IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-5923

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Immigration Act 1987
BETWEEN	MURSAL ABDI ISAK Plaintiff
AND	REFUGEE STATUS APPEALS AUTHORITY First Defendant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Second Defendant

Hearing: 22 March 2010

Appearances: D Ryken for Plaintiff
P McCarthy for Defendants

Judgment: 4 June 2010

JUDGMENT OF ASHER J

This judgment was delivered by me on 4 June 2010 at 11:30 am pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
D Ryken, Ryken and Associates, Auckland (david@rykenlaw.co.nz)
P McCarthy, Crown Law, Wellington (peter.mccarthy@crownlaw.govt.nz)

Preliminary

[1] On 4 August 2009, the Refugee Status Appeals Authority dismissed an appeal by Mursal Abdi Isak from the decision of a Refugee Status officer, declining to grant him refugee status. The Refugee Status Appeals Authority ("the Authority") had determined that the first principle issue before it was:

> Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

It answered that question in the negative, and dismissed Mr Isak's appeal. Mr Isak, who is from Somalia, now challenges the decision of the Authority by way of judicial review proceedings. He asks that the decision be set aside or quashed, and a new hearing ordered.

General factual background

[2] The Authority set out the background facts in detail at paragraphs [5]-[33] of its decision. It is clear that Mr Isak was born in 1973 in Somalia. Beyond that, there are no accepted facts. He asserts that he grew up in Mogadishu. His family moved south to Afmadow in 1991 when the civil war broke out. In October 1997 to January 1998 Mr Isak returned to Mogadishu, to collect his two half-sisters. He asserts that while he stayed there with his step-mother he married his first wife. He then left Mogadishu. He says that in 1999 he returned to Mogadishu in an unsuccessful attempt to bring his wife back to Afmadow. In June 2000, Mr Isak travelled to Kismayo to see his father, and then travelled to South Africa. Between February 2000 and April 2008 he lived in South Africa. He was granted refugee status in South Africa, and his certificate recording this status was before the Authority.

[3] He says he was allowed to work in South Africa, being employed in a fabric shop between 2001 and 2004, and co-owning a grocery shop between 2004 and 2008. Mr Isak married his second wife in 2005, and their daughter was born in 2006. The wife and daughter rejoined the wife's mother, who is based in Kenya, in 2007.

[4] Mr Isak asserts that in April 2008 he was robbed in his shop in South Africa and became afraid of xenophobic violence. He left South Africa for Beijing in April 2008, intending to go to Europe. Instead he appears to have changed his mind and came to New Zealand, arriving on 22 June 2008.

[5] On his arrival in New Zealand at Auckland International Airport, he claimed refugee status. He had deliberately destroyed his South African passport and travel document. In his interview he said that he had been asked to interpret for the Ethiopian Army, having fled from Somalia in 2008 and having been provided with a false South African passport. He did not say he had lived in South Africa. He was detained under a Warrant of Commitment at the Mangere Accommodation Centre.

[6] On 25 June 2008, Mr Isak filled out a "Confirmation of Claim" form, in which he admitted spending time in South Africa. He briefed Ms J Hindman to represent him. On Mr Isak's behalf she filed a statement of claim. Mr Isak was interviewed by a Refugee Status officer between 31 July and 1 August 2008 with Ms Hindman attending. On 18 August 2008 the Refugee Status officer provided a report, summarising the information relating to Mr Isak's claim. Ms Hindman provided submissions in reply. Mr Isak remained in custody.

[7] On 22 September 2008 Ms Hindman wrote to Compliance Operations seeking Mr Isak's release pending his hearing. She enclosed a letter of support of 21 September 2008 from Mr Mohamed, the President of the Somali Federation Community Incorporated, confirming Mr Isak was of the Ogaden Clan. The Ogaden clan has been subject to some persecution in Somalia. For reasons that I will traverse in detail later in the judgment, that letter was never given to the Refugee Status officer or, later, the Authority.

[8] Following two further extensions of the Warrant of Commitment Mr Isak was released from custody on certain conditions on 8 October 2008. The Refugee Status officer issued a decision on 21 November 2008. While accepting Mr Isak's evidence, he was declined refugee status because of his ability to return to South Africa. Ms Hindman lodged an appeal on 24 November 2008. The hearing before

the Authority proceeded on 2 March and 7 April 2009. The Authority issued the decision, which is now challenged, on 4 August 2009.

The decision

[9] The Authority in a clear and carefully reasoned decision set out in full the appellant's case and the facts he relied on, and outlined the material that had been submitted by Mr Isak in detail. It noted that the appellant had been provided with the files of the Refugee Status Branch of the New Zealand Immigration Service. It then proceeded to assess the appellant's case under the headings "Living and working in M Town", "Claim that wife lives in refugee camp", "The notebook", "Events in Somalia prior to leaving", and "False claims on arrival and in Confirmation of Claim form". The analysis showed that fundamental aspects of Mr Isak's evidence were inconsistent and unreliable.

[10] The Authority concluded:[1]

> … that the false information provided on arrival and then later in the claim form (at which point he no longer denied having been in South Africa and therefore had no discernable motivation to lie about his departure date from there), illustrates his willingness to use false information to support his created claim. It strengthens the overall finding that no part of his account can be believed.

The Authority went on to conclude that Mr Isak's account of events that caused him to leave Somalia and then South Africa was not truthful. It held:[2]

> Nor, in the context of his false account of life in Somalia, does the Authority accept his assertions to belong to the Reer Abdile sub-sub-clan of the Ogaden Sub-clan.
>
> In summary, then, the Authority finds that the appellant at the time of determination, is a male Somali national who would be returning there unaccompanied. In the absence of credible evidence, no other findings as to the profile or circumstances of the appellant on return to Somalia can be made.

[1] At [70].
[2] At [71]-[72].

The issues

[11] There are five causes of action raised in the statement of claim. These are:

a) error of fact as to the plaintiff's origins and Clan membership;

b) unfairness, namely failure of the Chief Executive of the Department of Labour ("the Chief Executive") to put before the Authority "the evidence as to the plaintiff's identity and Clan affiliation";

c) unreasonableness (based on the same allegation of failure to put information before the Authority);

d) procedural unfairness, being the failure of the Authority to put to the plaintiff its concern about his Somali origins and Clan membership; and

e) unreasonableness on the basis that the credibility findings were unreasonable.

[12] In essence, the appellant's claims came down to three fundamental points. First, procedural unfairness, because the material that was available showing that Mr Isak was a member of the Ogaden Clan of Somalia was not before the Authority. Secondly, that the Authority did not fairly put Mr Isak on notice that the credibility of his assertion of Ogaden Clan membership was at issue. As a third issue, not greatly pressed in submissions, Mr Ryken for Mr Isak argued that the Authority's credibility findings were unreasonable.

Statutory framework

[13] New Zealand is a party to the United Nations Convention Relating to the Status of Refugees and the 1967 Protocol to that Convention ("the Convention"). The Convention is Schedule 6 to the Immigration Act 1987 ("the Act"). Under the Convention a refugee is defined as any person who:

> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[14] Part 6A of the Act gives effect to New Zealand's obligations under the Convention. Under this part of the Act, claims to recognition as a refugee are dealt with by departmental employees who are described as Refugee Status officers. Their statutory function is to determine refugee claims. They require a claimant to attend an interview so that a decision concerning refugee status at the first stage may be made on the papers alone, or following a hearing. They are required by statute to provide reasons for their decisions.

[15] Appeals are to the Authority. The Authority is a statutory body constituted under s 129N of the Act, and deals with refugee issues. Schedule 3C of the Act sets out provisions relating to the Authority. Section 8 of that Schedule provides that, subject to any regulations the procedure of the Authority is to be such as the Authority thinks fit. Section 9 provides that the Authority may make such inquiries and obtain such reports as it considers necessary, and is not bound by any rules of evidence but may inform itself in such manner as it thinks fit. It conducts hearings of an inquisitorial nature: *X v Refugee Status Appeals Authority*,[3] *N v Refugee Status Appeals Authority*,[4] *T v Refugee Status Appeals Authority*.[5] The Authority is required to give reasons for its decisions: s 129Q(3). There is no statutory right of appeal from decisions of the Authority, even on questions of law. However, application for judicial review is not excluded: s 146A.

[16] In carrying out their functions under the Act in relation to a claim to refugee status, immigration officers must have regard to the provisions of the relevant part of the Act "and of the Refugee Convention": s 129X(2). Refugee Status officers and the Authority are obliged to "act in a manner that is consistent with New Zealand's

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[3] *X v Refugee Status Appeals Authority* [2010] 2 NZLR 73, at [271].
[4] *N v Refugee Status Appeals Authority* HC Auckland CIV-2007-404-7932 26 August 2008, Priestley J, at [55].
[5] *T v Refugee Status Appeals Authority* [2004] NZAR 552, at [17].

obligations under the Refugee Convention": s 129D(1): *X v Refugee Status Appeals Authority*,[6] *Attorney General v X*,[7] *Hassan v Department of Labour (Immigration)*.[8]

[17] If ultimately not granted refugee status, a refugee claimant has some further avenues available. As the Crown notes in its submissions, these are limited to a request for a permit under s 35A if there is no deportation or removal order in force or special direction, although there is no right to apply. Also, a further claim for refugee status may be possible where a change of circumstances in the home country creates significantly different grounds to the original claim: s 129J. These remedies are highly discretionary.

Approach to be adopted

[18] Mr Ryken for Mr Isak submitted that the highest intensity of review should apply. He relied on observations of Wild J in *R v Chief Executive of the Department of Labour*,[9] and Winkelmann J in *A v Chief Executive of the Department of Labour*.[10]

[19] Mr McCarthy for the Crown submitted that there is no reason to depart from the traditional *Wednesbury* standard. This was consistent with the detailed statutory scheme of the Act, the Authority's acknowledged expertise, and because the Authority does not automatically engage fundamental rights. The Crown submitted that the subject matter of the decision was refugee status and that there was no right to be recognised as a refugee. It was pointed out that under articles 1A(2), 1C – F of the Convention, certain people are excluded from refugee status, and that the Authority has no power to remove or deport any person (s 129W(d)), and does not have the function, power or jurisdiction to address any issue of a humanitarian nature beyond the recognition of refugee status (s 129W(e)). The fact that fundamental human rights are not automatically engaged by an Authority's declaration is, it was submitted, a factor pointing to a low intensity of review.

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[6] At [57].
[7] *Attorney General v X* [2008] 2 NZLR 579, at [15].
[8] *Hassan v Department of Labour (Immigration)* HC Wellington CRI-2006-485-101 4 April 2007, Mallon J, at [24].
[9] *R v Chief Executive of the Department of Labour* HC Wellington CIV-2008-485-123, 10 June 2008, at [24]-[29].
[10] *A v Chief Executive of the Department of Labour* HC Auckland CIV-2004-404-6314 19 October 2005, at [33].

[20] It was submitted by the Crown that the "right to be free from persecution" referred to in *A v The Chief Executive of the Department of Labour*,[11] does not in fact exist, and that there is no such right. Rather, it was submitted there was a right to enjoy asylum from persecution for a Convention reason, and a qualified duty not to expel or return a refugee to the frontiers of territories where his or her life or freedom would be threatened. Mr McCarthy asserts that there is no right to be free from persecution recorded in any of the leading domestic or international rights instruments.

Intensity of review?

[21] The concept of intensity of review has traditionally been applied to the analysis of *Wednesbury* unreasonableness,[12] which is concerned with the reasonableness of the outcome and not the process. The Crown discussed it on that basis. Mr Ryken applied it more generally, referring to the continuum of approaches to judicial review, adopting the approach of Baragwanath J in *Progressive Enterprises Ltd v North Shore City Council*.[13] Mr Ryken sought to place the intensity of review at the highest level in that continuum.

[22] The starting point is the fact that if Mr Isak is right, his life is in danger if he is returned to Somalia. The New Zealand Bill of Rights Act 1990 ("Bill of Rights") at ss 8 and 9 recognises the rights in New Zealand not to be deprived of life and not to be subjected to torture or cruel treatment. There is no provision which gives a right to freedom from persecution. The Universal Declaration of Human Rights, which New Zealand has not ratified or incorporated into legislation provides:

> **Article 14**
>
> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the United Nations.

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[11] *A v The Chief Executive of the Department of Labour* HC Auckland CIV-2004-404-6314 19 October 2005, at [33].
[12] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[13] *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [70].

The Convention Relating to the Status of Refugees in Schedule 6 to the Act is ratified by New Zealand and the references to it in Part 6A of the Act (s 129A, s 129E and s 129D) make it clear that it is the core policy document. In addition to Article 1(2), which refers to "a well-founded fear of being persecuted", Article 33(1) provides:

> **Article 33 Prohibition of expulsion or return ("refoulement")**
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion …

Guided by the observations of Keith J in *R v Zaoui*,[14] I proceed on the basis that, as directed by s 6 of the Bill of Rights Act 1990, relevant provisions of the Immigration Act must be given a meaning consistent with the rights and freedoms in the Bill of Rights, and those rights will be interpreted and the powers conferred exercised, so as to be consistent with international law, both customary and treaty based.

[23] It is central to the Convention that persons arriving in New Zealand must be given a fair opportunity to obtain asylum from persecution, which will be granted if a well-founded fear is made out. I am cautious about going further, and proceeding on the basis that there is a "right to freedom from persecution". The reference to such a right in *A v The Chief Executive of Labour* was an aside in a broader context. There is no doubt that the human rights to life and freedom referred to in Article 33 and our Bill of Rights are relevant to this application, involving as it does likely refoulement to an ungoverned State. The formulation of the Refugee Status Appeals Authority, (RPG Haines QC and L Tremewan), in *Refugee Appeal No. 71427/99*[15] is helpful, where, after a careful review of relevant authorities, it was stated in relation to refugee appeals:

> … persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of State protection …

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[14] *R v Zaoui* [2006] 1 NZLR 289 (SC) [90]-[91].

[15] *Refugee Appeal No. 71427/99* Refugee Status Appeals Authority Auckland, 16 August 2000, at [47].

"Freedom from persecution" is an imprecise phrase and can cover many actions and consequences. In the refugee context it is best seen as a phrase concerning freedom from breaches of core human rights, rather than a right itself.

[24] The courts have frequently indicated their willingness to intervene in relation to decisions that may involve a person in New Zealand being returned to a jurisdiction where that person's right to life may be threatened. Thus, in *Butler v Attorney General*,[16] Keith J observed that in relation to a process followed by the Refugee Status Appeal Authority where the decision may put an individual's right to life at risk, the courts reviewing any such decision have a special responsibility to see that the law is complied with. In *Jiao v Refugee Status Appeals Authority*,[17] Keith J emphasised the need for a "generous approach". He observed:[18]

> The need for that generous approach is reinforced by the consideration that the applicant's right to life may be put at risk if the refugee status is declined, a matter emphasised by this Court in *Butler v Attorney-General* [1999] NZAR 205, 211.

[25] Fisher J stated in *Khalon v Attorney General*,[19] that in refugee cases only the "highest standards of fairness will suffice since questions of life, personal safety and liberty are at stake". Similar remarks have been made in various High Court decisions: *K v Refugee Status Appeal Authority*,[20] and *A v The Chief Executive of the Department of Labour*. In the latter decision Winkelmann J observed that the impugned decision should be examined with "great care".

[26] Mr Ryken argues for the "hardest look". As Wild J observed in the immigration context in *Wolf v Minister of Immigration*,[21] it has long been recognised that the intensity of the judicial review of reasonableness is adjusted with regard to context. In *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd*,[22] Cooke P stated:

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[16] *Butler v Attorney General* [1999] NZAR 205 (CA), at 211.
[17] *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647.
[18] At [27].
[19] *Khalon v Attorney General* [1996] 1 NZLR 458 at 463.
[20] *K v Refugee Status Appeal Authority* HC Auckland M1586-SW99 22 February 2000, Anderson J, at [40].
[21] *Wolf v Minister of Immigration* [2004] NZAR 414, at [48].
[22] *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641, at 643.

> The depth of judicial review and the deference due to administrative discretion vary with the subject matter.

[27] A variable approach to reasonableness was recognised in *Wellington City Council New Zealand Limited v Woolworths New Zealand Limited (No. 2),*[23] where the most stringent standard from the applicant's perspective was applied. In *Electoral Commission v Cameron,*[24] Gault J applied "… a somewhat lower standard of reasonableness than 'irrationality' in the strict sense". So too in *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd,*[25] where a "less restricted" approach was adopted. In *Wolf v Minister of Immigration*, Wild J adopted a "lesser test"[26] favourable to the applicant because the decision involved the deportation of the appellant and the consequent break up of a family unit. In a case such as this, the threshold of "reasonableness" will be, from the applicant's perspective, at its lowest, involving as it does a decision which may indirectly relate to his right to life.

[28] *Wednesbury* unreasonableness is unique as a judicial review cause of action in that it focuses on the substantive outcome rather than the process of decision-making. In some decisions the language of varying standards of "intensity of review" or "hard" and "soft" look can be seen as extending to all judicial review causes of action: *Progressive Enterprises Limited v North Short City Council,*[27] *Mihos v Attorney General*,[28] and *X v Refugee Status Appeals Authority*.[29] Mr Ryken did not limit his plea for a "hard look" to *Wednesbury* unreasonableness, but sought to extend it to all his other causes of action. However, while what is procedurally fair may vary according to context, a court's actual process of examination of the facts and legal requirements will not vary in its intensity. While the issue may in the end be only semantics, I consider it artificial to grade the court's assessment of process. As Fogarty J observed in *Gordon v Auckland City Council:*[30]

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[23] *Wellington City Council New Zealand Limited v Woolworths New Zealand Limited (No. 2)* [1996] 2 NZLR 537 at 545, 552 and 556.
[24] *Electoral Commission v Cameron* [1997] 2 NZLR 421.
[25] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 at 66.
[26] At [65].
[27] At [70].
[28] *Mihos v Attorney General* [2008] NZAR 177 at [107]-[108].
[29] At [272].
[30] *Gordon v Auckland City Council* HC Auckland CIV-2006-404-4417 29 November 2006, at [11].

> Glossing this natural diversity of judicial review process, with notions of the court scrutinising legality more or less carefully, is difficult to grasp conceptually.

It has also been observed by Hammond J in *Lab Tests Auckland Ltd v Auckland District Health Board,*[31] that concepts such as "spectrums of response" and "deference" are ultimately quite unhelpful and even unworkable. Although the Court of Appeal in *Discount Brands Ltd v Northcote Mainstreet Inc*[32] considered the issue of special intensity of review, the Supreme Court[33] did not adopt such an approach. Rather, it approached the issue as one of statutory interpretation and the application of law to the facts. Michael Taggart in *Administrative Law,*[34] having considered the comments of Hammond J in *New Zealand Public Service Association Inc. v Hamilton City Council,*[35] observed:

> "Hard look" is one transplant that is unnecessary and should be rejected. Ultimately, as Hammond J pointed out in *Hamilton City Council*, its fatal flaw is that it does not tell a judge how hard to look in a particular case. Administrative law has too many doctrines like that already![36]

[29] I do not interpret the New Zealand decisions as requiring a variable standard of examination of the actual facts or the procedure followed. I find it easiest to avoid adjectival categorisation of the intensity of the court's level of scrutiny of the facts and law. Rather, I see the issues as the court's assessment of whether the process was lawful and fair, and then its willingness to provide a remedy following an error or procedural unfairness being established.

[30] I acknowledge that in this application for review, which reviews a decision which is likely to lead to the compulsory return of a resident to an ungoverned state where there is no rule of law and a risk to life, the Court should require a high level of procedural fairness. Further, it will be at its most ready to intervene and provide a remedy to ensure that the decision is lawful and that fair procedures have been adopted. Such an approach will ensure that the chance for error in the ultimate decision is minimised. Thus, while avoiding the adjectives of "hard look" or

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[31] *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776, at [379].
[32] *Discount Brands Ltd v Northcote Mainstreet Inc.* [2004] 3 NZLR 619.
[33] *Discount Brands Ltd v Northcote Mainstreet Inc* [2005] 2 NZLR 597.
[34] [2006] NZ Law Review at 75.
[35] *New Zealand Public Service Association Inc. v Hamilton City Council* [1997] 1 NZLR 30.
[36] At 87.

"intense scrutiny" other than in relation to *Wednesbury* unreasonableness, I nevertheless accept that in a judicial review application of this type, involving real risks to the applicant immigrant's life and liberty, the court should require a high level of procedural fairness. It should be generous in its approach, and very willing to uphold an application and provide a remedy if the consideration of the applicant's position by the Authority has been, for whatever reason, significantly unfair.

The relevance of the letter

[31] Mr Mohamed's letter of 21 September 2008 read as follows (set out without change to his punctuation or grammar):

> On behalf of Somali Federation Community we would like to confirm you that, Mr Mursal Abdi is a well known person of Somali Federation Community in Auckland. We take this opportunity to inform that Mursal is Somali national and belongs to ogoden clan resides in lower-juba and his family were suffered a traumatic experience since the civil war broken up in Somalia.
>
> We had constant interviews with mr mursal and we figured out that he is innocence, honest young male that deserves to be helped. We would also like to remind you that he is married, and has one daughter, and his daughter suffers sickness (asthma).
>
> Therefore, as a community we are committed to provide assistance to this young man. If you like further detail about this issue please do not hesitate to contact us.

[32] Mr Mohamed has deposed in the subsequent affidavit filed in these proceedings that prior to drafting this letter he had spoken to Mr Isak on at least ten occasions about details of life in Somalia. In his affidavit he sets out certain particular names and facts that Mr Isak knew in detail, relating to the Ogaden Clan. He confirmed that he had no doubt that he was a member of the Ogaden Clan.

[33] Mr Ryken submitted that if the Authority had known of Mr Mohamed's letter it may have reached a different conclusion on Mr Isak's Ogaden Clan membership. It is necessary to evaluate that submission. The letter and indeed the affidavit from Mr Mohamed, do no more than set out an expression of his opinion. It is possible that Mr Isak lied to Mr Mohamed as well, and that Mr Mohamed is wrong.

[34] Nevertheless, in an area of inquiry where there are few touchstones, a letter from an apparently senior and credible member of the Somali community with knowledge of the Ogaden Clan confirming from his personal investigation that Mr Isak was an Ogaden Clan member, was significant information. While it is possible that on an examination the evidence might turn out to be of little value, on its face it is of considerable value. It is likely to have been of real interest to the Authority and may have led to more enquiries. **Its value is confirmed by the affidavit subsequently filed by Mr Mahomed where he sets out the inquiries that he made of Mr Isak, which appear to have been extensive. According to him Mr Isak is privy to knowledge and information that he would have only obtained if he was a member of the Ogaden Clan. Mr Mahomed's father was a member of the Clan. His assessment could be seen as vital corroboration of Mr Isak's claim.

[35] If Mr Isak is a member of the clan, there is a significant body of evidence on which the Authority can conclude he faces persecution. In *Refugee Appeal No. 71346/99*,[37] where the appellant was a member of the Ogaden Sub-clan, it was observed at p 14 that the Ogaden Clan, and particularly the sub-clans, have over the period of 1991 to 1999 been progressively more and more marginalised. In a Deportation Review Tribunal case, *Shaqlane v The Minister of Immigration*,[38] it was observed that there is a pattern of gross flagrant or mass-violation of human rights in Somalia, and the Tribunal appeared to implicitly accept that a member of the Ogaden Clan was at risk as to personal safety in Somalia. In *Refugee Appeal No. 76062*,[39] the Refugee Status Appeals Authority reviewed clan rivalry in Somalia and observed that there had been open clan-based civil war through the 1990s, and that while the situation had changed since then there was still clan-based conflict.[40] In *Refugee Appeals Nos. 76335 and 76364*,[41] a very recent decision, it was observed that parts of Southern and Central Somalia are currently characterised by violence and chaos,[42] and that status of a clan (in that case the Midgan Clan), increased the applicant's risk of violence.

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[37] *Refugee Appeal No. 71346/99* Refugee Status Appeals Authority, Auckland, 28 October 1999.
[38] *Shaqlane v The Minister of Immigration* DRT 019/02, 29 August 2003 at 28.
[39] *Refugee Appeal No. 76062* Refugee Status Appeals Authority, Auckland, 15 October 2007.
[40] At [86].
[41] *Refugee Appeals Nos. 76335 and 76364* Refugee Status Appeals Authority, Auckland, 29 September 2009.
[42] At [54].

[36] Mr McCarthy submits that even if it was established that Mr Isak was a member of the Ogaden Clan, this would not be a trump card. This may be so. It is impossible for this court to assess that. It is, however, quite clear from the material before me that membership of a particular clan can considerably increase the risk of violence in Somalia. Membership of a clan has been treated as a pivotal issue in other decisions relating to refugee status or deportation.

[37] In particular, it must be noted that the Authority's rejection of Mr Isak's membership was based on the general lack of credibility of his evidence, and not because of any material indicating that he was not a member of the Ogaden Clan. The Refugee Status officer believed that he was a member of the Clan. If he had provided credible evidence that he was a member of the Clan, his general failure to provide credible evidence on other issues may have been irrelevant. The lies on other aspects of his life could not be material to the risk to him if he was indeed a member of the Ogaden clan. A well-founded fear of persecution may have been established. The Authority, if it had concerns about the assertion in the letter, could have asked questions about it, and Mr Mahomed may have been summoned to give evidence. There is a real possibility that if the Authority had had Mr Mahomed's letter before it and had accepted as a consequence that Mr Isak was a member of the Ogaden Clan, that it would have upheld his refugee status.

The Authority's lack of knowledge of the letter

[38] It is necessary to go into the facts relating to the provision of the letter in more detail. In September 2008, following his arrival in New Zealand, Mr Isak was being held in custody, and his release from custody was being sought pending a decision on his status. A letter was obtained from Mr Abdikadar Ali Mohamed dated 21 September 2008, about Mr Isak's membership of the Ogaden Clan. Mr Mohamed is the President of the Somali Federation Community Incorporated and had lived in New Zealand since 4 November 1998. Somali Federation Community Incorporated was previously known as the Auckland Ogaden Community Incorporated. Mr Mohamed has filed an affidavit in which he deposes that through his father's side he belongs to the Ogaden Clan, and has extensive knowledge of the Somali community in New Zealand.

[39] The letter was provided to Mr Isak's counsel, Ms Hindman. She enclosed it in a letter she sent the following day, on 22 September 2008, to "Janene Smith – Technical Adviser, Compliance Operations, Auckland". The letter read as follows (again without changes to punctuation or grammar):

> Our recent conversations requesting the abovenamed is Released on Conditions refers.
>
> In support of this we enclose a letter of support from Abikadar Mohamed – President of the Somali Federation Community Incorporated. Additionally we provide a copy of Mr Isak's republic of South Africa Certificate of Refugee Status.
>
> As Mr Isak has been detained since arriving in New Zealand over three months ago, we seek favourable consideration of this request.
>
> Should there be any further queries please contact the writer on the details above. Thanking you.

[40] Ms Hindman has deposed that having sent that letter to the Department of Labour she assumed that it would go to the Refugee Status Branch or to the Authority. Mr Newth, who is a Refugee Status officer, has deposed that in fact the Refugee Status Branch and Compliance Operations are two separate parts of Immigration New Zealand. He states that each has very different roles and the officers who work in each branch have different delegations under the Immigration Act. The Refugee Status Branch is concerned only with determining status claims, and has no power to detain or remove individuals. Compliance Operations officers have delegated power to detain and to remove individuals. He stated that it was his understanding that Compliance Operations kept separate files on individuals, and material held in the Compliance Branch is only passed on to other branches where there is a need to do so. He deposed that it was the usual practice to send Refugee Status Branch files to the Authority and that this was done. The Compliance Operations file was not from the Refugee Status Branch, and was not sent to the Refugee Status officer for the initial enquiry, or the Refugee Status Appeals Authority.

[41] Ms Hindman in her affidavit deposed that she was totally unaware that not all information given to the Department of Labour is passed on to the Refugee Status

Branch or the Authority. She thought that it had been placed before the Authority. There was no challenge to the credibility of Ms Hindman's assertion.

[42] In Appendix 1 of the Refugee Status decision, the documents tendered are listed. Neither Ms Hindman's nor Mr Mohamed's letters are mentioned. This should have alerted her to the fact that the letters were not before the Authority. Mr McCarthy for the Chief Executive submitted further that it ought to have been clear to Ms Hindman that she could not assume that the letter of support would be forwarded by Compliance Operations to the Refugee Status Branch. He points out that Ms Hindman was corresponding with different individuals in the Refugee Status Branch and Compliance Branch, at different postal addresses. He submitted that it was disclosed by the documents before the court that on 17 July 2008, at the outset of her involvement, she had complained about a breakdown in communication between the two branches. He also submits that although she had sent a copy of Mr Isak's South Africa Certificate of Refugee Status to the Refugee Status Branch on 28 July 2008, she did not assume that Compliance Operations had that, and sent a further copy when she wrote to it on 22 September 2008.

[43] These matters show that as an expert in the area, Ms Hindman should have been aware that there was a difference between the evaluation branch (Refugee Status), and the Compliance branch. It should have been obvious that there was at least a significant risk that neither the Refugee Status officer nor the Authority had a copy of the letter to Compliance Operations, as it had not gone to the Refugee Status Branch. Further, the lack of any reference to the letter in the appendix should have alerted her to the fact that it was not before the Authority.

[44] The Refugee Status Branch does not assume a maternalistic burden to assure all evidence is before it. This is clear from s 129P of the Act. Section 129P(1) and (2) provide:

> **129P Procedure on appeal**
>
> (1) It is the responsibility of an appellant to establish the claim, and the appellant must ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are provided to the Authority before it makes its decision on the appeal.

(2) The Authority—

(a) May seek information from any source; but

(b) Is not obliged to seek any information, evidence, or submissions further to that provided by the appellant; and

(c) May determine the appeal on the basis of the information, evidence, and submissions provided by the appellant.

It is explicit, therefore, that the obligation is on the appellant to provide all information and evidence to the Authority, and that the Authority is not obliged itself to seek any information or evidence, but may determine the appeal on the basis of the material provided by the appellant. This was recognised in *Jiao v Refugee Status Appeals Authority* where it was observed by Keith J that, while avoiding words such as "onus" and "burden", the applicant must prove its case.[43] It was for the applicant to make an effort to support his statements by any available evidence, and make an effort to procure that evidence and supply all pertinent information.[44]

[45] The obligation on the applicant is also clear from the Authority's procedures. Prior to the hearing Ms Hindman received a letter from a case officer of the Authority, dated 12 January 2009. It was a letter that presumably followed a standard form and contained a number of statements relevant to this application. It advised that the applicant must file submissions and evidence, and bring the Department of Labour file to the hearing. It stated that it was the applicant's responsibility to establish a claim to refugee status.

[46] Also, the Authority's Practice Note 1/2008 specifically stated at paragraph 2 that it was the responsibility of the appellant to establish the claim for refugee status (paragraph 2.1), and that the appellant must ensure that all information, evidence and submissions that the appellant wished to have considered in support of the appeal are provided to the Authority before it makes its decision. It confirms that the appellant should tender all available evidence in support of the appellant's claim (paragraph 15.1).

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[43] At [23].
[44] At [28].

[47] It should have been entirely clear to Mr Isak's counsel, therefore, that it was the appellant's obligation to provide the submissions and evidence to be relied on before the Authority. This was the express direction of the standard form letter, and the Practice Note. Further, it was clear that the hearing being de novo, it was for the appellant to make out his case. At the hearing the Authority would make its own assessment of the claim, and the appellant would be asked questions by the Authority, and the answers would be critical in the assessment process and the decision.

[48] It is provided at Regulation 15(2) of the Immigration (Refugee Processing) Regulations 1999 that:

> A Refugee Status officer or the Authority must ensure that an appellant is provided with a copy of any Departmental file or other material or information relevant to the appeal at least five working days before the date on which the appeal is to be considered or the appellant is to be interviewed.

Mr Ryken placed some reliance on this clause. However, the Regulation is directed to the provision of information to the appellant, not to the Authority. There is no suggestion that the appellant was not provided with a copy of all relevant Departmental information.

[49] The procedural scheme that is created by the Act, the Regulations, and the specific procedures and advice given by the Authority, place the obligation squarely on an appellant to provide all information to be relied upon to the Authority. This is in accord with the usual appeal practice procedures, where it is for the appellant to make out the claim. The general rule that those who apply for a remedy have the obligation to ensure that the relevant material is before the Tribunal, must apply. An applicant or appellant must make out its case. This is no less true in a refugee context, although the difficulties of language and resource that refugee appellants face will be recognised. Those difficulties can generally be met by the inquisitorial nature of the procedure, the low threshold of proof (a "well-founded fear"), and by the provision of funded counsel and interpreters. These safeguards were in place for this appeal.

[50] Before traversing the implications of these findings it is necessary to consider in more detail the other central ground of the judicial review application; that during the Authority hearing Ms Hindman and Mr Isak were not fairly put on notice that the credibility of Mr Isak's assertion that he was a member of the Ogaden Clan was at issue.

Alleged failure to advise Mr Isak that membership of Ogaden Clan at issue

[51] The Refugee Status officer in his decision accepted Mr Isak's evidence. He stated:[45]

> Mr Isak was an articulate and co-operative witness. He showed knowledge of the Clan system in Somalia and gave sufficient evidence to establish his Clan affiliation.

He confirmed this further at p 15, and indeed found that he was a member of certain sub-clans including the Ogaden sub-clan. He concluded:

> For all the reasons set out above it is considered that there is a real chance of Mr Isak being persecuted if he returns to Somalia now. His fear of being persecuted is therefore considered to be well-founded.

Ultimately, however, the Refugee Status officer decided against Mr Isak's application for refugee status on the basis that he could avail himself of the protection of the South African Government. That issue was not considered by the Authority, when it effectively reversed the Refugee Status officer's credibility findings and did not believe Mr Isak.

[52] Issues of fairness must be seen against the background of the fact that Mr Isak went into the Authority hearing having had his assertions about his membership of the Ogaden Clan accepted unreservedly at the previous hearing.

[53] The proceeding before the Authority was effectively a new hearing, rather than the traditional rehearing on appeal. In fact the Authority made little reference to the decision of the Refugee Status officer through the course of its decision, and effectively decided the matter afresh without reference back. The Authority member

[45] At p 13.

was a barrister with special expertise in refugee issues. In this case, which is presumably typical, there were no documents from Somalia or other hard facts relating to Mr Isak before the Authority, save for the South African document recognising his refugee status. Inevitably then, the assessment of the facts came down to a process of inquiry and deduction against the benchmark of known facts about Somalia.

[54] At the outset of its consideration the Authority advised Mr Isak:[46]

> Now, this is a fresh start to your case in that you do not have to prove to me that the RSB decision was wrong. In other words, I don't take any notice of the reasons for their decision but I do take notice of the evidence which you have given during your interview with the RSB. And you will see that I have your immigration service file which contains the evidence you have previously given. This is the same file that your lawyer has. Alright?

And then a little later:[47]

> Because this is your last opportunity to present case for refugee status, it is very important that you give truthful answers. Part of my function is to determine whether or not your evidence is credible and if you exaggerate or invent parts of your account, it becomes difficult to know what to believe.

And later,[48] the Authority questioned Mr Isak about his affiliation with the Ogaden Clan. The questions were detailed and answered in detail. There was nothing in the questions to indicate that the Authority was challenging Mr Isak's claims to membership of the Ogaden Clan. However, the evidence must be considered against the backdrop of the initial warnings, and specific challenging exchanges on specific background matters.

[55] In its decision the Authority assessed Mr Isak's case in detail. It found what on any analysis appeared to be very significant inconsistencies in his evidence. There were differences between what he asserted and known geographical facts, internal inconsistencies in his evidence and in the sequences that he put forward. It was also noted that in addition to destroying his passport, he provided false information in his first interview. He said then that he had left Somalia in

[46] At p 2.
[47] At p 3.
[48] At pgs 29 and 30.

January 2008, and that his wife and child were in Somalia and that he was at risk in Somalia because he had refused to work as an interpreter for the Ethiopian Army. This was all untrue. The Authority noted that when asked by the RSB to explain why he had provided this false information he said that it was because he was frightened of being returned to South Africa where he would be killed on return.[49] He also gave false information as to the events in South Africa which led to his departure.

[56] Mr Ryken submitted that an explicit warning that the Authority might not believe Mr Isak about his membership of the Ogaden Clan should have been given. He relied on the statement of Fisher J in *Khalon v Attorney-General*,[50] that only the highest standards of fairness will suffice since questions of life and personal safety are at stake.

[57] I consider that it had been made clear by the Authority to Mr Isak in the presence of his lawyer at the outset of the hearing that his credibility on all matters was at issue. It cannot be said that Mr Isak could not reasonably have been aware that his membership of the Ogaden Clan, which was part of his evidence, was one of those issues. As Mr McCarthy pointed out, it was not Mr Isak's answers to questions about whether he was a member of the Ogaden Sub-clan that caused the Authority to reject his evidence. Rather, it was his general lack of credibility on a large number of other issues which led the Authority to conclude that it could not rely on anything that Mr Isak said.

[58] I conclude that the Authority fairly gave notice of its intention to review all issues, and that Mr Isak's credibility was in issue on such matters. Mr Isak and his counsel should have been in no doubt that when he was being questioned about his membership of the Ogaden Clan as well as all other factual matters, he might not be believed. There was nothing unfair in the way in which the Authority proceeded. It tested Mr Isak's evidence very thoroughly over two days. In addition to him having lied extensively to immigration officials when he first came to New Zealand, his detailed evidence before the Authority had many major flaws only explicable on the

[49] At [68].
[50] At 463.

basis that at least large portions of his story were inventions. It was perfectly rational and fair for the Authority, not knowing of the letter, to reject his claim to Ogaden Clan membership, despite the fact that no specific flaws had been exposed in his evidence on that point, because his evidence generally appeared to be self-serving and untrue. As the Authority stated, the only matter that it could accept was that Mr Isak was a male Somali national.

Summary of conclusions to this point

[59] I conclude, therefore:

a) Mr Mahomed's letter that the Authority did not have before it was material and could well have affected the outcome of the appeal by corroborating Mr Isak's claim to be a member of the Ogaden Clan.

b) There was no error by the Refugee Status Branch or the Authority in not placing Mr Mahomed's letter before the Authority. That was the job of Mr Isak's counsel.

c) The Authority conducted the hearing fairly and without error on its part.

[60] The issue before the court at this point is, therefore, whether in the absence of procedural unfairness, or any error or reasoning or of law, the failure by counsel to place material information before the Authority is a sufficient ground to warrant quashing the decision and directing a re-assessment by the Authority.

Evaluation

[61] Mr Ryken, as well as arguing procedural unfairness, has pleaded error of fact constituting an error of law as his first ground for review. He submits that irrespective of issues of unfair procedure and unreasonableness, the fact that there was a mistake of fact on a material matter is a sufficient basis for review. Of course at this point I do not know if there was an error of fact as to membership of the Ogaden Clan. That cannot be determined at this hearing. The only error, if it can be

called that, was the Authority not considering Mr Mahomed's letter. That was the error caused by Mr Isak's counsel in not providing it.

[62] In Lord Diplock's widely recognised categorisation of judicial review grounds as being illegality or unlawfulness, irrationality and procedural impropriety,[51] there is no obvious place for counsel error causing a possibly incorrect decision. Nor is there in Cooke J's statement in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*,[52] that a Minister is bound to act in accordance with law, fairly and reasonably, any indication that counsel error would be an appropriate basis for a court to intervene. Traditionally the focus has been on the decision-making process, and the courts will not interfere where there has been no discernable fault in that process.

[63] However, in this appeal, while there was no fault by the decision-maker in its processes, there has been a material error if the process is looked at as a whole. That has been an error by counsel in not ensuring that the material evidence was before the Authority. This error may have led to a result that is unfair to Mr Isak, if he is viewed in isolation from his lawyer.

[64] Traditionally, given that lawyers are generally agents for their clients, the knowledge and actions of lawyers are attributed to clients on principles of agency law. However, the concept of agency is not necessarily apt in the context of a state funded lawyer who is given the task of defending a possible refugee who does not speak English, is not familiar with the New Zealand customs, and if unsuccessful is likely to be immediately removed from New Zealand. Such a person has little ability to chose counsel, understand counsel's actions, or seek redress at a later point.

[65] In the context of asylum and refugee cases in England and New Zealand counsel error has been the subject of some attention. The Crown relied on *Al Mehdawi v Home Secretary*.[53] There, the appellant's solicitors had failed to correctly advise the appellant of the date of hearing. There was no appearance at the

[51] See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[52] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).
[53] *Al Mehdawi v Home Secretary* [1990] 1 AC 876.

hearing by the appellant or the solicitor. The Tribunal had decided that adequate notice had been given, by notice to the solicitors, and proceeded to consider and dismiss the appeal. The appellant sought judicial review on the basis of breach of natural justice through denial of a hearing. He succeeded at first instance, and in the Court of Appeal but failed in the House of Lords. The issue was defined by Lord Bridge as being:[54]

> Whether a party can complain of a denial of natural justice where he has been afforded by the decision-maker an opportunity of presenting his case, but through the fault of his own advisers the opportunity has not been taken.

Lord Bridge set out the answer of the House as follows:[55]

> …. A party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the dispute on his behalf cannot complain that he has been the victim of a procedural impropriety or that natural justice has been denied to him.

[66] *Al Mehdawi v Home Secretary* and other cases are considered in Wade & Forsyth *Administrative Law* 10 ed at 424-425 under the heading of "Relief refused in discretion". The learned authors noted in relation to *Al Mehdawi v Home Secretary*:[56]

> Where it is by the applicant's own default, or by that of his advisers, that his case cannot be heard, the courts will sometimes be willing to exercise discretion in his favour. But the House of Lords reversed such a decision in a deportation case where the applicant missed the hearing of his appeal because his solicitor wrote to him at the wrong address, and this decision appears to make the end of these indulgences. [footnotes omitted]

[67] In *Reg v Criminal Injuries Board Ex parte A*,[57] the House of Lords considered judicial review of a decision of the Criminal Injuries Compensation Board, made in the absence of a relevant police doctor's report, which had not been submitted to it. *Al Mehdawi v Home Secretary* was referred to, but not given any detailed consideration. This was not a case of counsel error and the failing was by the police. It was accepted that acting upon an incorrect basis of fact could be

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[54] At p 897.
[55] At p 898.
[56] At 425.
[57] *Reg v Criminal Injuries Board Ex parte A* [1999] 2 AC 330.

regarded as a ground of review.[58] However, Lord Slynn of Hedley preferred to decide the case on the alternative basis argued, which was that what occurred was in breach of the rules of natural justice and constituted unfairness. He observed:[59]

> *It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness*. Thus, I would accept that it is in the ordinary way for the applicant to produce the necessary evidence. There is no onus on the Board to go out to look for evidence, and nor does the Board have a duty to adjourn the case for further inquiries if the applicant does not ask for one.
>
> [emphasis added]

Ultimately, the House of Lords considered that there had been fault on the part of the police in not presenting the report and decided the case on that basis.

[68] In *R (Haile) v Immigration Appeal Tribunal*,[60] judicial review was sought by an Ethiopian national seeking asylum on the basis that the special adjudicator did not have before him a significant piece of evidence, which affected his decision. Simon Brown LJ observed:[61]

> Nor am I persuaded that the House of Lords' decision in *Al Mehdawi v Home Secretary* precludes this court having regard to the wider interests of justice here, not less given that this is an asylum case rather than a student leave case as was *Al Mehdawi v Home Secretary. Aspects of that decision may, in any event, now need to be reconsidered in the light of the House of Lords' speeches in R v Criminal Injuries Board Ex parte A [1999] 2 AC 330.*
>
> [emphasis added]

A re-hearing was ordered. It was held that the special adjudicator had made a mistake.

[69] In *FP v Secretary of State for the Home Department*,[62] the appellant's lawyers had failed to notify the Asylum and Immigration Tribunal of a change of his address, so that the appellant did not know of the appeal hearing, which was determined against her. The grounds put forward in support of the review were error of fact or the emergence of new facts. Sedley LJ in his decision referred to *R (Tofik)*

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[58] At 344-345.
[59] At 345.
[60] *R (Haile) v Immigration Appeal Tribunal* [2001] EWCA Civ 663.
[61] At [26].

v IAT ,[63] an asylum case where he had said, with the support of other members of the court:

> A client is not necessarily fixed with his or her solicitor's errors in seeking to oppose removal from the United Kingdom, at least when the client has been in no way responsible for them.

[70] Sedley LJ in *FP v Secretary of State for the Home Department* dealt with the question of whether in the field of refugee law the errors of representatives are to be imputed to their clients. He called that form of imputed fault the "surrogacy principle".[64] He distinguished *Al Mehdawi v Home Secretary* on the basis that the case involved asylum seekers who were not making a first appeal, or had lost their first appeal and were making a second appeal to establish their claim. He noted that the "surrogacy principle" had not been uniformly adopted or applied by the courts. He was of the view that *Al Mehdawi v Home Secretary* did not necessarily govern asylum cases.[65] In distinguishing the case of the applicants before the court he observed:[66]

> Although Lord Bridge's opinion is carefully framed in terms of principle and not of pragmatism, the case before the House was far distant from the kind of case we are concerned with. These cases do not only involve asylum-seekers who are either making a first appeal or have lost their first appeal and are making a second endeavour to establish their claim: they include asylum-seekers who have won their initial appeal before an immigration judge and are seeking to hold the decision against the Home Secretary's appeal. For some of these, the exercise of the right to be heard may literally be a matter of life and death; for all of them save the bogus (and even they have to be identified by a judicially made decision) it is in a different league from the loss of a student's right to remain here. The remedial discretion which afforded Mr Al Mehdawi a fallback is absent from the asylum law.

He quoted Lord Denning MR from *R v IAT Ex Parte Mehta*,[67] holding that a solicitor's mistake might amount to special circumstances for enlarging time. Lord Denning said:

> We never let a party suffer because their solicitors have made a mistake and are a day or two late in giving notice of appeal ... all the more so ... where [the appellant] would have no remedy against their solicitor for any

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[62] *FP v Secretary of State for the Home Department* [2007] EWCA Civ 13.
[63] *R (Tofik) v IAT* [2003] EWCA Civ 1138.
[64] At [32].
[65] At [45].
[66] At [43].
[67] *R v IAT Ex Parte Mehta* (1976) Imm AR 38.

> negligence. If she is out of time for appeal, she will be removed from this country, and it would be of no consolation to her to say that she has a remedy against her solicitor.

[71] The appeals were allowed in *FP v The Secretary of State for the Home Department*, although on the grounds that the rules themselves were productive of irremediable procedural unfairness. In their separate decisions Lady Justice Arden and Lord Justice Wall also distinguished *Al Mehdawi v Home Secretary*,[68] on the basis that in England removal in an immigration case is very different from removal in an asylum case where Articles 2 and 3 of the Geneva Convention are engaged.[69]

[72] *Al Mehdawi v Home Secretary* was considered and distinguished in New Zealand by McGechan J in *Lal v The Removal Review Authority*.[70] A defective appeal document had been filed, and this was material to the Refugee Removal Authority's decision adverse to the appellant. McGechan J found that there had not been requisite procedural fairness. It was held that the appeal document in that case was so plainly incomplete that this should have been obvious to the Refugee Removal Authority, which should have made inquiries. It should have been clear that the notice of appeal failed to address the necessary criterion, and the Removal Review Authority should have informed the appellant of that. He allowed the application for review, but on broader grounds than just error by counsel.

[73] In the New Zealand decision of *Amosa v Secretary of Justice*,[71] Heron J relied on three earlier English cases: *R v West Sussex Quarter Sessions; Ex parte Johnson (Albert and Mand) Trust Co. Ltd*,[72] *Rahmani v Diggines; R v Diggines; Ex parte Rahmani*,[73] and *R v Immigration Appeal Tribunal Ex parte Enwia*.[74] In relation to the latter case he quoted Stevenson LJ who in *Diggines* said:

> We have considered also the four or five categories of case to which judicial review applies, which Mr Collins submits, contrary to the judgment of Comyn J, are exhaustive, and the possibility that they may be extended in a proper case to cover errors in law, not only of the decision-making body, but

[68] At [43].
[69] At [91].
[70] *Lal v The Removal Review Authority* HC Wellington AP 95/92 10 March 1994 at 23.
[71] *Amosa v Secretary of Justice* HC Wellington CP 317/94 22 December 1997, Heron J.
[72] *R v West Sussex Quarter Sessions; Ex parte Johnson (Albert and Mand) Trust Co. Ltd* [1973] 3 All ER 289.
[73] *Rahmani v Diggines; R v Diggines; Ex parte Rahmani* [1986] 2 WLR 530.
[74] *R v Immigration Appeal Tribunal Ex parte Enwia* [1984] 1 WLR 117.

> of the other party, for which *R v Leyland Justices, Ex part Hawthorn* [1979] QB 283 is an authority, *and even of the party complaining of the decision by way of judicial review, for which there is no authority.* Bearing in mind the judgments of Orr and Lawton LJJ in *Reg v West Sussex Quarter Sessions, Ex parte Albert and Maud Johnson Trust Ltd* [1974] QB 24, 39 and 42, and of Lord Hailsham of St Marylebone LC and Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR, 1155, 1160-1161 and 1174-1175, we can see that *it might be permissible to quash a decision seriously affecting a person who by mistake or misunderstanding due to his own defects or those of his advisers was deprived of the opportunity of being fully heard before the decision was reached.* However, we find it unnecessary and undesirable to decide whether judicial review would lie in such a case, because we are clearly of the opinion that this is not such a case.
>
> [emphasis added]

Heron J also quoted Stephenson LJ from later in *Diggines*:

> But the remedy and the jurisdiction are not to be confined too rigorously by precedent and I respectfully agree with the observation of Lord MacDermott LCJ in *Reg (Burns) v County Court of Judge of Tyrone* [1961] NI 167, 172:
>
> Though the main branches of certiorari have long since been shaped and fixed by precedent, they are still alive and capable of growth in the furtherance of their established purposes.

[74] Heron J in *Amosa v Secretary of Justice* did not in that case refer to *Al Mehdawi v Home Secretary.* In *Amosa v Secretary of Justice* the plaintiff in an application for review was seeking to review a decision of the Deportation Review Tribunal. Two reports and a reference favourable to the plaintiff were not put in evidence before the Tribunal. Heron J stated:[75]

> I think the law correctly draws the line at exercising any right of judicial review over a tribunal which acts properly and fairly but for reasons totally unrelated to its function is not given important evidence which if presented would be essential to discharging … its statutory role and function.

In *Amosa v Secretary of Justice* Heron J held that there was sufficient in the handling of relevant evidence to think that there was a basic failure of the rules of natural justice, and he determined that the court should intervene.

[75] In none of these cases has the successful ground for review specifically been an error by counsel that has resulted in a possible mistake of fact by the Tribunal.

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[75] At 12.

However, the two New Zealand decisions, and the English decision of *R (Haile) v Immigration Appeal Tribunal*, appear to contemplate that a circumstance could arise in a refugee context where judicial review will be granted on the basis of counsel error, where that has resulted in the Tribunal not having material information or a proper understanding of the material information before it. In *R v Criminal Injuries Board* it was accepted *obiter dicta* that where no one was at fault but there was unfairness, that there could be intervention.

[76] Standing back, Mr Isak has not been treated fairly. There is no suggestion that it was his error that led to Mr Mahomed's letter not being put before the Authority. Indeed, he could have fairly expected that it was before the Authority. There was a procedural error, and it was not his fault. If we assume for a moment that Mr Isak is a member of the Ogaden Clan and that it is dangerous to his liberty and life to be returned to Somalia, one can imagine his bafflement as he returns. He will have failed because highly relevant information that had been provided to his lawyer was not before the body that had decided his status. It is not entirely irrelevant to note that the Refugee Status officer did believe his evidence that he was a member of the Ogaden Clan.

[77] I adopt the observation in *R v Criminal Injuries Compensation Board* that it is a ground of review if there has been a breach of the rules of natural justice and unfairness, and that it is not necessary, at least in refugee cases such as these, to find that the Tribunal or government body was at fault. The mistake could be seen as a mistake of fact (there was no corroboration of clan membership) by the Authority, although it was not the fault of the Authority. But I think it is best categorised as procedural error in the process as a whole leading to manifest unfairness. I do not ignore s 129P(1) and (2) of the Act which make it clear that it is the responsibility of the appellant to establish the claim and ensure that all evidence is before the Authority, and that the Authority is not obliged to seek information or evidence. The position would have been different if the evidence was only of a failure by counsel to make inquiries from Mr Mahomed or a person in a similar position. But here there has been an explicit failure to present relevant available evidence obtained to support Mr Isak's application, and that has been a failure on the part of counsel and not Mr Isak. In *Jiao v Refugee Status Appeals Authority* Keith J, while referring to the

responsibility on the applicant to provide information, observed also that there was an obligation on the person charged with determining the applicant's status to:[76]

> (i) *Ensure that the applicant presents his case as fully as possible and with all available evidence.*
>
> (ii) Assess the applicant's credibility and evaluate the evidence *(if necessary giving the applicant the benefit of the doubt)*, in order to establish the objective and the subjective elements of the case.
>
> (iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.
>
> [emphasis added]

This comment recognises the unusual nature of a refugee status hearing and the need for particular efforts to be made to ensure that the applicant's case is properly presented.

[78] There must be a concern about using judicial review to quash a decision where there has been no unlawfulness, irrationality or procedural error, by or of the Authority. But I comfort myself with the observations of McGechan J in *Lal v The Removal Review Authority* in quashing a decision of the Authority, although on somewhat different grounds:[77]

> Lest this decision be misunderstood, and taken too widely, I add a footnote. First, *I am considering only the position of the RRA*. This is not some universal ruling. *I am not considering the position of other statutory tribunals, with different statutes, functions, and procedures.* Nor am I considering the position of traditional Courts of Justice, with their own rules and established procedures. *The traditional adversary situation between subject litigants could raise further issues*. It may be the conclusion reached in relation to the RRA sometimes will translate to some extent into other fields; or it may not. *A little additional fairness never hurts, but time will tell*. Second, the finding reached, as relating to the RRA, is based on the facts noted. This was a clear case: total omission, likelihood of oversight, immediate contact available, and no obvious likelihood of delay. It called for response. Less obvious cases, such as slight coverage, or ambiguity, or appeals plainly hopeless on other grounds, could generate a different response, particularly given resource implication and the need for expedition. I am certainly not directing the RRA must make an immediate and minute examination of all appeals filed, with reference back to appellants of all minor or speculative difficulties, real or conceivable. Registry's are not revising barristers. There is room for common sense

[76] At [28].
[77] At p 24.

> administration. I go no further, at this point, than the clear case; where there is a clear possibility of unfairness if a vital omission is not pointed out, that small step should be taken.
>
> [emphasis added]

[79] This case is not as strong for the appellant as in *Lal v The Removal Review Authority* in that I do not feel able to criticise any aspect of the Authority's conduct of this matter as did McGechan J in that case. It is most unfortunate that an error by counsel will lead to a further hearing. If the factual issue had been less fundamental, or the evidence less cogent, the result might have been different. However, this was very important evidence relating to the fundamental plank of Mr Isak's case. The consequences of the wrong decision may be dire. I consider there is a real risk that not leading this evidence could lead to a very grave injustice being done to him. The cost and delay of a rehearing is a small price to pay, if such an outcome is avoided. A generous approach to intervention is warranted. A little additional fairness is called for.

Wedenesbury unreasonableness

[80] It is not necessary given my conclusions to consider in detail Mr Ryken's submissions relating to *Wednesbury* unreasonableness. Suffice to say, I found none of them made out; indeed on the material before the Authority the decision was entirely reasonable. Although there was no evidence to show that Mr Isak was lying about his membership of the Ogaden clan, there was ample material before the Tribunal for it to reject his other evidence as lacking in credibility. The Authority's rejection of Mr Isak's evidence was based on a solid number of clear changes in his story, contradictions in his evidence and differences between what he said and what are known facts. The Authority's reasoning and outcome on the material before it cannot be criticised.

Result

[81] I, therefore, set aside the dismissal of the plaintiff's appeal before the Refugee Status Appeal Authority, and direct that there is to be a rehearing before it. I emphasise that it may well be that when the Authority explores Mr Mahomed's

evidence, that it again declines to grant refugee status. That will be a matter for the Authority.

Costs

[82] This would not appear to be a case for costs, but as I have not heard counsel on the topic, I reserve costs for further submissions, if costs are sought. If they are sought by either party a memorandum should be filed and I will make timetable orders.

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Asher J