Neutral Citation Number: [2009] IEHC 83

THE HIGH COURT

JUDICIAL REVIEW

2007 979 JR

BETWEEN

J. M. A.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 6th day of February, 2009.

1. The applicant seeks leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated 2nd July, 2007 affirming the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status.

2. Mr. Peter Leonard B.L. appeared for the applicant and Ms. Sinéad McGrath B.L. appeared for the respondents. The hearing took place at Kings Inns in Court 1 on 28th January, 2009.

Factual Background

3. The applicant claims to be a national of Somalia and a Muslim. His account of events is as follows: he was born on 12th May, 1988 in Goob Weyn but moved to the Calanley district of Kismayo, a southern port city, when he was very young and lived there until he was eleven years of age. He is a member of the Talaabo Ade sub-clan, which he says is a sub-clan of the Muse-Dheryo, which in turn is a part of the minority Midgan clan. He says his father was a blacksmith who operated a shop and was well known in the locality. The applicant claims that militia used to beat his father with an iron bar and with the butt of a gun at his shop in Kismayo in order to extort money from him.

4. In 1999, the applicant's family arranged for him to leave Somalia with three men of the Midgan clan. He moved to the Eastleigh area of Nairobi in Kenya, where he remained for five years. For the first two months he lived with the three Somalis with whom he had travelled, but he then lived on the streets before finding shelter at a mosque. He made money by selling sweets and washing cars with a group of other homeless Somali boys and learned to read and write Somali with this group. He says he was regularly harassed by Kenyan police and arrested three times; on each occasion he was forced to bribe the police to secure his release. In 2001, he was told by a man at the mosque who was from his area of Somalia that his father and half-brothers had been killed by militias. The group of homeless boys would collectively save money they had earned so that each in turn, according to the length they were in the group, could buy a ticket to escape

Kenya. His turn to escape came on 7th June, 2004. He journeyed to the U.K. with the help of an agent, travelling via Hargeysa (Somalia), Dubai and Bahrain. Once in the U.K., the agent helped him to find his aunt in Watford.

The U.K. Asylum Application

5. The applicant applied for asylum in the U.K. on 8th July, 2004, when he was sixteen years of age, claiming to fear persecution on the basis of his "race". He completed a Screening Form, made a personal statement, completed a statement of evidence, and attended for interview. At that interview, he said he was of the Midgan clan and the Muse-Dheriyo sub-clan. He claimed that he had entered the U.K. in June, 2004, that he was living with his aunt, and that he had left Somalia five years previously, in 1999. He said he had since lived in Nairobi and that he had sold sweets and washed cars there. He said that for the first two months he had lived with three other Somalis, then on the streets and then in a mosque. He said he was constantly harassed by Kenyan police. In 2001, he heard from a man at the mosque that his father and half-brothers had been killed. He said he and around 30 other boys had saved money to escape, and he had travelled with an agent to the U.K. via Hargeysa, Dubai and Bahrain.

6. At interview, he was asked a number of questions about his clan and about Somalia and the Kismayo area. He was unable to answer many very basic questions. He could not name any towns close to Kismayo or any of the islands nearby. He did not know the names of any Midgan sub-clans apart from the Muse-Dheryo, and he could not name any other place other than Kismayo where the Midgan people live. He did not know any of his clan's occupations except blacksmiths, and he could not name any larger clans who lived nearby. He did not know the date or year his family became affected by the civil war, and he did not know the clans who attacked and robbed his father.

7. His application was refused at first instance by the Home Office on the 19th August, 2004. He appealed to an Immigration Adjudicator of what was then the Immigration Appellate Authority (I.A.A.), and a hearing took place. A negative decision issued on 6th November, 2004. He was then served with a notice to leave the U.K. or face removal.

8. A copy of the Home Office decision and an incomplete copy of the Immigration Adjudicator's decision are before this Court. In the Home Office decision, it was not accepted that the applicant was 16 years old as claimed. It was noted that country of origin information indicates that although the Midgan clan suffer discrimination in the social and economic sphere, there is no indication that their security is at risk from targeted action by other clans. The Home Office caseworker went on to make a number of negative credibility findings, doubting that the applicant was a member of the Midgan clan on the basis that the applicant did not know the traditional occupations of the clan and did not have a thorough understanding of the clan structure.

9. The appeal decision confirms the earlier determination but for different reasons. As part of the consideration of the evidence and findings of fact the decision stated that-

> *"On the question of the appellant's credibility, I am not persuaded by a number of aspects of his evidence, but do, on balance, […] accept that the main core of his account is true, and that he is a Midgan, who was sent away by his parents from Kismayo, and came to this country having spent some time in Kenya."*

10. The Adjudicator went on to find that "*whilst I accept this central part of his account*", two strands of the applicant's evidence were "*totally lacking in credibility*", namely his version of how he raised money to journey to the U.K., and his claim that he was only sixteen years of age. Having said as much, the Adjudicator reiterated as follows at para. 32:

> *"However despite my misgivings on these two issues, the central core of his claim stands. He has shown little knowledge of the Midgan clan system, but has been consistent in claiming that his family was from this clan, and that his father suffered intimidation whilst working as a blacksmith in Kismayo. Whilst there is nothing to corroborate the claim that his father had been killed, it is perfectly plausible that this happened, bearing in mind the turmoil in Somalia during this period."*

11. The Adjudicator ultimately found that the appellant had not demonstrated that he personally faced any persecution. The remainder of his findings in that regard (paras. 34-37) are not before this Court as page seven of the appeal decision is missing from the file, but it is clear from page eight that the appeal was dismissed.

The Irish Asylum Application

12. The applicant arrived in the State on the 1st July, 2005, having travelled through Scotland and Northern Ireland. He made an application for asylum on the 29th July, 2005, claiming to fear persecution on the basis of his clan membership. He claimed to be seventeen years of age and he was treated as an unaccompanied minor for the purposes of his application.

13. He completed an initial ORAC questionnaire on the 4th August, 2005. He stated that he had made no previous applications for asylum, and had never lived anywhere apart from Somalia. He said that he left his country after his father was killed by militia, and he himself was captured by militia who detained him for two years, forcing him to work for them and to give blood, and beat him. He said his aunt who lives in America made his travel arrangements, and that he came to Ireland with an agent by boat and by airplane. He said he spent three days in Kenya en route.

14. It emerged, through a EURODAC "hit", that the applicant had previously applied for and been refused asylum in the U.K. It seems that a decision was made not to transfer the applicant to the U.K. under the Dublin II Regulation but instead the State accepted responsibility for determining his application in Ireland.

15. He was interviewed by ORAC according to the usual s. 11 procedure, which was conducted through the Somali language on the 18th October, 2005. He reiterated his claim that his father was killed in Somalia "when he was there", and that he had been kidnapped by militia and taken to a camp, where he was beaten and forced to work for two years. He escaped and went to his aunt's house. Some way into the interview, it was put to him that he had previously applied for asylum in the U.K. and although he initially denied it, the applicant then admitted that he had been refused asylum in the U.K. in 2004, and had then travelled to Ireland via Scotland. He then said his father was killed in 2001. He then wished to change his story saying he was born in Goob Weyn, moved to Kismayo when he was very young, and left Kismayo in 1999. The interview was then adjourned.

16. A second s. 11 interview took place on the 7th December, 2005. The applicant confirmed that he lived in Kismayo from an early age until 1999, that he

lived in Nairobi from 1999 to 2004, and in the U.K. from 2004 to 2005. He said that for the first two months in Nairobi he lived with the men he had travelled with. He was then homeless for a few days but found shelter at a mosque, where he remained for five years. He explained that after being refused in the U.K., he was advised to lie by Somali people in Scotland, who said he would be sent back to Somalia if he told the truth. He said he was scared to be sent back. He said that the answers in his initial questionnaire dealing with the period after he left Somalia were untrue. The interviewer then adjourned the interview to allow the applicant to complete a new questionnaire.

17. In his second questionnaire, which the applicant completed on 12th December, 2005, he confirmed that he had lived in Kenya from 1999 to 2004, made a previous unsuccessful claim in the U.K., and travelled to Dublin via Scotland and Northern Ireland. He said his father had been beaten and subject to extortion at his shop in Kismayo, and that the applicant left Somalia when he was eleven years of age, in 1999, at a time when the militia were taking all children over the age of ten, as his parents were afraid the militia would abduct him. His parents arranged for the applicant to travel to Nairobi with three Somali men. In Nairobi, he stayed with those men for two months but then became homeless. He found a place to sleep in a mosque in the Eastleigh district, and used to wash cars. He was arrested three times by the Kenyan police, but paid money for his release. In 2001, he was told that his father had been killed, and since then has had no contact with his family. At the mosque he met people who cleaned cars and worked in hotels to collect money between them so each one could leave Kenya and go to a safe place. His turn came on 7th June, 2004.

18. The applicant's s. 11 interview was rescheduled for the 19th January, 2006. At that interview, he stated that his clan and sub-clan were the Midgan and Muse-Dheryo. The applicant was asked a number of questions about those clans, and the areas where he claims to have lived in Somalia and in Kenya. He was asked about the districts of Kismayo, the distance from Kismayo to Goobwyn, the towns between Kismayo and Goobwyn, and the names of the roads in the Eastleigh area of Nairobi. He was unable to answer questions about his sub-clan. He said that he did not know much about his clan but learned about them since he went to England. He named two sub-clans of the Midgan, including the Muse Dheryo, and named his own sub sub-clan as the "Talaabo ade" but could name no others.

19. In the course of the rescheduled interview, the applicant said his father had a blacksmith's forge in Kismayo, and that militias would regularly beat him with the butt of a gun in order to extort money from him. The applicant confirmed that in Nairobi, he spent two months with the three Somalis he had travelled with, then was homeless, and then lived in a mosque with more than 20 other Kenyans and Somalis. He stated he had washed cars, and had been arrested three times by Kenyan police. He confirmed that a Somali man who recognised him at the mosque in 2001 told him of the death of his father and half-brothers. He has since heard nothing of his family. He reiterated that he had travelled through Hargeysa, Dubai and Bahrain, using money collected as part of a group of 30 people.

20. A report was compiled in compliance with s. 13(1) of the Refugee Act 1996, as amended, on 7th and 8th February, 2006. Having consulted country of origin information (COI), the authorised officer noted that the Midgan were able to settle in north-eastern Somalia and to attach themselves to majority clans with whom they can live and trade easily. The COI noted that there was no indication that the security of the Midgan clan was at risk from targeted actions by other

clans. The ORAC officer found that it was therefore unlikely that the applicant would encounter ill-treatment amounting to persecution.

21. The officer also found that "significant credibility issues arose", relating to:

a. The applicant's initial lack of candour and untruths told at that stage, including the claim that he was captured by militia and that he had witnessed his father's killing;

b. The failure of his previous asylum application in the U.K. and his failure to return to Somalia before journeying to Ireland;

c. The implausibility of the claim that by chance he met a man he knew from Somalia at a mosque in Nairobi in 2001;

d. His scant knowledge about the Midgan clan, "particularly given that Somalis have very strong oral traditions", and the absence of a reference to the Talaabo Ade sub-clan in COI (an appendix to the s. 13 report contained an Oxford House report on clan structures in Somalia); and

e. His vague geographical knowledge of the area he claims to come from and inaccuracies in his answers to questions in that regard.

22. The ORAC officer concluded that the applicant had not provided sufficient proof that he lived in Somalia for most of his life, and she made negative credibility findings under s. 11B (b) of the Refugee Act 1996 as amended and further that Ireland was not the first safe country in which the applicant had arrived since leaving Somalia as he had not made an asylum application in Kenya, Bahrain, or Dubai. She also made a finding under s. 13(6) (d) of the Act of 1996 as a result of the applicant's prior application in the U.K the consequence of which was that the applicant would not be entitled to an oral hearing before the RAT.

The RAT Stage

23. The applicant submitted a Form 2 Notice of Appeal to the RAT on the 7th March, 2006, addressing the issues highlighted in the s. 13 report. This is the prescribed form appropriate to documentary based appeals. On the issue of the applicant's credibility, it was submitted that any information that the applicant has about his clan and sub-clan would have been imparted to him at a young age and that it was plausible that his memory of detail would have faded since then. It was submitted that the applicant was aware of his clan from early childhood but that such matters were not discussed among the boys he knew in Nairobi, as he mixed with boys of all clans. It was also submitted that it was unsustainable to suggest that the applicant's credibility was undermined by his failure to recollect the distance from one town to another, or to identify close-by towns, having left Somalia at the age of eleven. Several COI reports were appended to the Notice of Appeal. The ORAC file sent for consideration to the Tribunal Member contained all the documents relating to the assessment and review of his file from the UK immigration authorities.

24. A negative RAT decision issued on the 10th April, 2006. That decision was subjected to judicial review proceedings which were compromised on the 27th

September, 2006. The decision was vacated and the matter was remitted for reconsideration to a different Tribunal Member.

25. The applicant was not notified that his appeal had been allocated to a new Tribunal Member, and no new or amended Form 2 Notice of Appeal, submissions or additional documentation were submitted by him or on his behalf. On the 2nd July, 2007, a second RAT decision issued rejecting his appeal. It is that decision that is the subject of the within proceedings.

26. The RAT decision was notified to the applicant by letter dated 10th July, 2007. The following day, the applicant's solicitors wrote to the Tribunal Member, expressing surprise that a decision had issued, requesting that the decision be withdrawn, and requesting that the applicant be given an opportunity to make up-to-date submissions. No response was received to that letter, and the applicant's solicitors sent a further letter dated the 23rd July, 2007. Attached to that letter was a letter dated 20th July, 2007, from the Somali Community in Ireland, stating that the writer was satisfied, having spoken to the applicant, that he is a member of the Midgan minority ethnic group and a member of the Talaabo' ade sub-clan. The letter states that the Talaabo' ade is known by that name in the local community in Goobweyn, but as Abukar throughout Somalia.

27. The RAT responded to the applicant's solicitors stating that the appeal was assigned for determination to a Member of the Tribunal following the compromise of a judicial review, and that as a decision had issued the Tribunal had "no further role in the matter."

The Impugned RAT decision

28. The RAT decision follows the usual structure, insofar as it sets out the applicant's claim, addresses various legal issues (this section amounts to thirteen of the decision's seventeen pages), and then contains an analysis of the claim contained in one of the seventeen pages.

29. In the "law" section, the Tribunal Member cites portions of paras. 213 and 219 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, relating to minors, and to a *Statement of Good Practice* compiled by the Separated Children in Europe Programme, which states that "*[w]hen making a decision about a separated child's asylum claim authorities should have regard to the UNHCR guidelines as contained in the Handbook and the 1997 Guidelines*". At the start of the analysis section, the Tribunal Member states that because the applicant is a minor, he is "*entitled to a more liberal interpretation of the benefit of the doubt."*

30. The analysis of the applicant's claim is cited in full:-

> *"Even having considered the Applicants status as a minor, credibility issues arise which serve to undermine the Applicant's account. When questioned about the clan he belonged to the Applicant said that when he got to the UK he did not know much about it but he had since learned. When asked to name the sub-clans of the Muse Deryo (the Applicant's clan) the Applicant said "I don't really know", and he then stated that he belonged to the Talaabo Ade sub-clan of the Muse Deryo. An Oxford House Report shows the genealogy of the Muse Deryo and there is no reference to the Talaabo Ade sub-clan to which the Applicant states he belongs to (Appendix 9, on file). Somalia is a clan based society and Somalis have strong oral traditions where information in relation to clans is passed on from one generation to the next. Even considering the fact that the*

Applicant spent four years in Kenya, one would expect that he would have a greater knowledge of his clan, consideration that Somalia is a clan based society and this was the reason he had to flee Somalia. The Applicant's lack of knowledge of his clan seriously undermines his credibility."

31. The Tribunal Member then notes that the applicant lived in Kenya for four years, and travelled through Dubai, Bahrain, the U.K., and Scotland, and she makes a finding under s. 11B (b) of the Refugee Act 1996, as amended. She also records that the applicant had made a prior unsuccessful application in the U.K., and that s. 13(6) (d) of the Act of 1996 had been found to apply. She concludes by stating that all relevant documentation had been considered - including the Notice of Appeal, COI, the U.K. Home Office documentation, the questionnaire, the s. 11 interview notes, and the s. 13 report – and she affirms the ORAC recommendation.

THE APPLICANTS' SUBMISSIONS

32. It is contended that the RAT decision is as sparse and as basic as such decisions can get. In circumstances where the human rights of an applicant are potentially at risk as in this case, such applicant deserves a more comprehensive analysis of his case particularly if, as happened here, the applicant was an unaccompanied minor and even more so when the appeal was paper based and the Tribunal Member had no opportunity to see and hear him tell his story.

33. The applicant's primary complaints in respect of the RAT decision relate to:-

a. Inadequate assessment of the applicant's claim;

b. Failure to take account of the applicant's minority; and

c. The lack of correspondence between the Tribunal and the applicant inviting them to make fresh submissions after the first RAT decision had been vacated.

(a) Inadequate assessment of the applicant's claim

34. Counsel for the applicant submits that the analysis section of the RAT decision was insufficient insofar as it consists of no more than 200 words, and does not amount to a real assessment of the evidence actually given by the applicant. Reliance is placed on *Bujari v. The Minister for Justice, Equality and Law Reform* [2003] I.E.H.C. 18 as establishing how an assessment should be carried out. He argues that in this case there is no indication that the Tribunal Member considered the submissions made in the Form 2 Notice of Appeal urging that the credibility findings made by ORAC should be viewed in the context of the applicant's evidence that he was only eleven years old when he left Somalia and could not then read or write. There was no indication either that the Member had considered the submission that the applicant answered certain of the questions put to him about Somalia at his rescheduled s. 11 interview or that he was honest about his ignorance of the clan system, saying that he had learned some details about his own sub-clan only after he arrived in the U.K.

35. It had also been submitted the Tribunal Member ought to have taken account of the fact that the core details of the applicant's claim to be a member of the Midgan clan were accepted by the U.K. Immigration Adjudicator as this decision and supporting papers were before the RAT.

(b) Consideration of the applicant's minority

36. It was strenuously contended that the Tribunal Member was obliged to take account of the applicant's minority when assessing his evidence for credibility. The Tribunal Member herself makes specific reference to this aspect of her obligations and states that such a minor is entitled to a liberal interpretation of the benefit of the doubt, yet it was argued she did not go on to actually adhere to that principle as there was no indication in her assessment that the applicant was given any benefit of the doubt let alone any liberal interpretation of that principle.

(c) Lack of correspondence

37. Counsel for the applicant notes that sixteen months passed between the date on which his form 2 Notice of Appeal was submitted and the date on which the impugned RAT decision issued. It is contended that after the first RAT decision was vacated, the RAT should have notified the applicant and/or his legal representatives that the appeal had been allocated to a new Tribunal Member. Counsel accepts that the applicant and his legal representatives could have been more pro-active, but it is submitted that fair procedures apply nevertheless and that the applicant should have been notified and/or invited to make new or updated submissions, particularly given his status as a minor and the absence of an oral hearing.

38. It was argued that if the applicant had been notified of any concerns which the Tribunal Member had in respect of his lack of knowledge about his clan, he could have made submissions in that regard. The Court's attention is drawn to the fact that once he became aware that his claims with respect to his sub-clan had been rejected, the applicant obtained a letter from the Somali Community in Ireland stating that the applicant was from Somalia and explaining that he was a member of the Midgan minority ethnic group and a member of the Talaabo' ade sub-clan, and that the Talaabo' ade sub-clan is known by another name outside of his locality. It is submitted that as a result, the Tribunal Member failed to consider the applicant's appeal in the light of up to date information. Reliance is placed on *N.M.B. v. The Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 24th January, 2005), and *F.A.A. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Birmingham J., 24th June, 2008).

THE RESPONDENTS' SUBMISSIONS

39. Counsel for the respondents accepts that the RAT decision is "tight" but she submits that it is a balanced and reasoned decision.

(a) Assessment of the applicant's claim

40. It is submitted that the Tribunal Member went to the core of the applicant's claim, which was the finding by ORAC in the s.13 report that *"[w]hile it is accepted that the applicant is still a minor (17 years old), the fact that he has such scant knowledge of the clan he claims to belong to constitutes a serious credibility issue"* and that the alleged sub-clan referred to by the applicant was not identified in objective country of origin information consulted. Further, that in spite of the fact that these key issues were identified in the s 13 report of 7th February, 2006 to which the COI relied upon was actually appended, the majority of the applicant's submissions in the Form 2 Notice of Appeal dealt with the general situation in Somalia, which was never in dispute. Only two of the submissions in the Notice of Appeal dealt with the credibility findings relating to how the applicant says he learned of his father's death and relating to his geographical knowledge, and only one short submission dealt with the clan issue, as follows:-

> *"The appellant instructs that from early childhood he was aware of his clan but that once he moved to Nairobi and found himself taking shelter in the Mosque and cleaning cars to make a living, he mixed with boys of all clans and that such matters were not discussed as these boys relied on each other for support and that discussion of clans would have led to friction. As such, any knowledge concerning his clan or its sub clans would have been imparted to him as a young boy and it is plausible that the memory of detail would have faded during his teenage years."*

41. This, it was argued, was the sum total of any submissions on the key clan issue, which was a glaring gap in their submissions. No attempt was made to establish by objective COI that such a sub-clan did, in fact, exist.

42. The Tribunal Member did not make any negative finding on the applicant's claim that he is a Somali national and therefore any submissions that the Tribunal Member should have taken account of the applicant's lack or otherwise of geographical were off point and irrelevant.

43. Counsel for the respondents further contends that if the applicant in fact has key information that was not submitted to the RAT, it is open to him to make a submission to the Minister under s. 17(7) of the Refugee Act 1996, as amended, to be re-admitted to the asylum system. Section 17(7) provides as follows:-

> "A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister."

44. Counsel for the respondents directed the court to inconsistencies between the core story told by the applicant in his U.K. application and the story that he told in his Irish application. In the U.K. application among other differences, there was no mention of the sub-clan that the applicant told ORAC he belongs to. She also outlined basic questions that he was unable to answer at his initial asylum interview with the Home Office on 13th August, 2004 and that if the Tribunal Member was obliged to take account of the appeal decision of the U.K. Immigration Adjudicator it would also have been incumbent upon him to consider the numerous negative credibility findings in the first instance Home Office decision.

Reversal of the Burden of Proof

45. Counsel for the respondents submits that because a finding was made under s. 13(6)(d) of the Refugee Act 1996, as amended, this meant that the application attracted s. 11A of the Act, as inserted by s. 7(f) of the Immigration Act 2003, and that the burden of proof shifted to the applicant to rebut the presumption that he was not a refugee. She submits that the RAT decision was, therefore, a generous decision.

(b) Consideration of the applicant's minority

46. Counsel for the respondents submits that it is clear on the face of the RAT decision that the Tribunal Member was conscious that the applicant was a minor, and that she took his minority into account when assessing his claim. It is contended that there is no direct or inferential evidence that the Tribunal Member did not take account of the applicant's credibility; reliance is placed on the judgment of Hardiman J. in *G.K. v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 where he stated at p. 427 that:-

> "A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

47. It is also submitted that the a certain reality should appear in this case as the applicant was not a young child but rather a young adult aged 17 years.

(c) Lack of correspondence

48. The applicant did not elaborate this aspect of his criticism of the contested decision as the Court pointed out that there is no provision in the s.13 (6) procedure for any correspondence between the RAT and the applicant/appellant. There is no procedure under the Refugee Act 1996, as amended, for the seeking of further evidence from ORAC or from the applicant.

THE COURT'S ASSESSMENT

49. This being an application to which section 5(2) of the *Illegal Immigrants (Trafficking) Act* 2000 applies, the applicants must show substantial grounds for the contention that the decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

50. The RAT decision seems, at first glance, to be a somewhat truncated analysis of the evidence. This in itself cannot be seen as evidence of a lack of fair procedures or flawed process as it is known that some decision-makers are admirably gifted in reducing lengthy submissions to conclusions of elegant precision capturing every point of importance and substance without hint of verbosity. At first glance this short analysis also seems to gloss over the applicant's youth although it is stated that the applicant was entitled to a liberal interpretation of the benefit of the doubt. Can her findings be faulted as argued by the applicant?

51. It was common case that a Tribunal Member reviewing a documentary based appeal from an earlier negative ORAC assessment must approach the task with care and must compare the findings made by ORAC in the light of the appeal submissions and any new country of origin information furnished. The Tribunal Member states that she did so and thus it has to be established whether the facts supported the findings and whether adequate reasons were furnished. In doing so it must be remembered that judicial review is not an appeal of the decision, that the assessment of credibility is uniquely in the hands of the Tribunal Member and the Court must not substitute its views for that of the Tribunal Member. The Court must confine its review to a careful scrutiny of the process engaged in evaluating the relevant facts and the relevant documents and the reasoning underlying the decision. Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) provide a guideline to how assessments must be carried out, as follows:-

> "The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:
> (a) all relevant facts as they relate to the country of origin […];
>
> (b) the relevant statements and documentation presented by the protection applicant […];

(c) the individual position and personal circumstances of the protection applicant […] so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection applicant's activities since leaving his or her country of origin were in engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship."

52. In this case the RAT had received all the documents held by ORAC relating to the applicant's asylum application together with the documents relating to his failed U.K. asylum application. The applicant had attended for at least five interviews and the Tribunal Member either had a note of those interviews or the reasoned decision. She therefore had before her the several very different accounts of alleged persecution recounted by the applicant, especially in relation to the killing of his father and his claimed and then abandoned history of capture by clan militia and ill-treatment for two years followed by his flight to Kenya. While these facts were recited in the early part of the RAT report, they played no discernible role in the Tribunal Member's analysis of the claim. Her negative findings related uniquely to whether the applicant belonged to the Migdan clan or a sub-clan of the Muse Dheryo. The applicant's failure to answer questions about the clan was deemed fatal to credibility even though he was a youngster when leaving Somalia. Furnished COI was consulted and it was observed that Somalia is a clan based society and Somalis have strong oral traditions where information in relation to clans is passed on from one generation to the next. The Tribunal Member accepted that the applicant was young when he left Somalia but nevertheless she expected a better level of knowledge of his clan than he displayed. She did not ignore the fact that he had made a previous application in another country, noting that s. 13 (6) (d) of the Refugee Act 1996 had been found to apply. The finding under that sub-section is that:-

"d) the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected)".

53. It can be assumed that by adverting to the finding made under s. 13(6)(d), the Tribunal Member was indicating that she was conscious that the applicant was, by reason of that finding and pursuant to s.13(5) of the Act of 1996, not entitled to an oral hearing and confined to a documentary based appeal.

54. The Tribunal Member also found that s. 11B (b) of the Act of 1996 operated. That sub-section provides as follows:-

"11B. – The Commissioner or the Tribunal, as the case may be, in assessing the credibility of an applicant for the purposes of the investigation of his or her application or the determination of an appeal in respect of his or her application, shall have regard to the following:- […]

(b) whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence."

55. In my view, this was a finding that the Tribunal Member was entitled to make on the information before her. While there is a possibility that information relied upon and referred to as the Oxford House report may not have been a fully definitive source on the families and clans of Somalia but the inescapable conclusion to an assessor reading the many questions posed to the applicant over at least five interviews in two jurisdictions is that the applicant was not knowledgeable on the area from which he said he came nor on the clans traditions of that area. There were many aspects of the applicant's story which could reasonably have led the Tribunal Member to make negative credibility findings. Indeed, it could not have escaped her that other assessors of fact relied on different aspects of the applicant's evolving narrative of who he was, where he came from, why he left Somalia, and how he came to be here. I cannot substitute my views for those of the RAT and as there was ample evidence on which to come to this and other negative credibility findings, I believe that there is little utility in seeking to set aside the decision on this basis. The decision is indeed spare but it can undoubtedly be said that it achieves its target. In essence it says I do not accept your credibility because you do not know basic things about your claimed clan. You lived in another country for four years without asking for asylum. You passed through several countries before you arrived in the United Kingdom and sought asylum. You failed there and applied for asylum here without revealing that fact and you were not forthcoming in explaining how you got here. The reasons for confirming the ORAC findings are therefore clear.

56. I should mention a particular legal argument was floated in the present case upon which I propose to make some comments. Counsel for the respondents submits that because a finding was made under s. 13(6)(d) of the Refugee Act 1996, as amended, the case attracts s. 11A(1) of the Act, which in effect reverses the burden of proof onto the applicant. She argued that the Tribunal Member was therefore entitled to approach the appeal from the basis that the presumption was that the applicant was not a refugee and had to rebut this presumption. In its relevant parts, s. 11A provides as follows:-

"(1) Where, at any time during the investigation of an application by the Commissioner under section 11, it appears to him or her that an applicant (a) […], or

(b) had lodged a prior application for asylum in another state party to the Geneva Convention,

then the applicant can be presumed not to be a refugee unless he or she shows reasonable grounds for the contention that he or she is a refugee.

(2) […].

(3) Where an applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee."

57. Counsel for the respondents submits that s. 11A(1) applies of necessity because a finding was made under s. 13(6)(d) and that the applicant was

therefore presumed not to be a refugee and was obliged to rebut that statutory presumption. As I understand her arguments – and it must be stressed that the matter was not fully argued but was little more than an explanatory mention to the Court - counsel contends that the statutory presumption that the applicant was not a refugee applied not only at the ORAC stage but also at the RAT stage. Upon a closer examination of s. 11A in its entirety, it seems to me that counsel may be incorrect in this regard. It seems to me that s. 11A (1) applies to the Commissioner at the investigation stage while s. 11A (3) regulates the burden of proof at the appeal stage. It is not clear why the burden changes for the two stages but it does not seem to be that on a construction of the ordinary meaning of the words that the words carry the meaning attributed by the respondents. However, I reiterate that my comments in this regard arise in a context where this argument was not fully argued and they do not form part of the *ratio* of this decision. In any event, the concept of the reversed presumption seems not to have been realised or acted upon by the Tribunal Member.

58. As I indicated at the hearing, I do not see any force in the argument that there was a breach of fair procedures insofar as there was no correspondence between the RAT and the applicant following the settlement of the first RAT decision. In this regard, the within case bears many similarities to the case of *G.M. Uddin v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 22nd January, 2009), where this Court rejected the submission that in paper-based appeals there is an obligation on the Tribunal Member to warn the applicant that his appeal might fail on a particular point and to allow the applicant to call further evidence. As was the case in *Uddin*, the applicant in the present case was aware from the s. 13 report that doubts had been raised as to his credibility, in particular to his claim that he was a member of the Talaabo Ade sub-clan. The applicant and his legal representatives were aware that when the first judicial review proceedings were settled that the matter had to be allocated to a new Tribunal Member and re-considered. If, as it is suggested, new information had come to light at that stage, it was for the applicant and / or his legal representatives to make updated submissions when the case settled. As is well established, applicants are not simply inactive or passive participants in this process; they are obliged to act in their own interests.

59. Like *Uddin,* the facts of this case are quite different from those of *Idiakheua v. The Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 150 or *Moyosola v. The Refugee Applications Commissioner & Others* [2005] I.E.H.C. 218 where reliance was placed by the Commissioner on documents which were not presented by the applicants. That did not arise in the present case. In the circumstances I reiterate my finding in *Uddin* that:-

> "In my view, as the Tribunal Member did not rely on any new or undisclosed document to arrive at her conclusions, there was nothing either unfair or procedurally improper in assessing the appeal on the basis of the documents before her furnished from the Commissioner's papers or the appeal submissions. There is no provision under the appeal process for the Tribunal Member to engage in correspondence with the applicant or his legal advisers."

60. The applicant's arguments in this regard must, therefore fail. Again, even if the letter from the Somali Community in Ireland had been furnished to the Tribunal Member and considered by her there would be little utility in reviewing the RAT decision on that basis as the contents of the letter would not necessarily be accepted as being from an objective source.

61. Finally, I should deal with the treatment in the challenged decision of the applicant's minority. Paragraphs 213 to 218 of the UNHCR Handbook provide guidance on the manner in which cases involving unaccompanied minors are to be determined. At para. 213, it is noted that problems may arise in such cases due to the difficulty of applying the criteria of a "well-founded fear". Paragraph 214 states that the case of a minor applicant "*must be determined in the first instance according to the degree of his mental development and maturity*". It also notes that efforts should be made both in the case of a child and in the case of an adolescent to ensure that the child's interests are fully safeguarded. Paragraphs 215, 216 and 217 are of particular note in the context of the within proceedings, and therefore merit citation in full:-

> *"215. When a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity. It can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have a fear and a will of their own, but these may not have the same significances as in the case of an adult.*
>
> *216. It should, however, be stressed that there are only general principles and that a minor's mental maturity must normally be determined in the light of his personal, family and cultural background.*
>
> *217. Where the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors."*

62. This is a case where the applicant was, according to his own assertion, seventeen years old at the RAT stage. Again, according to his assertion, he had travelled from Somalia to Kenya where he had survived without family for four years and then made his way to England and eventually to Ireland. He had learned to read and write Somali from the other street children in Nairobi and had earned enough to pay for his travel to Europe. In the circumstances I do not believe that the Tribunal Member can be criticised for considering his maturity in the light of his personal background as set out at para. 216 of the UNHCR Handbook.

63. Again, if I am wrong about this, there is little utility in finding that the applicant was not treated fully as a minor in that his personal background ought to have been ignored as the applicant has long since attained his majority.

Conclusion

64. In the light of the foregoing I am not satisfied that substantial grounds have been shown and accordingly I must refuse leave. However for the several reasons which were stated in this decision relating to the utility of granting judicial review, I propose not to make an order for costs against the applicant.