Neutral Citation Number: [2009] IEHC 217

THE HIGH COURT

JUDICIAL REVIEW

2006 681 JR

BETWEEN

M. M. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT OF MS. JUSTICE CLARK, delivered on the 12th day of May, 2009.

1. The applicant is seeking leave to apply for judicial review of the decision of the Refugee Appeals Tribunal ("RAT"), dated the 28th March, 2006, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that the applicant should not be declared a refugee. The hearing took place on 14th March, 2008 and 1st April, 2008. Mr. Mark de Blacam S.C. and Mr. John Stanley B.L. appeared for the applicant and Mr. Anthony Moore B.L. appeared for the respondents.

The asylum application

2. The applicant claims to be a national of Sudan, a Muslim and a member of the Masalite / Massaleit tribe of Darfur, which is a black African tribe as opposed to an Arabic tribe. He was born in Khartoum and Arabic rather than the Masalite dialect is his first language. He arrived in the State on 13th January, 2005 and applied for asylum the following day claiming to fear persecution by reason of his race. He had no identity documentation, saying he left his nationality certificate in his father's lorry in Sudan. In his ORAC questionnaire he indicated that he was born in 1981 and grew up in the village of El Jenjenat in the North Darfur province of Sudan. He attended the local school between 1988 and 1996 and he then worked as a herder on his father's farm. He said he left Sudan because of the "*war led by the terrorist government, along with its support for the Arab tribes (the Janjawid), and the ethnic cleansing that they engage in against us, killing and scattering and expropriating our precious animal and farming resources.*" He said millions of his tribes people had been expelled and thousands killed and that those who resist face death, hunger, thirst or sickness owing to "*the siege mounted by the government, which prevents them from receiving assistance.*" When asked why he did not move to another town or village to avoid persecution, the applicant answered:

"We suffer from racism and ethnic cleansing throughout Sudan, even in our village. So how could I go to some place where I would be persecuted and where I would have no home to live in? As such I opted to remain in my village amongst my family and neighbours, in my home."

3. He feared that if he returned to Sudan "*They would kill me immediately"* because they were trying to wipe out his tribe. On the subject of his travel arrangements he said he escaped his village on foot and went to the neighbouring village of Sharnaya: "*All the villagers were fleeing from the approaching Arabs*". He had some money and paid some traffickers who brought him to Libya and on to Ireland. All his documents were translated as the applicant spoke no English.

The s. 11 Interview

4. The applicant attended for his s. 11 interview on 13th October, 2005. He was assisted by an interpreter. The applicant was asked questions about his education, his father's farm and the events of 2004. He said his village of Jenjenat is located in the district of Tawilla, governance of Al Fashir. At school he learned Arabic, Islamic education, maths, geography, history and some English. After school he worked with his father, shepherding sheep, goats, cows and camels. They sold the animals in Al Fashir, sometimes Kutum and Al Tawila markets.

5. He said his problems began around 17-20th February, 2004 when he and his father were in his father's lorry, returning from the market at Tawila. His father left him with the lorry, which had merchandise aboard (sugar, tea, oil and soap). Three uniformed, armed persons surrounded the lorry and demanded to see his licence. He did not have it and asked them to wait for his father. One went inside the lorry looking for its papers. When the applicant asked him to get out they stabbed him in the knee with a bayonet, called him a "slave" and made off with the merchandise. Upon his return the applicant's father took him to the hospital in Korma where he spent one week and was operated on. Six weeks later he had his cast removed.

6. When asked what happened next he said there was a lot of stealing in the area around that time. On 28th November, 2004, roughly 250 people came on horseback to the applicant's village and opened fire for no reason. He and the other villagers ran for their lives to a forested area nearby. They did not return to the village but instead walked by night to another village, Shagiyra, three or four hours away. The people in that village were also fleeing. The applicant and his fellow villagers walked with them to Shartoyah, where they arrived early the next morning. People were leaving in lorries. Some other villagers who had fled Jenjenat came through Shartoyah and the applicant learned that Jenjenat had been burned and everything had been stolen. The applicant stayed at the marketplace, hoping for a lorry. The following morning he learned from passing lorry-drivers that his father's lorry had caught fire but no-one knew anything more about his family. He paid 10 million Sudanese pounds to a lorry-driver to allow him to travel with him to Libya.

7. When questioned about Jenjenat he said there were 700-1000 inhabitants and it was 30 minutes by lorry from Tawila (15-25km) and less than an hour from El Fashir (30-35 km). He drew a map indicating the location of Jenjenat, Shagiyra, Shartoyah, Kormah, Al Fashir and Tawila. When asked why he went to hospital in Korma and not in nearby Al Fashir he said it was because "*security would ask too many questions.*" When asked to name IDP camps beside Al Fashir and Tawila he named "Al Shouk" camp near Al Fashir and said "Al Sak" camp is near Korma but

did not know the name of any camp near Tawila. When asked why he did not go to the camps to see if any of his family had survived the attack on Jenjenat, he said he had heard people were open to being attacked, arrested or imprisoned in those camps.

8. He was then questioned about his travel through Libya. He said they travelled for six days through many hay plantations. He did not know the name of the first city they came to because he was asleep. They arrived at a market and he was taken by car to a plantation where he spent thirteen days. He did not know what city the plantation was in. It was put to him that there were many Sudanese people living and working in Libya but he said he did not meet any Sudanese people at all and did not stay there because he was following the smuggler and he could have been arrested if he was found out by the police. He was then brought to a harbour and boarded a large cargo ship on 19th December, 2004. The ship stopped a few times and on one occasion he changed to a smaller container ship. He did not know what port he arrived at. After he arrived he said he was told to tell any policeman or person he met that he was Sudanese. He said "*I arrived here at night, very cold, and in the morning I was at the city centre*" and was directed to ORAC by people on the street.

9. When asked what he feared if returned to Sudan he said he was afraid of torture because he is of the Masalite tribe. He was asked to name the tribe's leaders and its homelands and to identify what makes it different. He gave the names of two Sultans in Al Geneina and a King. He said the tribe has its own language and marriage customs.

10. He was asked if he had Sudanese friends in Ireland, if they were asylum seekers, if they had been interviewed and if he was a member of any Sudanese organisation. He gave the names of some Sudanese friends, three of whom have refugee status. He said he was not a member of any organisation. He was also asked to identify the names and dates of all the national holidays in Sudan and he gave several dates. When asked if he had performed military or national service he said he had not because he was helping his father and it did not happen until his brothers were older and he paid ten sheep every year to postpone the service. He was asked to give the price of a goat, sheep, cow and camel at market and did so, each in dinars and a goat's price also in Sudanese pounds.

11. At the end of the interview the applicant signed and initialled each of the pages of the interview notes and indicated that he had understood the interpreter.

The s. 13 Report

12. A report was compiled in compliance with s. 13(1) of the Refugee Act 1996 in November, 2005 in which a negative recommendation was made and several negative credibility findings drawn. The ORAC officer made unusually strong findings stating that there were "*serious misstatements, factual inaccuracies, material falsehoods and major discrepancies*" in the applicant's allegations which were "*of such a degree and nature as to seriously undermine the credibility of his claim*". He found that some of the applicant's key statements were "*not coherent and not plausible*" and ran counter to generally known facts about the Tawila and El Fashir areas. He found that the applicant was "*in fundamental error*" about matters such as the existence of a village named Jenjanat and the relative locations of towns and villages in his native area, that he had failed to establish that he was a long-term resident of the Darfur region or of the Masalite tribe, that his account could not be regarded on the whole as being credible and that he could not be given the benefit of the doubt. The officer found that country of

origin information (COI) did not support key elements of the applicant's claim insofar as there was "*no record whatsoever*" of Jenjenat or Shartoyah at the locations indicated and insofar as the applicant was incorrect in his orientation of the villages in the region. The officer concluded that "*a true native of Darfur and one who studied geography in school would not have been in such fundamental error or ignorance*". Attached to the s. 13 report were several information requests made by ORAC of the Refugee Documentation Centre, several maps of the Darfur region and several COI reports.

13. The officer noted that there was no reference in the COI consulted to a major attack having taken place on 28th November, 2004 and he found that the applicant was "*distinctly lacking in knowledge*" about the Massaleit tribe. He also found the applicant's evidence on military service to be "*in direct conflict*" with COI which indicates that able-bodied males – particularly those in Darfur – are not able to postpone service unless they have connections to the regime. In addition, he found that the applicant's account of his travel was not credible. He concluded that the applicant had made false declarations and found s. 11B (a), (b), (c), and (f) of the Refugee Act 1996, as amended, to be particularly relevant and material.

14. The material supplied with this decision makes it clear that the ORAC officer went to considerable effort to establish the existence of the three villages named by the applicant being Jenjenat, with several variations of spelling, and the two villages written down as Shatila and Shartoya. The researcher was unable to find any villages of those names or any details of an attack on 28th November 2004.

The Notice of Appeal

15. The applicant appealed and a Form 1 Notice of Appeal was lodged by the applicant's solicitors (the Refugee Legal Service, RLS) on his behalf in January, 2006. A number of generic grounds of appeal were set out in the Form 1 but of importance, a newsletter compiled by the *Sudan Organisation Against Torture* (SOAT) in November - December, 2004 was appended to the appeal document. This newsletter stated as follows:-

> *"On 28 November 2004, 300 Janjaweed militias attacked Jenjenat, a village about 20 km east of Tawilla in Northern Darfur state. They destroyed 200 houses, looted the villagers' livestock and killed some 17 people. The attack displaced thousands of villagers. […]"*

16. Later in the newsletter, referring to the same attack, it was stated that "The villagers have been displaced to Shertaya village, 25 km west of al-Fashir."

17. Also of importance is that attached to the Form 1 was a medical report provided by the applicant's G.P. dated 10th February, 2006, which recorded that there was a 25cm laceration on his thigh and over his knee and several smaller scars which the applicant attributes to being stabbed with a bayonet and approximately 50 suture marks along the length of the main scar. The G.P. recorded that the applicant has ongoing pain and a loss of sensation in his knee and calf and that the applicant has "deep psychological sequelae" and feels anxious most of the time. He indicated that he believed the applicant to be "quite depressed" and that he had started taking anti-depressants and had counselling arranged for him.

The Oral Hearing

18. The applicant was legally represented at his oral appeal hearing which took place in February, 2006. The Court is fortunate to have a note of the hearing

which was taken by the applicant's RLS caseworker. From that note it appears that the applicant had modified the date of the bayonet attack which he previously stated as having occurred between February the 17th and 20th and had now said it was between the 15th and 25th February. His explanation that it occurred in the middle of the month did not impress the Tribunal Member. When questioned about his journey to Libya he was unable to name any of the ships he travelled in and described that he got through immigration by hiding inside a truck and banging to get out, after counting to 500. He then walked into town where he was given directions to the ORAC office.

19. When the question of possible relocation arose, the Tribunal Member gave to the applicant and his counsel a copy of para. 3.8.8 of a U.K. Home Office Operational Guidance Note (O.G.N.) of 13th December, 2005 which states that "*Ordinary non-Arab ethnic Darfuris are not at risk of persecution outside the Darfur States and it is considered that it is not unduly harsh to expect them to relocate to an area within Sudan in which they will be safe.* […]." The applicant replied that he had not attempted to relocate because "racism is everywhere".

20. It was put to the applicant that the s. 13 report indicated that he did not know the geography of the area where he claimed to have lived as well as he should and that no evidence of Jenjenat was found. Counsel for the applicant pointed out that documentation had been submitted in respect of Jenjenat and the SOAT newsletter was drawn to the Tribunal Member's attention. The Tribunal Member clearly attached little weight to the document as it was put to the applicant that unsuccessful searches had been made by the Refugee Documentation Centre in respect of Jenjenat. The applicant was questioned about the origin of the newsletter and he said a friend living with him in Kilkenny had obtained it for him and that person was not involved with SOAT.

21. The Presenting Officer then put it to the applicant that COI indicates that it is not possible to avoid military service unless connected to the regime. The applicant said he had no such connection but "if they caught me they could take me". He explained that he speaks a little of the Masalite dialect because he learned it from his father but his mother was from a different tribe and the people in his village communicate through Arabic because of the mix of tribes. When asked why he didn't go to the IDP camps in Darfur he said he had heard the camps were being attacked and was afraid he would be forced to do military service even though his family had been giving sheep to the authorities every year to postpone his duty. When asked how he came to have 10 million Sudanese pounds in November, 2004, he replied that his father had given him the money to buy goods. He said it was more difficult to do business since the conflict.

22. When asked why he had not mentioned the incidents of February and November, 2004 in his questionnaire the applicant replied that he did not know he had to put everything into the questionnaire, there was not enough space to put everything in, he was scared the questionnaire would go to the Sudanese authorities and he "put the whole thing under the word racism". He said he was assured at his s. 11 interview that none of his detailed answers would go to his government. The Tribunal Member put it to him that it is "abundantly clear" that the questionnaire must be completely filled and he read the guidelines for the completion of the questionnaire to the applicant. He then put it to the applicant that his reasons for omitting to mention the two incidents in the questionnaire were not plausible and were an attempt to frustrate the proper investigation of his application.

23. A negative decision issued from the RAT on 28th March, 2006. It is that decision that is the subject of challenge in this case.

The Impugned Decision

24. The Tribunal Member in his decision goes through the applicant's evidence and then deals with the medical report in the following way: "*I have considered this report in light of the provisions of the Istanbul Protocol.*" He clearly attaches little weight to the contents of the medical report because the wording used in that report does not conform with the hierarchy of credence established in the Istanbul Protocol. He relied on the findings of the U.K. Home Office O.G.N. of December, 2005 with respect to the internal flight alternative for non-Arab ethnic Darfurees and said the O.G.N. was "*considered in light of the forward looking aspect of the Convention*." He noted that the s. 13 report found the applicant to be in fundamental error about the geography of his region and that country reports were submitted by both parties in relation to the location of his village. The Tribunal Member made no reference to the SOAT report. He stated "*I have considered all country reports in this case, bearing in mind the decision of Mr Justice O'Leary in the case of Brindu delivered on the 28th February 2005*".

25. The decision makes several negative credibility findings which may be summarised as follows:-

> a. That the applicant he had not submitted any reliable photographic identification and very little in the way of identity documentation, had not provided a reasonable explanation for their absence and had not addressed the issue even though he was resident in Ireland since 2005. The Tribunal Member referred to s. 11B (a) of the Refugee Act 1996, as amended.
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> b. The applicant had failed to provide a reasonable explanation to substantiate his claim that Ireland was the first safe country in which he had arrived since departing from Sudan. He referred to s. 11B (b) of the Act of 1996.
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> c. The applicant had not provided a full and true explanation of how he travelled to and arrived in the State as he did not know anything about the ships that brought him here and did not know where he changed ships. The Tribunal Member found the applicant's account of what happened when the ship docked in Ireland to be "totally without credibility" and noted that the applicant's evidence was "vague and evasive and had an air of unreality to it". He referred to s. 11B (c) of the Act of 1996.
>
> d. That it was difficult to believe the applicant was unable to recall the exact date of the February, 2004 attacks, bearing in mind that it occurring in the recent past.
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> e. That the questionnaire was silent in relation to the incidents of February and November, 2004, and that the applicant had not provided a reasonable explanation for those "material omissions" and thereby had attempted to frustrate the proper investigation of the asylum claim.

26. The Tribunal Member again referred to the U.K. Home Office O.G.N. of December, 2005 in the light of the forward-looking test and he concluded by listing the documents to which he had regard (including the Form 1, the s. 11

interview notes, the s. 13 report, all documentation submitted to ORAC, all COI furnished, the applicant's oral evidence and the submissions made on his behalf at the appeal hearing). This application therefore requires that an examination of that decision takes place.

Extension of Time
27. The applicant was approximately eight weeks outside of the fourteen-day period allowed by s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* and has applied for an extension of time. The respondents have opposed the extension of time. The applicant's solicitor has sworn an affidavit giving an exhaustive explanation of the delay in filing the proceedings which is attributed to a change of solicitors, difficulties in taking instructions owing to language, geographical and communication challenges, the unfamiliarity of the solicitors' office with Darfuri nationals and difficulties in procuring a transcript of the oral appeal hearing. I accept that the applicant was in Kilkenny whereas his solicitors were in Dublin and he only speaks Arabic and that it is difficult to obtain the services of translators in Kilkenny, raising communication difficulties. In the circumstances I am satisfied that there is good and sufficient reason for extending time.

The Issues in the Case
28. The applicant's primary complaints in respect of the decision are as follows:-

a. Unfair procedures;

b. Failure to address the core elements of the applicant's claim;

c. Flawed assessment of credibility; and

d. Flawed assessment of the availability of internal relocation.

29. The respondents reject the complaints made and additionally argue that any errors found are severable from the decision.

(a) Unfair procedures
30. Mr de Blacam S.C., counsel for the applicant, submitted that the applicant's credibility was doubted at the ORAC stage owing to a lack of evidence with respect the villages of Jenjenat and Shartoyah and the attack of 28th November, 2004. He argued that the applicant approached his appeal by addressing those findings and to that end furnished the RAT with a SOAT newsletter referring to the villages and the attack which ORAC had rejected. Counsel argued that the applicant was entitled to assume that his appeal would at least deal with the issues that had been of importance at the ORAC stage. He submitted that the Tribunal Member acted in breach of fair procedures by failing to address those issues and instead dealing with the appeal on other bases.

31. The applicant relied on *N.N. v. The Refugee Appeals Tribunal & Ors* [2007] I.E.H.C. 230. In that case the applicant presented in the State as a South African national, travelling on what appeared to be a forged South African passport, but in her ORAC questionnaire claimed to be from Zimbabwe. She had previously applied in the U.K. and been deported to Harare. It was accepted by ORAC that she was from Zimbabwe. The Tribunal Member dealt with her paper-based appeal throughout as though she was from South Africa. McGovern J. found that the appeal was approached as "*a fundamental reassessment of the applicant's claim*" and held that the appeal treated the appellant "*in a manner which was wholly unfair*."

32. Counsel for the applicant argued that the applicant's appeal was equally unfair as the basis of the assessment undertaken by the decision-maker changed at the RAT stage insofar as the Tribunal Member concentrated on the applicant's travel arrangements whereas at the ORAC hearing the problems on credibility related to the existence of a village called Jenjenat and whether an attack on that village had taken place at all. The applicant had addressed this in his appeal documents but this was ignored and the ground shifted at the RAT stage.

33. Mr. Moore B.L., counsel for the respondents, argued that it is often the case that a claim will be decided at the ORAC stage on one basis – e.g. credibility – and on an entirely different basis at the RAT stage – e.g. state protection or internal relocation. He submitted that the role of the Tribunal Member is not to uphold or overturn the findings made in the s. 13 report but rather to assess the claim made by the applicant before him.

(b) Flawed Assessment of Credibility

34. Counsel for the applicant argued that the inference must be drawn from the decision that the Tribunal Member was implicitly accepting that the applicant was a non-Arab Darfuri by going on to address internal relocation and by failing to make any negative credibility findings in that regard. Counsel for the respondents argued that no such inference should be drawn.

35. There was a dispute between the parties as to the extent of the negative credibility findings made and the concentration by the Tribunal Member on the matters set out in s. 11B of the Refugee Act 1996. The applicant urged that the circumstances in which he left Darfur did not lend themselves to his being in a position to obtain a passport or other identity documents and he relied on the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which states at para. 196 that:-

> *"In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents."*

36. Counsel for the respondents defended the finding made by the Tribunal Member under s. 11B (a) as although the applicant did not have identity documentation when he arrived, he had made no attempt to have them sent over from Sudan despite being in the State for a substantial period of time, and he gave no explanation for his failure to do so. Counsel also pointed out that the applicant even though he did not bring his identity documents he nevertheless had the presence of mind to obtain a large sum of money to pay for his journey to Libya in the flight from the Janjaweed attack.

The s. 11B (b) and (c) Findings

37. While there was considerable debate between the parties as to whether Ireland was the first safe country in which the applicant could have sought asylum this was not the key dispute between the parties and I do not believe that it is necessary for me to resolve that issue.

38. Similarly there was considerable room for argument as to whether the applicant's description of his travel and arrival in the State was either full or truthful or whether it was so found by the Tribunal Member.

The other credibility findings

39. The applicant argued that the Tribunal Member's finding that it was difficult to believe that the applicant could not recall the exact date of the February attack

was not a sufficiently compelling or cogent reason to reject his credibility while the respondents argued that it was rational for the Tribunal Member to make an adverse finding in this regard, given the discrepancy outlined. The respondents also argued that if the finding was found to be irrational or unreasonable it was nevertheless severable.

40. The applicant's evidence was described as vague, evasive and as having "an air of unreality" to it. He was criticised because his questionnaire did not furnish any account of the events of February and November, 2004. The applicant explained at his oral appeal hearing that he had not referred to the events initially because he feared that the information might be furnished to the Sudanese authorities. When assured that this would not happen at the s. 11 interview, he provided the information.

41. Counsel for the respondents argued that the Tribunal Member's observation that the applicant's evidence was "vague and evasive and had an air of unreality to it" is capable of being upheld and is a cogent and valid finding as the Tribunal Member had the opportunity of observing the applicant give evidence whereas the Court relies on the "arid pages" of a transcript. In that regard reliance was placed on *Muanza v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Birmingham J., 8th February, 2008).

(c) Failure to address the core issue of the case

42. This is the key issue in the case. The applicant contended that the Tribunal Member failed to address the core issue in the applicant's claim namely that he is a non-Arab Darfuri whose village was attacked. It was argued that his case is supported on an objective basis by both medical evidence and very specific COI. Counsel argued that decision-makers in asylum cases must deal with the core issue of the case and reliance was placed on *Sango v. The Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 395 where Peart J. granted leave on the basis that it was arguable that the Tribunal Member had made negative credibility findings on three matters that were "*arguably of too peripheral to the core issue to justify an overall adverse credibility finding."* Peart J. held that "*There must be a cogent nexus between the matters upon which the applicant has been found not to be credible and the core issue in the application*."

43. Counsel for the respondents submitted that the matters on which credibility findings were made were matters which went to the applicant's claim and on which it was proper for the Tribunal Member to make findings. Counsel observed that the applicant's account of the attack of 28th November is inconsistent with that detailed in the SOAT newsletter insofar as the applicant said at the oral appeal hearing that the attack was carried out by the government / army who were on horses, whereas the newsletter states that the attack was carried out by the Janjaweed. He further argued that as stated by Feeney J. in *Gilingil v. The Refugee Appeals Tribunal* [2006] I.E.H.C. 302, the mere fact that an account is found to be consistent with COI does not, of itself, lead to the conclusion that the account is true or correct.

(d) Assessment of Internal Relocation

44. Counsel for the applicant complained that the Tribunal Member assessed the option of internal relocation in the applicant's case on the basis of a U.K. Home Office O.G.N. of December, 2005 but failed to have regard to a UNHCR *Position Paper on Sudanese Asylum-Seekers from Darfur* of February, 2006 which he says is markedly inconsistent with the O.G.N. At para. 8 of that document the UNHCR states that although internally displaced persons (IDPs) are receiving international assistance in Darfur and Khartoum, this "*should not give rise to the*

conclusion that it is safe or reasonable for the claimants to return to parts of Sudan" as their safety and security remains under threat. The paper continues:-

> "In UNHCR's assessment, the threats are so widespread that it cannot be said that there is an internal flight alternative anywhere in Sudan for asylum-seekers from Darfur, including for those who resided in Khartoum before the Darfur crisis. Sudanese of "non-Arab" Darfurian background returning to Sudan face a heightened risk of scrutiny by the security apparatus. Furthermore, where internal displacement is a result of "ethnic cleansing" policies, denying refugee status on the basis of the internal flight or relocation concept could be interpreted as condoning the resulting situation on the ground and therefore raises additional concerns."

45. Paragraph 9 of the UNHCR paper goes on to recommend that States should provide international protection to non-Arab Sudanese asylum-seekers from Darfur whether by according them refugee status or a complementary form of protection. It further recommends that "*no non-Arab Sudanese originating from Darfur should be forcibly returned until such time as there is a significant improvement in the security situation in Darfur*."

46. Counsel for the applicant submits that in the light of this information it was perverse for the Tribunal Member to suggest that a Sudanese person from the applicant's tribe could safely relocate within Sudan. He accepted that the UNHCR paper was *not* furnished by the applicant to the Tribunal Member but he pointed out that the paper is dated February, 2006 and the RAT decision is dated 28th March, 2006. He argued that it may be said with a reasonable degree of certainty that the document may have been in existence at the date of the oral hearing and was certainly in existence at the time of the RAT decision.

47. Counsel for the respondents pointed out that at the appeal stage it is for the applicant to show that he is a refugee and that the applicant's legal representatives must at all times been aware that internal relocation was a point that could have been taken up by the RAT as part of a holistic assessment of that refugee determination. In the applicant's questionnaire he was asked if he had moved to another town or village to avoid persecution and from that time the applicant and his solicitors were on notice that the question of internal relocation was in issue but they elected not to address the question.

48. It is my view that the Tribunal Member's finding on internal relocation was on the basis of reputable COI at the time. If the situation has changed, then this is a matter that should be drawn to the attention of the Minister for Justice, Equality and Law Reform but is not a matter that affects the validity of the RAT decision, which can only be assessed in the light of the information that was properly before the RAT. The applicant's arguments on this ground fail.

Severability

49. Counsel for the respondents further argued that where a series of alternative findings is made in an appeal decision, one or more findings may be severed if they prove to be incorrect or ill-founded and where the outcome would remain the same in their absence. Reference was made to the decision of Clarke J. at the substantive stage in *Evuarherhe v. The Minister for Justice, Equality and Law Reform & Anor* [2006] I.E.H.C. 23. Clarke J. concluded that the finding that state protection was available was "*somewhat problematic*" but that it was clear from the use of the words "*in any event*" that the "*the question of State protection merely confirmed a view which* [the Tribunal Member] *had already taken on the*

issue of fear stemming from the applicant's father's tribe" and that "*the same decision would have been reached even if the question of State protection had not arisen*." Reference was also made to *Kikumbi v. The Office of the Refugee Applications Commissioner & Anor* [2007] I.E.H.C. 11, where Herbert J. found a mistake of fact to be severable, noting that the mistake did not invalidate the Tribunal Members conclusion "*because that conclusion was also based upon this other entirely separate and severable consideration, which was not demonstrated to be also incorrect*." Counsel for the respondents in the present case argued that in this case there were two findings, the first relating to credibility and the second to relocation, and that the second finding – if found to be ill-founded – can be severed.

The Court's Assessment

50. This being an application for leave, section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies and the applicant must therefore establish "substantial grounds" for contending that the RAT decision should be quashed. As is now well established, this means that grounds must be shown that are reasonable, weighty and arguable as opposed to trivial or tenuous.

51. I do not in any way wish to substitute my views for those of the Tribunal Member who had a very distinct advantage in having heard and seen the applicant. While there are many credibility findings made by the Tribunal Member on the evidence, I remain profoundly concerned about two issues in the case and I am satisfied that substantial grounds have been identified to impugn the decision on those two grounds. It is of concern that the medical report was dismissed simply because the wording used did not conform to the terms of the Istanbul Protocol. The doctor was not one attached to the Spirasi Centre for the Care of Survivors of Torture who are familiar with the specific language of the credibility hierarchy set out in the Istanbul Protocol but the doctor undoubtedly found objective evidence of a very significant injury which had been treated as evidenced by 50 suture marks and which had continuing sequelae for the applicant. The contents of the medical report were capable of supporting a bayonet attack at the appropriate time and thus softening the suspicion attached to the applicant's varied evidence over the exact date of the occurrence of the attack.

52. The second issue which causes me to question the fairness of the procedure may have its origins in translation and the many and varied English spelling of Arabic/Darfuri place names. In this regard, Darfur is spelled Darfour in the typed translation of the applicant's questionnaire. Tawilla is sometimes spelled Tawila. Janjaweed and Janjawid are interchangeable. Of particular concern to this Court is the lack of discussion of why or how the SOAT report which details an attack on the very villages described by the applicant was rejected.

53. As Clarke J. in *Imafu v The Refugee Appeals Tribunal* [2005] I.E.H.C. 182, pointed out, the question for the Court in a judicial review is whether a fair determination setting out a rational and substantive basis for a finding of lack of credibility has been achieved and whether on the evidence before the Court it appears that there were materials properly before the Tribunal which would have allowed it to come to the conclusions which grounded such rational basis.

54. While I have little doubt that some of the credibility findings made by the Tribunal Member relating to matters set out in s. 11B of the Refugee Act 1996 could properly have been made, there remains the distinct possibility that their stand alone status could be reduced when viewed against the medical report and

the SOAT report had they been fully considered and reasons provided for their rejection.

55. While cognisant that all that the Court has before it is a transcript of the oral appeal hearing, which does nothing to evoke the applicant's tone or demeanour, the speed or degree of hesitancy with which he answered questions and is therefore reluctant to interfere with many of the findings relating to the applicant's travel arrangements. Those qualms and qualifications notwithstanding, it seems to me that there has been no substantive basis set out in the decision for rejecting the applicant's core description of the reasons for his flight from Sudan. Instead there has been a concentration on other issues which may have been unexpected in an applicant who prrepared his appeal by furnishing what he believed to be a rebuttal to the key credibility findings made in the S13 report. I believe that at the very least, the medical report required some assessment and reasoning and that the SOAT report should have compared and set against the ORAC s. 13 report on the geography issues.

56. The apparent discrepancy between the questionnaire and the interview was explained by the applicant and his explanation was rejected but it is distinctly possible that when the explanation is viewed in the context that COI confirms that there was an attack on a place called Jenjenat, the Tribunal Member may have found the applicant's explanation less difficult to accept. It seems to this Court that many of the negative credibility findings made by the Tribunal Member derive from the acceptance that Jenjenat did not exist and that no attack took place to cause the applicant to flee. Clearly, the Tribunal Member was unimpressed by the very detailed SOAT report which was available on the internet and was more influenced by the ORAC officer's s. 13 report which found no reference to such a village. It seems he was also unimpressed by the applicant's apparent lack of knowledge of the villages in the area of Jenjenat.

57. I have carefully read all the documents furnished, as I believe one must in a review of the law and facts pertinent to asylum cases. Whether one considers that such examination is in pursuit of constitutional justice or heightened scrutiny makes little difference. The description of the necessary judicial activity is unimportant unlike the fact that it does occur. This scrutiny raises the concern that spelling and language translation might possibly be at the bottom of the problems that occurred and which led to the basic rejection of the core issue that the applicant is of the Massalite tribe from Northern Darfur.

58. I say this because at page 100 of the file there is a reference to an incident which may be the one described by the applicant at his interview and at his oral appeal hearing. The reference is contained in an extract provided by the research service consulted by the ORAC pursuant to specific queries. It quotes from a U.N. Sudan situation report dated 30th November 2004, cited in an IRIN news report, which describes:

> *"fighting was reported in villages approximately 15km North of Tawilla on 27 Nov. where reportedly a group of armed tribesmen attacked and looted Debenat, Kunja and two other villages around Kossa hill. 15 civilians were reportedly killed and six others were reportedly injured from those attacks."*

59. Another extract from a U.N. Sudan situation report of 28th November, 2004 confirms *"fighting in an area north west of Tawilla area on 27 Nov."* It seems distinctly possible that Debenat and Kunja could be either misspellings or alternate spelling versions for Jenjenat and Kutum or Korma. The incidents

reported, the date and the number of victims recited bear an uncanny resemblance to the story told by the applicant and have a temporal connection with the date of his flight and arrival in the State. For these reasons, it is certainly arguable that the view taken by the Tribunal Member of the rest of the applicant's evidence was coloured by his rejection of his claim to be from an African tribe subject to persecution in Darfur. A different view may possibly have been taken if it were accepted that the applicant actually came from a village which was attacked on the 27/28 November 2004. It would be unfortunate if an applicant in such a situation were to be rejected on the basis of the English spelling of the villages of Darfur.

Conclusion

60. In light of the foregoing, I am satisfied that substantial grounds have been identified and accordingly, I grant leave.