability or otherwise of their records/system for the time in question, or as to whether in all cases of departing visitors who have outstayed their visa there is invariably a prosecution under s. 24 of the Immigration Act 1971. The applicant further submitted that the Tribunal had failed to consider or give any reasons for rejecting the reasons which had been given in the notice of appeal concerning the frailty in the Border Directorate's main case record database which, it was submitted, fatally

undermined any such adverse finding.

32. The applicant submitted that it was not permissible to criticise the applicant for leaving the UK and returning to Malawi after his visa had run out because he was legally obliged to leave the UK (although this overlooked the fact that by this time, the applicant had already overstayed for some considerable time). The respondents submitted that this was a misconstruction of the finding. The applicant was not being criticised for his conduct in leaving the UK; rather, the Tribunal was assessing whether it was consistent and credible with his account in the round. The respondent submitted that as the finder of fact, the Tribunal was perfectly entitled to arrive at the conclusion that it was not credible that a man who had lived in the UK until 2006, in a gay relationship, did not know, enquire, research or otherwise come by the information that homosexuality was illegal in his home country, before he took the step of leaving the UK for Malawi; it was unchallenged that this was publicly available knowledge at the time. The respondent submitted that there was no irrationality in this finding.

33. The respondents submitted that it was not being suggested in this submission that it was impermissible or irrational of the applicant to return to Malawi - he may have chosen to do so for all the reasons that a person might wish to return to their home country, notwithstanding the unfavourable laws. But this was not the explanation which the applicant gave to the Tribunal - rather, he insisted that he was completely unaware that homosexual activity was illegal in Malawi (while he did know that it was taboo). Of course, had he been aware of the true position, and had he been genuinely in fear of persecution as a result, he could have considered staying in the United Kingdom, illegally or otherwise. Indeed, he would have been entitled to advance a claim as a refugee *sur place*. It was the lack of knowledge which the Tribunal found to be incredible and this conclusion was based on the premises, which were to a large extent, if not entirely, based on the applicant's own account and is justifiable accordingly.

34. The respondents' argument in this regard is well made. The Tribunal was entitled to enquire as to why the applicant had voluntarily left the United Kingdom to return to Malawi, especially as he had been in a homosexual relationship in the United Kingdom. The Tribunal was entitled to come to the conclusion that it was incredible that in the circumstances, the applicant did not know that homosexual acts were against the law in his home country.

35. The applicant further submitted that the RAT did not have regard to the country of origin information specifically relating to the plight of homosexuals in Malawi. He submitted that the first named respondent erred in law and breached constitutional justice requirements in failing to make any assessment of the relevant laws and regulations of the applicant's country of origin and how they are applied to homosexuals.

36. The UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity states:

> *"The Guidance Note recognises sexual orientation as 'a fundamental part of human identity': para. 8. It advises at para. 12 that 'being compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State may amount to persecution'. It further states:*
>
> > *'25. A person cannot be expected or required by the State to change or conceal his or her identity to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.*
> >
> > *26. . . . there is no duty to be 'discrete' or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships'.*
>
> *The Guidance Note refers to the Yogyakartha principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity of 2007, which were drafted by a distinguished group of human rights*

experts, including the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations. They are stated to 'reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity'. The principles recognise that sexual orientation and gender identity are "integral to every person's dignity and humanity". They suggest that the right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity.

19. These principles were endorsed by the UK Supreme Court in H.J. (Iran) and H.T. (Cameroon) v. Secretary of State for the Home Department [2010]UKSC 31. The Court held that the 'reasonable tolerability' test applied by the Court of Appeal had to be rejected. Homosexuals are entitled to freedom of association with others of the same sexual orientation and to freedom of self-expression in matters that affect their sexuality. It is a breach of fundamental rights to compel a homosexual person to pretend that their sexuality does not exist or that the behaviour by which it manifests itself can be suppressed. Persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action. Having said that, the persecution must be State-sponsored or condoned in order to engage Convention rights and simple discrimination or family or social disapproval is not sufficient."

37. The applicant submitted that the first named respondent took no cognisance of the UNHCR Guidance Note and failed to apply it or the Yogyakartha principles in reaching a negative decision in respect of the applicant.

38. The respondent has argued that though the Tribunal may not have proceeded to explicitly draw final conclusions in relation to the position in Malawi, in fact, these matters were rehearsed at length in the decision of the RAT and there was ample evidence that the matters were adverted to in arriving at the decision in a manner which was favourable to the applicant's position, assuming his claim was true. The respondents pointed out that the RAT had referred at length to the legal position as pertaining in Malawi at pp. 23 to 24 of its decision.

39. The respondents argued that where there is a general finding of lack of credibility, the requirement to engage with country of origin issues was greatly diminished, and in some instances, may be eliminated altogether. The respondents cited the following *dictum* from the judgment of Peart J. in *Ojelabi v. Refugee Appeals Tribunal & Anor.* (Unreported, High Court, 28th February 2005):

"The lack of credibility fundamentally infects the subjective element of a well-founded fear of persecution. The applicant was simply not believed, as I have said. In such a situation, the objective element of the well-founded fear assessment does not require to be made, since without a credible subjective element, the objective element does not become relevant."

40. The respondents did not dispute that the country of origin information which was raised in the appeal created a *prima facie* issue as to whether the prohibitive and restrictive laws of Malawi, as regards homosexuality, would constitute persecution. The respondents suggested that the uncritical way in which this information was recited in the report of the Tribunal Member demonstrated that this was accepted as being so. In one sense, the very one-sided recounting of the country of origin information was the finding that the preponderance of available sources pointed to the *dejure* prohibition and criminalisation of homosexual sexual activity in Malawi, and that this aspect of the applicant's claim (the objective position) was well-founded.

41. For the same reason, it could not be suggested that the Tribunal Member was unaware of the laws of Malawi (nor of the application of those laws in a number of notorious cases) when he came to judge the veracity and likelihood of the claims advanced by the applicant herein. Nor was it the case that the Tribunal Member ever doubted that the applicant's experience was consistent with country of origin information or that it was unlikely to have

happened in a country such as Malawi.

42. The respondents argue that such laws cannot constitute persecution in *vacuo* - to amount to a persecution which would give rise to a successful application for asylum, these laws would have to be experienced or apprehended by a person who had a particular personal history and sexual orientation (e.g. most obviously, a Malawian man or woman who was or wished to be outwardly homosexual). Because the Tribunal found that the applicant was incredible as a personal historian, this essential precondition to establishing persecution within the meaning of the Act and the Convention was absent, and it was for this reason that this claim failed, not because of any failure to properly consider the effect which the laws of Malawi would have on a person who is manifestly gay. There was no suggestion that the applicant could or should conduct himself in such a way as to conceal his true sexuality.

43. The applicant also argued that the respondent made a serious error in its consideration of the choice of country in which the applicant made his application for asylum. It was submitted that one of the errors on the face of the impugned decision relates to the fact that the Tribunal Member seriously misquotes Professor Hathaway in his book 'The Law of Refugee Status' (1991) in relation to the question of claiming asylum in the "*first safe country*" or the so-called "*direct flight requirement*".

44. The first purported quote "*those who truly fear return to their State ought reasonably to claim protection in intermediate countries of potential refuge*" appears at pp. 72 to 73 of the book, and the passage in which it appears must be quoted in full to give it context:

> *"The more pernicious interpretations of the 'fear criterion' involve the disentitlement of persons whose claims to refugee status may have been otherwise objectively solid. First, the Board has sometimes ruled that persons who do not avail themselves of the earliest opportunity to flee their State of origin cannot reasonably be said to fear persecution in that country. Second, claims have been denied on the ground that those who truly fear return to their State ought reasonably to claim protection in intermediate countries of potential refuge, rather than disclosing their fear only upon entry into Canada. Third, and most frequently asserted, is the notion that genuinely fearful persons would not delay in making their need for protection known to Canadian authorities, and would, in any event, seek status before deportation is imminent."*

45. The applicant points out that Professor Hathaway goes on to state that "*the conceptual difficulties in drawing these conclusions have been previously discussed . . .*" and, as will be seen below, relevant discussion appears at pp. 46 to 50 of the book in relation to the first safe country. It would therefore appear that Professor Hathaway would characterise what the Tribunal has purported to do in respect of this issue as a "*pernicious interpretation*".

46. The second quote "*it is hard to believe that a person in the grip of an uncontrollable fear of being persecuted for political or other reasons does not make any effort to eradicate this fear when the opportunity arises*" is not a statement of Professor Hathaway at all, but rather, something the author quotes at p. 49 of his book from the judgment in Canadian Immigration Appeal Board decision in *Ferrada* in 1981. The applicants point out that Professor Hathaway immediately follows this quote in his text by stating:

> *"Fortunately, the Federal Court of Appeal has intervened to constrain this implied direct flight rule."*

47. The applicant submits that the quotations which have been included in the decision are the very antithesis of Professor Hathaway's views on the subject. It is submitted that in the relevant chapter of his book, at pp. 46 to 50, Professor Hathaway was at pains to point out that there was no requirement to seek protection in the country nearest home or the first safe country, that there is no requirement of direct travel, and that refugees are effectively allowed to choose their country of refuge. Professor Hathaway demonstrates that while in Canada there was an attempt, indirectly, to incorporate a direct flight rule by impugning

the credibility of the claimants who do not claim refugee status in other countries of passage or residence, this approach has not found favour in the Federal Court, particularly where some explanation is given for not seeking refugee status in a particular country of transit.

48. The applicant submits that the Tribunal Member, on the face of the decision, misdirected himself as to the law when he stated at p. 25 of the decision:

> *"Given the above comments of Professor Hathaway, it is not considered credible that if the applicant had a genuine fear of persecution that he would not have claimed asylum when he had the opportunity to do so."*

49. The applicant submitted that the adverse conclusion arrived at by the decision maker and the related conclusion at p. 26 that the applicant could have sought asylum in the Netherlands (through which he was only transiting), simply because the Netherlands is a signatory to the Convention, are objectionable and invalid. It is also submitted that the conclusion at p. 24 that "*his failure to claim asylum in Kenya, Netherlands and at Dublin Airport is neither plausible nor credible and I find it undermines his credibility*" is flawed, erroneous in law and irrational.

50. The respondent argued that the Tribunal was entitled, indeed obliged, to enquire into the circumstances in which the applicant arrived in this jurisdiction, and to draw whatever conclusions were appropriate. The account which the applicant gave of choosing this country was based solely on the fact that his "uncle" told him to come here. His uncle, he admitted, was not aware of the reason why he was leaving Malawi but he adopted his recommendation nonetheless. At another juncture, the applicant stated that his uncle was not, in fact, a relative, and that he only referred to him as "uncle", yet on the basis of the recommendation alone, he bought a ticket to Ireland and passed through a number of other jurisdictions en route.

51. The respondents submitted that these were the recounted and undisputed circumstances of the applicant's arrival into the country, and it was submitted that the respondent was entitled, as a matter of law and fact, to draw such conclusions as he saw fit and justified, and that this included an inference from the unadorned explanation that the applicant chose Ireland and spurned other earlier options on the basis of an entirely unqualified recommendation from an ill-defined acquaintance. The recital of Hathaway as an authority seems to be largely redundant in the particular circumstances of this case and the specific inference is valid, even if the more general inference is not properly supported by the writings of that very well regarded author.

52. I am satisfied that the respondent quoted very selectively from Professor Hathaway's book. The inference given that the learned author supported the so-called "direct flight requirement" was totally misleading. The learned author was not suggesting any such requirement, indeed, he was coming to the very opposite conclusion which was summarised at p. 46 of his book as follows:

> *"There is no requirement in the Convention that a refugee seek protection in the country nearest his home, or even in the first State to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the State in which she intends to seek durable protection. The universal scope of post-Protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim refugee status."*

53. The applicant also submitted that the RAT appeared to draw an adverse credibility inference in respect of the applicant's sexual orientation from his answers as to whether he socialised in the gay community since his arrival in Ireland. It was submitted that this questioning of the applicant was not appropriate and was irrelevant, or was, at best, peripheral, especially given the limited resources available to an asylum seeker in this jurisdiction. It was further submitted that it was irrational to have reached adverse inferences from his answers - he simply did not know anyone and did not get involved in the gay community and did not know any gay bars. While he admitted that he did not make any effort to check the gay scene in Ireland on the Internet, it was submitted that to treat

this omission as a reason for doubting his sexual orientation was entirely irrational in the circumstances.

54. The respondents submitted that in terms of possible relevance, the applicant had stated that in Malawi, he had been frustrated in not being able to enjoy normal social life in public, and in having to do so within the confines of his own home, it was reasonable to expect that he would pursue such opportunities as soon as they were available to him. The respondent further suggested that this was a line of questioning which would be likely to have assisted any applicant who was otherwise bereft of independent evidence in support of his claim, and to corroborate to some extent, at least, the fact of their declared sexuality, being the fundamental basis for his claim to be entitled to asylum. It was submitted that the Tribunal was entitled to assess his answers for truth and to take them into consideration along with the other matters raised in the appeal if they were found to be inconsistent with the account being put forward.

55. The RAT made fleeting reference to the issue in the following terms:

> *"The applicant was asked since he came to Ireland, did he socialise in the gay community. At the interview, the applicant said 'I went to a nightclub once in Dublin, I don't know the name, it's in Temple Bar. I don't know any gay bars in Limerick (see s. 11 interview, Q. 66, p. 8). At the hearing to the same question, the applicant said 'I did not get involved in the gay community in Ireland and I don't know anyone'. He said he can use the Internet but he made no effort to check the gay scene in Ireland."*

56. I do not read this portion of the decision as implying that any negative inference was to be drawn against the applicant on this account.

57. Turning to the approach that should be taken by this Court to cases such as the present, a number of helpful decisions have been laid down in previous case law. In *SBE v. Refugee Appeals Tribunal* [2010] IEHC 133, Cooke J. laid down the principle that in judicial review of a negative credibility finding, this is exclusively a question for the Tribunal Member to answer. The Court must resist the temptation to substitute its own view on credibility for the assessment made by the Tribunal Member. The Court is concerned only to ensure the legality of the process by which that conclusion was reached. Cooke J. stated as follows at para. 22 of his judgment:

> *"22. In reviewing a decision which turns predominantly on credibility the Court is fully conscious of the fact that the issue is one which is exclusively for the decision maker to determine. It must resist any temptation to substitute its own view of credibility for the assessment made by the Tribunal member. It is concerned only to ensure the legality of the process by which that conclusion has been reached."*

58. In *Khazadi v. Minister for Justice, Equality and Law Reform & Ors.* (Unreported, MacMenamin J. 2nd May 2006), the judgment dealt with the situation where the Tribunal Member had overlooked medical evidence that was compelling and was such as to require specific attention. The Court stated as follows:

> *"There is one area, however, where it seems to me that it is at least arguable that the tribunal member fell into error. This is in connection with the question of the medical evidence. The tribunal member correctly draws attention to the fact that it is a matter for the tribunal itself, and not for medical practitioners, to make determinations regarding credibility. Insofar as any person, no matter how expert, purports to make findings which are determinative of the issues to be considered by the Tribunal, such views should be placed to one side. They fall only within the remit of the Tribunal itself.*
>
> *However the fact remains that there are at least arguable grounds that is a failure to take into account a relevant consideration which was material in nature. Prima facie the signs of mistreatment or torture tended to support the applicant's account of events. It has been contended that there were relevant*

considerations which went to the issue of credibility. However it is arguable that what is absent is any indication that relevant medical material and evidence helpful to the applicant's case was taken into consideration or weighed in the balance in the determination of the Tribunal. It is also arguable that it is insufficient for a tribunal member in rejecting important evidence to fail to give reasons for such rejection and that is insufficient merely to state that such evidence is being disregarded because the tribunal member has had the benefit of an oral hearing and being given copies of country of origin information and documents submitted by the applicant and the Commissioner."

59. In *Gladys Tabi v. Minister for Justice, Equality and Law Reform* (Unreported, Peart J. 27th July 2009), Peart J. stated as follows at p. 10 of his decision:

> *"It is not desirable that a decision be parsed and analysed word for word to discern some possible infelicity in the choice of words or phrases used and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon have been clearly misunderstood or misstated by the decision maker. The whole of the decision must be treated and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion. If a decision maker makes a significant and material error in how the evidence has been recorded, or other serious error of fact, then of course the process by which credibility has been assessed falls short of the required (sic) to meet a proper standard of constitutional justice. But such an error must go beyond a mere possible ambiguity arising from the words used. The error must be clear and it must go to the heart of the decision making process and fundamentally undermine it.*
>
> *This Court should not lightly interfere with an assessment of credibility, since it is quintessentially a matter for the decision maker who has the undoubted benefit of seeing and hearing at first hand the applicant giving her evidence. This Court cannot substitute another view simply by a reading of words on the page and by way of the summary contained in the documents, unless an error is a clear and manifest error, without which a different decision might well have been reached."*

60. *E.O. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 433 established that it does not follow from the fact that something is not expressly referred to in a decision that it was not considered. Hedigan J. was of the view that if there was any requirement to have regard to the applicant's right to have respect for private life, the decision makers had complied with that requirement. He stated as follows:

> *"33. In the light of the judgment in Sanni, this Court is of the view that it does not follow from the fact that something is not expressly referred to in a decision that it has not been considered. In my judgment, it is abundantly clear that the analysing Officers were aware of the family and domestic circumstances of the first, second and third named applicants; they were clearly aware that the first named applicant's husband was now in Ireland, and that a third child had been born to her. They were, therefore, aware of any effect that the deportation orders would have on those involved. In the circumstances, and in particular in the light of the fact that the husband cannot be viewed as a member of the functioning family unit, I am of the view that if there was any requirement to have regard to the applicants' right to respect for their private life, the analysing Officers complied with that requirement."*

61. In *R.R. v. Refugee Appeals Tribunal* [2008] IEHC 406, it was held that where a mistake has been made in relation to a particular issue, this may not be fatal to the ultimate decision of the Tribunal if the error was made in relation to a peripheral matter. Cooke J. stated as follows at para. 22 of the judgment:

> *". . . At the risk of repetition, I stress that credibility is frequently judged by reference to collateral matters; thus, it seems to me, that there could not be*

any criticism of a decision, say, of the Refugee Appeals Tribunal if extensive findings of want of credibility on collateral or peripheral matters founded a conclusion as to credibility on what might be the main question (e.g. whether or not a person might be subject to persecution on political grounds). It seems to me further, that as a matter of principle, there is no reason why a decision should not stand even if it is not possible to sustain some one, if not more than one, adverse credibility finding on such collateral matters or peripheral matters, per se. Further, it seems to me that a misstatement, misconception or misunderstanding in relation to a factual matter (even one relied upon in reaching a conclusion) may, in very many cases, not be fatal in as much as it may be severable from any ultimate conclusion."

62. In *NUZ v. Refugee Appeals Tribunal* [2010] IEHC 141, the Court set out the correct approach to be taken in a review of a credibility decision:

> *"The Court agrees with the respondent that the correct approach to the review of any adverse credibility decision is to view the decision as a whole and then to consider whether the matter complained of, in the event of the complaint being upheld, represents a core finding upon which the adverse credibility decision was based, either in whole or in part. If it does not go to the core of the matter, then the decision must fall in the event of the complaint being upheld. However, if it does not go to the core of the decision, then even if the complaint be upheld, the decision ought to stand providing, of course, that there was other unimpugned evidence capable of supporting it."*

63. And, in particular, to principle 7, which was in the following terms:

> *"7. A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim."*

Conclusion

64. I am satisfied that the RAT fell into error in its conclusion that all the threatening letters were received by the applicant before he took flight to Balaka. It was clear from the evidence of the applicant, as contained in the Questionnaire and in the interview, that he received a further anonymous letter when he returned from Balaka, threatening to report him to the police on account of his sexuality. The timing of this letter was important because its receipt appears to have been the factor which persuaded the applicant to flee the country and seek asylum in Ireland.

65. This was a clear error which, if it had not been made, may have resulted in the Tribunal reaching a different conclusion.

66. I am also satisfied that the Tribunal fell into error in holding that an adverse finding could be made against the applicant by virtue of the fact that he did not seek asylum in either Kenya or Holland. The Tribunal was somewhat selective in its quoting of passages from Professor Hathaway's book 'The Law of Refugee Status' in this regard. The applicant gave credible reasons why he did not seek asylum in these countries.

67. As the adverse credibility findings are stated by the Tribunal to have been considered "cumulatively", it is not possible to say what the decision of the RAT would have been without the two impugned findings.

68. I am satisfied that on account of these two matters, the impugned decision of the RAT should be struck down. Accordingly, as this is a telescoped hearing, I will make an order allowing the applicant to seek judicial review of the decision of the RAT dated 23rd November 2010, and I will make an order quashing the said decision. I direct that the application be referred back to the RAT for reconsideration by a different Tribunal Member.

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