Neutral Citation: [2014] IEHC 623

THE HIGH COURT

[2010 NO 825 J.R.]

BETWEEN

M.A.I.

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL AND ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 19th December 2014

1. This is a telescoped application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal dated 17th May 2010 refusing refugee status to the applicant. The applicant seeks, inter alia, an *order of certiorari* quashing the decision and an *order of mandamus* directing the matter to be remitted to the Tribunal for reconsideration.

Background

2. The applicant is a member of the Kurdish speaking Zebari tribe and is from Iraq. He arrived in Ireland on the 17th October 2008. He sought refugee status on the same date. The applicant claims he fears persecution from an unnamed terrorist group in the following circumstances.

3. The applicant worked as a shepherd in a village some 25km from his home. He was employed by the village Mukhtar and lived in the Mukhtar's house. His work schedule was as follows: He would take his flock of sheep from the village across countryside into different areas of the mountains approximately 1-1 ½ hours away. He claims that on the 15th September 2008, while working he was approached by four masked men driving a car who informed him that they wanted him to park a car full of explosives in front of a police station. The applicant believed the men to be terrorists but did not know which terrorist group they represented as they did not tell him. He agreed to meet these men again the following day at the same location. The applicant returned home to his mother in his home village with whom he recounted what had occurred. Accompanied by his mother, he went to the police and informed them of his encounter. According to the applicant, the police did not believe him as he was only a shepherd and had brought no proof. While the applicant resumed his work as a shepherd the following day, he did not return to the area where he had encountered the masked men and accordingly did not keep his appointment with them. Some four days later, his mother came to his place of work and informed him that on two occasions she had been visited by men at her home. On each occasion the men were dressed normally and spoke politely to her and had told her that they wished to see the applicant who, they said, had agreed to do a job for them. According to the applicant, it was on the second occasion that his mother had realised that these were the same men who had asked the applicant to carry out an act of terrorism. His mother advised him to escape. The applicant's uncle arranged for him to leave Iraq and he duly left on the 20th September 2008 and travelled to Turkey where he stayed for 15 days, thereafter travelling by truck and arriving in Ireland on the 17th October 2008.

The Refugee Appeals Commissioner's report

4. For the purpose of his s.13 report, the Refugee Appeals Commissioner accepted that the applicant was "*a national of Iraq*", although this was "*without prejudice to the examination of whether or not the applicant's claimed fear of persecution in Iraq was well founded*". The Commissioner had before him an "*Original Iraqi Nationality Certificate of the Applicant*", issued on 12th June 2006, with translation thereof, which the Commissioner stated he was "*unable to verify*". Further, the Commissioner considered that a nexus "*to the grounds for refugee status set out in section 2 of the Refugee Act, 1996 (as amended)*" "*may exist in the applicant's claim*" "*in light of the foregoing and of his claim being based upon a stated fear of persecution by individuals who allegedly intended to force him to undertake terrorist activity*". The Commissioner's observations in this regard were "*without prejudice to the credibility concerns*" set out in his report.

5. Ultimately, the Commissioner recommended that the applicant be refused refugee status on the ground that his claim lacked credibility by reason of the following factors: the terrorists had not made a concerted effort to find the applicant at his place of employment; the applicant's claim of how the terrorists had located his home address was internally inconsistent; the fact that the applicant's mother had not found the approach from the terrorists suspicious on the first occasion they called to her; disbelief that the applicant could have afforded to pay $2000 towards the $5000 spent in aid of the applicant's departure from Iraq.

6. The applicant appealed the Commissioner's rejection of the claim to the Refugee Appeals Tribunal. The Tribunal's Decision, dated 17th May 2010, affirmed the Commissioner's recommendation.

The challenge to the Tribunal Decision

7. The Decision of the second named respondent rejecting the application for refugee status is based on the lack of credibility of the applicant, expressed in the following terms:-

> *"The Tribunal was not generally satisfied as to the appellant's credibility in relation to the particular claim for asylum advanced by him. Some of his evidence just ran contrary to common sense and was implausible and on other occasions his evidence was contradictory".*

8. The Tribunal Member cited eight examples of the applicant's evidence which led to the adverse credibility finding. These are addressed variously in the course of the judgment.

9. The applicant challenges the Decision primarily on the basis of the Tribunal Member's failure to assess the credibility of the

applicant's claim in the context of pertinent country of origin information which was presented at the hearing. Furthermore, the Tribunal Member failed to make a finding as to whether the applicant was from Iraq and to have due regard to original documentation submitted by him, all of which was central to the applicant's claim for refugee status. In addition, it is contended that the errors attaching to the Tribunal Member's adverse credibility findings were compounded by the interpretation process ordained for the oral hearing of the applicant's appeal. It is submitted that the absence of proper interpretation services on the day of the hearing is of itself sufficient to warrant the quashing of the Tribunal member's decision. I propose firstly to deal with this latter issue.

The interpretation ground

10. Preliminarily, the respondents object to the applicant's arguments on the basis that the statement of grounds did not address the now claimed deficiencies in the interpretation assistance provided for the applicant, and objection was made to the applicant seeking to reformulate his statement of grounds to encompass this issue. On this point, I am satisfied that the respondents were sufficiently alerted to the case being made by the applicant on the interpretation issue from the contents of the applicant's grounding affidavit sworn the 17th June 2010 and from the contents of an affidavit sworn by the applicant's solicitor on the 13th November 2014. In those circumstances it cannot be said that there is any prejudice to the respondents where they were afforded opportunity by this court to respond on affidavit to the matters raised by the applicant's solicitor in his affidavit of the 13th November 2014.

11. In his ASY1 Form, the applicant listed his nationality as Iraqi and his language as Kurdish-Badini for which a translator would be required. The record of his s. 8 interview, conducted on 21st October 2008 indicates that a Kurdish-Badini interpreter was present. He completed his s.11 questionnaire on the 22nd October 2008. The English translation of that document records the applicant's first language as Kurdish and that he spoke a little Arabic. It also indicated that the translation into English was from Kurdish-Sorani. As advised by the applicant in the course of his s.11 interview, he himself had not completed the Questionnaire, rather it was completed on his behalf by an "*Iraqi Kurdish guy*" who he had met at his place of residence and who had rendered him assistance.

12. The applicant's s.11 interview with the Refugee Applications Commissioner took place over a number of hours on the 2nd March 2009. The record indicates that the interview was conducted with the aid of a Kurdish-Badini interpreter and that at the outset the applicant acknowledged that he was able to understand the interpreter. The interview concluded with the Commissioner enquiring, inter alia, if the applicant was satisfied that the interview was conducted in a language he understood: if he was able to understand the interpreter: if he was satisfied with the manner in which the interview was conducted and if he was satisfied that the information recorded in the interview was as stated by him. All of these enquiries were answered in the affirmative.

13. The applicant submitted his notice of appeal of the Commissioner's rejection of his asylum claim on the 3rd June 2009. As is clear from the Tribunal Member's decision, on the first occasion (31st March 2010) the appeal came on for hearing, a complaint was made that a Kurdish interpreter had not been provided. An Arabic interpreter was present on the day and this had come about because the applicant's notice of appeal (completed by the Refugee Legal Services, his then legal advisors) indicated that an Arabic interpreter would be required. The hearing of the applicant's appeal was duly adjourned to 4th May 2010.

14. The Tribunal Member's Decision dated the 17th May 2010, following upon the oral hearing of 4th May 2010, records as follows:-

> *"The details of the appellant's claim are set out in his questionnaire and interview with the Commissioner and Notice of Appeal and evidence to this Tribunal. On the first occasion the matter came before the Tribunal, a complaint was made that a Kurdish interpreter was not provided and a request made that a Kurdish interpreter be provided for his hearing. On that basis, the Tribunal adjourned the hearing without entering into evidence and directed that a Kurdish interpreter be provided at an adjourned date. On the 4th May 2010, a Kurdish interpreter was provided/or the appellant's benefit. Notwithstanding same, the appellant complained that his dialect may not be exactly the same and it was possible that some words may differ slightly. It was apparent to the Tribunal that the appellant was able to tender his evidence to the Tribunal fluently and easily through the Kurdish interpreter and any slight nuances in dialect were not such as to impinge on the ability of the appellant to be understood. The Tribunal was satisfied that its obligation pursuant to s. 16 (11)(d) of the Refugee Act 1996 had been complied with in this respect. "*

15. In his grounding affidavit sworn on 17th June 2010, the applicant avers that his account of the events in Iraq as set out in his affidavit was the account which he had given to the Commissioner and to the Tribunal. He states:-

> *"I say that I am from[.....] Iraq. I say that this is an Arab village. I am a Muslim from the Zebary ethnic group and my first language is Kurdish. I say that I am illiterate and worked as a shepherd ..... I say that I worked for the Mukhtar, the authority representative of the village ..... I worked every day from early morning to sunset and would rest and visit my mother once a month.*
>
> *I say that one day a group of people approached me while I was working up in the mountains about an hour or an hour and a half from the nearest village. I do not know who they were but I believed them to be terrorists. They had their faces covered with masks. They informed me that they wanted me to drive a car full of explosives, park it in front of the local police station and leave it there after which they would explode the vehicle. I did not want to do this but I told them that I needed to think about it as I feared these men. They told me to meet them at the same place the next day but I never returned to that area with my herd again for fear of encountering them. "*

16. At para. 9 he further avers:-

> *"I say that I gave this evidence to both Commissioner and the Tribunal. However, I believe that this was not translated at the hearing before the Tribunal. I say that the interpreter who assisted me at the Tribunal spoke a different Kurdish dialect. This was brought to the attention of the Tribunal Member by the interpreter himself before I started giving evidence. The interpreter explained that the interpretation would not be fully accurate. I say that the Tribunal Member stated that he would go ahead with the hearing as he was satisfied the Tribunal had provided a suitable interpreter and that I could be understood"*

17. In his affidavit sworn the 13th November 2014 accounting for the delay of some 13 days outside the statutory time limit for the issuing of the within proceedings (in respect of which no issue is taken by the respondents), the applicant's solicitor avers as follows:-

> *"I further say that I appeared on behalf of the Applicant at his refugee appeal hearing on the 4th May 2010. I say that as soon as the hearing commenced, the interpreter provided by the Tribunal informed the Tribunal Member that he spoke a different dialect (Kurdish-Sorani) from the applicant (Kurdish Badini). I therefore applied for an adjournment on*

this basis. I say that the Tribunal Member refused my application for an adjournment. I say that this is apparent from the Tribunal's decision and the grounding affidavit of the Applicant herein."

18. In the course of the hearing of the within proceedings, counsel for the respondents sought and was granted liberty for the second named respondent to file an affidavit in response to paragraph 9 of the applicant's solicitor's affidavit. In an affidavit sworn on the 21st November 2014, "*from a perusal of the Tribunal's file*", an executive officer of the second named respondent avers as follows:-

> *"I say that a Kurdish-Badini Interpreter was provided by the Tribunal for the Hearing on 04/0512010. I beg to refer to a true copy of the Hearing Document and a true copy of the Interpreter Form for said Hearing upon which marked with the letters FE1 I have signed my name prior to the swearing hereof.*
>
> *I say that it is stated at para. 3.1 of the Member's Decision, that "the Applicant complained that his dialect may not be exactly the same and it was possible that some words may differ slightly. It was apparent to the Tribunal that the appellant was able to tender his evidence to the Tribunal fluently and easily through the Kurdish interpreter and any slight nuances in dialect were not such as to impinge on the ability of the appellant to be understood The Tribunal was satisfied that its obligation pursuant to s. 16(11) (d) of the Refugee Act 1996 had been complied with in this respect. "*
>
> *S. 16 (11) (d) of the Refugee Act states:-*
>
> *"The Tribunal shall, where necessary, use its utmost endeavours to procure the attendance of an interpreter to assist at the hearing. "*
>
> *I say and believe that the Tribunal did use its utmost endeavours to procure the attendance of a Kurdish-Badini interpreter as requested by the Applicant for his Hearing on 04/05/2010."*

19. On the resumption of the within proceedings on 25th November 2014, counsel for the respondents acknowledged that the affidavit sworn on behalf of the second named respondent did not address the issue of whether an adjournment had been applied for on the 4th May 2010 and refused, and the court was advised that the respondents were accepting that such application had been made and refused. That notwithstanding, counsel for the respondents submitted by virtue of the documents exhibited by the executive officer in her affidavit, there was evidence before the court that a Kurdish-Badini interpreter had been provided by the second named respondent on 4th May 2010.

20. The first document exhibited in the executive officer's affidavit is headed "Refugee Appeals Tribunal Attendance Record at Appeal Hearing", it is clearly part of the Tribunal's internal administrative record and it records thereon various details pertaining to the applicant's appeal, including, inter alia, the name of the Tribunal Member hearing the case, the date and time of the hearing, the name and nationality of the applicant and the names of the applicant's legal representative and the ORAC presenting officer. Aside the heading "Language" are the words "Kurdish-Badini" along with the name of the interpreter present on the 4th May 2010. The second document exhibited is headed "Interpreter Form" "Time Record Sheet". In manuscript, alongside the words "Language Required" is written "Kurdish-Badini." This document contains a signature which, the respondent's counsel advises, is that of the interpreter present on the 4th May 2010. Counsel for the applicant does not dispute that the signature on the timesheet is that of the interpreter who was present on the day but contends that the appearance of that signature on the document is not disposative of the issue of whether, notwithstanding what is recorded on the time sheet, the interpreter apprised the Tribunal Member that he spoke a different dialect (Kurdish-Sorani) to that of the applicant (Kurdish-Badini). I agree with the applicant's counsels argument on this point, particularly in circumstances where the applicant's affidavit sworn on the 17th June 2010 and his solicitor's affidavit of the 13th November 2014 make reference (which is unchallenged by the respondents) to the interpreter having brought to the attention of the Tribunal Member that he spoke a different Kurdish dialect to that of the applicant. I accept therefore the interpreter present on the day spoke Kurdish-Sorani.

21. Counsel for the applicant submits that the failure of the Tribunal Member to adjourn the proceedings on the hearing date to ensure the presence of a Kurdish Badini interpreter was in marked contrast to the prior oral stages of the applicant's asylum process where a Kurdish-Badini interpreter was present at the applicant's s.8 and s.11 interviews. It is submitted that the Tribunal was obliged to afford the same level of interpretation services to the applicant. It is further submitted that directing the appeal to proceed with a Kurdish-Sorani interpreter may have led to errors apparent in the Tribunal Member's Decision and in this regard counsel points to part 3 para. 3 of the Decision entitled "*The Applicant's Claim*" wherein it is recited, inter alia, "*he gave evidence that he immediately told these people that he could not do this and informed the police at the station which they had intended to target and the police did not believe his story and dismissed it out of hand as being a crank complaint. He said that he then fled his village on the 20 1h September 2008 to live with Mukhtar."* This record of what the applicant said at his appeal hearing differs to what he told (which according to the applicant was correctly recorded) the Commissioner during his s.11 interview where he stated that he had worked and lived with a named individual "A Mukhtar" for two years. Later in his s. 11 interview, the applicant explained that at the time of the named events he was living "*in the Mukhtar's house*". Furthermore, the applicant points to example 3 of the 8 recorded examples in the Tribunal Member's Decision which led to the finding that the applicant was "*generally not credible*". This reads as follows:-

> *"There was a discrepancy in the appellant's evidence as to what his reaction to the alleged terrorist was when they asked him to drive an explosive laden car to the local police station between his section 11 interview and his appeal hearing. He had stated during his section 11 interview, that he had requested time to think about their proposal, not giving them a definite response, negative or positive, to which they acceded. During his appeal hearing, he claimed for the first time that he had immediately refused outright to accede to their proposal. "*

22. It is submitted that this is an erroneous finding on the part of the Tribunal Member which could only have been arrived at from a difficulty in interpretation, given that the applicant claims to have been consistent in his account of this event before the Commissioner and in his evidence before the Tribunal and in circumstances where his account was correctly recorded by the Commissioner.

23. It is argued that the Tribunal Member's failure to ensure that the applicant's appeal was conducted with the aid of a Kurdish-Badini interpreter breached the provisions of s.16 (11) (d) of the 1996 Act.

24. Notwithstanding that an application for an adjournment having been applied for and refused, the respondents refute that there are grounds for impugning the manner in which the Tribunal Member handled the issue of interpretation of the applicant's evidence, in particular the respondents point to the second named respondent's willingness on the first hearing date to adjourn the proceedings in circumstances where the provision of an Arabic interpreter on that date was in compliance with the request which had been made in the applicant's notice of appeal. Moreover, on the first hearing date, the request was for a Kurdish interpreter, without reference to

any specific dialect. The respondents submit that the Tribunal Member was in the best position to ascertain whether the applicant had difficulty understanding the interpreter provided on the 4th May 2010 and the Tribunal Member found that he had no such difficulty. The respondents argue that there was no evidence that there was a communication issue during the oral hearing, had there been, the Tribunal Member would have taken it seriously.

Decision on the interpretation ground

25. Central to the ability of a decision maker to make a rational and informed assessment of evidence tendered in the course of a hearing is the decision maker's ability to receive that evidence through the clearest and most direct channel. This is routinely achieved where both the person giving evidence and the decision maker speak the same language. However, even where there is a shared language, difficulties may from time to time arise where a particular dialect is unfamiliar to either and this imposes on the decision maker an obligation to be vigilant to ensure the witness is understood. Where the person giving evidence does not speak the language of the decision maker, either adequately or at all, the service of an interpreter (who is versed in the languages of both) becomes a necessary and indeed mandatory tool. Interpretation services are a routine requirement in asylum cases before the Refugee Applications Commissioner and the Tribunal and indeed prior. I agree with the proposition, advanced in Goodwin-Gill and McAdam's "*The Refugee in International Law*" that:-

> *".. the use of interpreters in a manner which will best elicit the narrative of the claimant is something of an art. Translation is not a mechanical process, but a two- way, sometimes three way street, that places particular responsibilities on every participant in the refugee determination process. The interpreter is both link and obstacle; link, because he or she facilitates an oral dialogue; and obstacle, because the questioner's intentions may be misunderstood, either because of a failure to communicate clearly and coherently, or because both parties do not posses a common basis of understanding and values. What the applicant says comes across filtered and then has to pass by the decision maker's own baggage of preconceptions. "*

26. On the date of the applicant's oral hearing before the second named respondent, the "*three-way street*" comprised the applicant, the Kurdish interpreter and the Tribunal Member and indeed the other participants in the appeal process. Thus, on the 4th May 2010, the interpreter was the channel through which the applicant's evidence flowed. In the course of this hearing, it has not been suggested that anyone other than the applicant and the interpreter spoke Kurdish. It is common case that the Tribunal Member was alerted to a perceived difficulty, described by the Tribunal Member himself, in his Decision, that the Kurdish interpreter's dialect *"may not be exactly the same and it was possible that some words may differ slightly"* and, as attested to by the applicant's solicitor, *"the interpreter provided by the Tribunal informed the Tribunal Member that he spoke a different dialect (Kurdish-Sorani) from the applicant (Kurdish-Badini)."* The solicitor's evidence has not been challenged in the second named respondent's replying affidavit. I am satisfied that having been made aware that the interpreter present at the hearing spoke Kurdish-Sorani, the Tribunal Member was on enquiry that the applicant, already at one remove from the Tribunal Member as decision maker by the absence of a common language, could well be put at two removes by virtue of the fact the applicant and the interpreter while sharing a common language did not share a common dialect. The Tribunal Member, while not specifically addressing the application for the adjournment, detailed his satisfaction that the Tribunal's obligation under s. 16 (11) (d) of the 1996 Act was complied with as *"it was apparent to the Tribunal that the appellant was able to tender his evidence to the Tribunal fluently and easily through the Kurdish interpreter and any slight nuances in dialect were not such as to impinge on the ability of the appellant to be understood."*

27. In the absence of the Tribunal Member's own proficiency or fluency in both Kurdish-Badini and Kurdish-Sorani, of which there is no evidence, I cannot accept that the decision to proceed with the oral hearing satisfied the Tribunal's obligation, either pursuant to s. 16 (11) (d) of the Act or pursuant to the requirements of fair procedures to afford the applicant a proper hearing. I am not satisfied that the Tribunal Member did his utmost, as contended by the respondents, in circumstances where it would appear from what had transpired before the Commissioner and indeed prior, the respondents had the wherewithal to procure a Kurdish-Badini interpreter. Moreover, the court is mindful that the applicant challenges example 3 of the eight examples which led to the rejection of his credibility on the basis that the account he gave to the Tribunal Member was the same as that given to the Commissioner yet the account recited by the Tribunal does not accord with the testimony he gave. While it is not possible to determine if in fact this discrepancy arose from difficulties in interpretation, the court has to countenance the possibility that an error in interpretation could account for this discrepancy. In circumstances where it is not possible to discern the weight given by the Tribunal Member to that particular finding viz a viz the other credibility examples, the infirmity in the interpretation assistance provided on 4th May warrant the quashing of the Tribunal Member's decision.

The failure to consider country of origin information and identity documentation furnished by the applicant

28. As stated already, eight credibility examples, recited in his Decision, led the Tribunal Member to conclude that the applicant was "not credible in his evidence".

29. Examples four, five and six read as follows:-

> *"The appellant's contention that the reaction of the local police to his information concerning the terrorist's plan to bomb their police station was one of indifference and disbelief strikes the Tribunal as inherently implausible. One would expect that the police would take such information seriously and at least make some rudimentary effort to substantiate it rather than immediately dismissing it out of hand particularly when it concerned a plot to bomb their own station. The alleged reaction of the police is neither logical nor inherently plausible."*
>
> *"The appellant was unable to name or otherwise identify which purported terrorist group he was allegedly the subject of persecution by. Whilst that, in itself, may not be fatal to the credibility of his claim, in conjunction with his further assertion that he could not relocate safely within Iraq as he feared that the same group would be able to track him down, it becomes contradictory and implausible. The Tribunal would ask, rhetorically, how he can claim to have a well founded fear that they would be able to find him when he does not know who they are, the extent of their network (if any), the number of members, their resources etc."*
>
> *"The stated basis for the appellants fear that the (unknown) terrorists would kill him because he did not accede to their request to drive a car for them is thin and vague in the extreme. His solicitor pointed to country of origin information to support such a purported fear but the appellant himself failed to provide any objective basis for such a belief When he was not even aware which group was purportedly targeting him, it stretches credulity that he would be aware that their modus operandi would purportedly be and claim to have a well founded fear of persecution on that basis."*

30. The applicant submits that the Tribunal Member's finding as "*inherently implausible*" the applicant's account of the police reaction

to his complaint ran counter to the country of origin information which the applicant had submitted in aid of his appeal. Similarly, it is submitted that the Tribunal Member's fifth and sixth examples also ran counter to cogent country of origin information which was before the Tribunal. At the first (subsequently adjourned) hearing on the 31st March 2010, the applicant submitted to the Tribunal the "*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*" (April 2009), together with the UK "*Operational Guidance Note*" on Iraq.

31. It is argued on behalf of the applicant that if the Tribunal Member were to hold against the applicant, it was incumbent on him to discount, and with reasons therefore, the country of origin documentation that had been submitted. That was especially the case in the context of the fourth and fifth credibility examples, already recited above.

32. The overall thrust of the Tribunal Member's s.6 analysis, and in particular, the reference to the decision of Clarke J in *N v. Refugee Appeals Tribunal & anor* [2009] IEHC 432 (quoted below) and the reference to the dictum of Peart J in *F. v. Minister for Justice Equality &law Reform & ors* [2008] IEHC 126 (referred to more fully below) would suggest to the court that the Tribunal Member considered himself exempt from the requirement to embark on a consideration of the applicant's country of origin information in light of his overall assessment of the applicant's credibility.

33. Yet, on the other hand, the Tribunal Member went on to state:

> *"Notwithstanding the principle enunciated in Folarin V Minister for Justice (Unreported High Court, Peart J., 2nd May 2008) that:-*
>
> *"Once such a fundamental lack of credibility is found, the Tribunal is not obliged to refer to country of origin information to see whether her story can be believed."*
>
> *this Tribunal has considered all of the various country of origin information reports and information. "*

34. The Decision does not record what weight (if any) was placed on the country of origin information. The reliance on the aforesaid dictum would suggest that the Tribunal Member considered himself absolved from recording his views on the information in the Decision.

35. An issue to be decided in this case is whether the approach adopted by the Tribunal Member was correct in law. The departure point for the necessary analysis must be reg. 5 of the European Communities (Eligibility for Protection) Regulations 2006. Under the heading "*Assessment of Facts and Circumstances*", reg. 5.(1) provides that:-

> *"The following matters shall be taken into account by aprotection decision maker for the purposes of making a protection decision:*
>
> *(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;*
>
> *(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm; ... "*

36. These are mandatory requirements and, it would seem to me, to be departed from only in clear and specific circumstances and with good and sufficient justification.

37. The respondents submit that the decision maker's findings on credibility in the present case were of such a fundamental nature that he was entitled to disregard the country of origin information submitted by the applicant. The respondents point to the dictum of Peart J in *Folarin* (following his earlier decision in *Imafu v. Minister for Justice Equality and Law Reform & ors* [2005] IEHC 416 that:-

> *"Once such a fundamental lack of credibility is found, the Tribunal is not obliged to refer to country of origin information to see whether her story could be true. The first and essential matter for determination is whether the story can be believed. It is only when that hurdle has been successfully overcome that country of origin information can assist in the assessment of whether the alleged fear of persecution is subjectively and objecitvely justified. "*
>
> In Folarin, Peart J. found the applicant's case "*... not even arguable on the facts as disclosed in the grounding affidavit*" and that there were "*very detailed reasons which based the credibility finding*"

38. In *Imafu*, Peart J remarked that the above approach to country of origin information was appropriate in:-

> *" ..an exceptional type of case where the Tribunal Member can quite adequately and completely assess and reach a conclusion on the personal credibility of the applicant, such that there would be no possible benefit to be derived from seeing whether the applicant's story fits into a factual context in her country of origin. "*

39. The respondents also relied on the following passage from the judgment of Cooke J in *IR v. Minister for Justice Equality and Law Reform and the Refugee Appeals Tribunal* (24th July 2009) where he states:-

> *"The Court accepts that there may well be cases in which an applicant relies partly on oral assertions, partly on documents, and partly on country of origin information and in which the decision maker has sound reason to conclude that the oral testimony is so fundamentally incredible that it is unnecessary to consider whether the documents are authentic and whether the conditions in the country of origin are such that the claim could be plausible. The decision - maker in such a case is finding that what the applicant asserts simply did not happen to him. "*

Furthermore, the respondents' written submissions state that:-

> "..the Tribunal Member had regard to the Country of origin information and found that it had little or no weight in assessing the Applicant's claim. There is not a hint or suggestion in the Country of origin information that in 2008 shepherds in Mosul were being targeted by militants"

40. In the first instance, I do not find merit in the respondents' reliance on the foregoing dicta in support of their argument that there was no obligation to consider country of origin data in circumstances where the Tribunal Member has stated that he "*considered all of*

the various country of origin information reports and information." I fail to comprehend therefore how it can be argued that the Tribunal Member was not obliged on "*Folarin*" principles to embark on an analysis of country of origin information. As regards the respondents' contention that the Tribunal Member found that the information had "*little or no weight*", the difficulty with that contention is that, as I have already remarked, the Decision does not record what weight was accorded to the information.

41. Counsel for the applicant opened certain passages from the UNHCR document (dated April 2009) to the court including the following:-

> ***"Overall approach to the assessment of international protection needs of Iraqi asylum seekers".***
>
> *"In view of the serious human rights violations and ongoing security incidents which are continuing in the country, most predominantly in the five Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al Din, UNHCR continues to consider all Iraqi asylum seekers from these five Central Governorates to be in need of international protection. In those countries where the numbers of Iraqis asylum-seekers from those five Central Governorates are such that individual refugee status determination is not feasible, UNHCR encourages the adoption of a prima facie approach. In relation to countries which are signatory to the 1951 Convention relating to the Status of Refugees ("The 1951 Convention") and/or its 1967 Protocol or relevant regional instruments and have in place procedures requiring refugee status to be determined on an individual basis, Iraqi asylum seekers from the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al Din should be considered as refugees based on the 1951 Convention criteria or the relevant applicable regional criteria .... "*

"It is not possible to set down with absolute precision the types and patterns of claims that will continue to be made by Iraqi asylum- seekers from those parts of the country. However, the detailed analytical information provided further below in the paper highlights some of the key groups from which those who are most at risk of harm are drawn. Without implying that each and every member of these groups is actually the target of risk, they include, in particular:

> *-Iraqis affiliated with political parties engaged in power struggles*
>
> *-Government officials and other persons associated with the current Iraqi Government, Administration or Institutions*
>
> *-Iraqis (perceived to be) opposing armed groups or political factions*
>
> *- Iraqis affiliated with the MNF-1 of foreign companies*
>
> *-Members of religious and ethnic minorities*
>
> *-Certain professionals (academics, judges, doctors etc)*
>
> *- Journalists and media workers*
>
> *- UN and NGO workers, human rights activists*
>
> *-Homosexuals*
>
> *-Woman and children with specific profiles ....."*
>
> *"In the context of the Central Governates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din where, even though the security situation has improved in parts, there is still a prevalence of instability, violence and human rights violations by various actors, and the overall situation is such that there is a serious likelihood of harm. Armed groups remain lethal, and suicide attacks and car bombs directed against the MNF-1/ISF, Awakening Movements and civilians, in addition to targeted assassinations and kidnappings, continue to occur on a regular basis, claiming the lives of civilians and causing new displacement. These methods of violence are usually targeted at chosen areas where civilians of specific religious or ethnic groups gather, including places of worship, market places, bus stations, and neighbourhoods. Violence appears often to be politically motivated and linked to ongoing struggles over territory and power among various actors. As clarified above, even where an individual may not have personally experienced threats or risks of harm, events surrounding his or her areas of residence or relating to others, may nonetheless give rise to a well-founded fear. There is also more specific targeting of individuals by extremists elements of one religious or political group against specific individuals of another, through kidnappings or execution-style killings. Rape is also being used as a means of persecution. Due to the complex situation of a high number of actors involved in providing security and actors involved in violence, where the lines are often blurred, an asylum-seeker's failure to identify the perpetrator of violence should not be considered as detrimental to his/her credibility. "*
>
> *"Where the applicant is at risk of harm in the hands of a non state actor, the analysis of the well-foundedness of his or her fear requires an examination of whether or not the State, including the local authority, is able and willing to provide protection. In this situation of the Central Governorates, given weak government structures, and the fact that government security forces are infiltrated by radical elements from militia groups, protection from State authorities would, in almost all cases, not be available. Consequently, an asylum seeker should not be expected to seek the protection of the authorities, and failure to do so should not be the sole reason for doubting credibility or rejecting the claim. In addition, given that these areas of Iraq are highly unstable and insecure, travel is fraught with risks, there are difficulties to access basic services and to ensure economic survival in the situation of displacement, on internal flight relocation alternative would on the whole be unavailable. "*
>
> *"Generally, no internal flight alternative will be available because of*
>
> *(i) the ability of non State agents of persecution to perpetrate acts of violence with impunity,*
>
> *(ii) the ongoing levels of violence in mainly the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al Din giving rise to new persecution,*
>
> *(iii) access and residency restrictions, and*

(iv) the hardship faced in ensuring even the basic survival in areas of relocation. When, however, the availability of internal flight or relocation alterative must be assessed in a national asylum procedure, it should be examined cautiously and in the context of the individual claim. UNHCR's Guideless on Internal Flight/Relocation Alternative should be taken into account."

42. Counsel for the applicant does not suggest that the aforegoing amounted to a "trump card" for the applicant (nor could it be) but submits that the UNHCR document was an important background against which the applicant's claim should at least be assessed. I agree with this proposition and I am not satisfied that any of the eight credibility examples recited by the Tribunal Member in aid of his finding that the applicant was not credible were either individually or cumulatively of such enormity that the Tribunal Member was relieved of his obligation to set out the weight he gave to the country of origin documentation which was before him. The internal inconsistencies in the applicant's explanation as to why the claimed terrorists were not able to find him at his place of work on any subsequent occasion, which grounded the Commissioner's 3.3.ii finding, and upheld by the Tribunal Member in example one of his credibility findings, could not on any reasonable or rational basis be said to lawfully preclude the necessity to record in the Decision the Tribunal Member's considered view of the state of affairs in Ninewa relied on by the applicant in aid of his appeal. Nor do I consider that the applicant's explanation for the failure of his mother to put "two and two together" on the first occasion the claimed terrorists arrived at her house (number one in the eight credibility examples) met the standard of fundamental incredibility so as to obviate the necessity to state the weight given to the applicant's country of origin information. The details in the UNHCR document concerning the Ninewa Governorate from whence the applicant claims he hailed, was at the very least a context against which to weigh the evidence which gave rise to the Tribunal Member's fourth, fifth and sixth credibility examples, quoted above. In particular, I fail to comprehend how the fifth credibility finding could be expected to withstand challenge in circumstances where no reference, rudimentary or otherwise, was made to the situation in Iraq when relatively up to date information from a reliable source (UNHCR) was available to the Tribunal. As stated in Hathaway+ Foster, "The Law of Refugee Status "...country data is normally a critical means of both putting an applicant's evidence into context, and more generally of ensuring a complete understanding of relevant risks". While the Tribunal Member as the mandated decision maker is the sole arbiter of the applicant's credibility and indeed the sole arbiter of the weight to be given to country of origin information, what was lost to the applicant by the approach adopted by the Tribunal Member in this case was the opportunity to know, from the face of the record, how his credibility was assessed against the picture painted by the UNHCR Handbook.

43. I agree with the dictum of Clarke J in *KNQ (Iraq) v. The Chairperson of the Refugee Appeals Tribunal and Ors* [2013] IEHC 117:-

"While it is certainly true that it is not necessary for a Tribunal Member to recite and analyse each and every document furnished to him, most cases call for some reference to the situation in an applicant's country of origin."

44. This is no more than a restatement of the dicta of Pearl J. in the UK Immigration Appeals Tribunal decision of *Horvath v. Secretary of State for the Home Department* [1999] INLR to the effect that:-

"it is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative of value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin. "

45. My finding in this regard does not in any way detract from the dictum of Feeney J in *O.A.A. v. Minister for Justice Equality and Law Reform and the Refugee Appeals Tribunal* [2003] IEHC 169 where he states:-

"It is the function of the Refugee Appeals Tribunal and, not this court in a judicial review application to determine the weight, (if any) to be attached to country of origin information and other evidence proffered by and on behalf of the Applicant."

46. Thus, in all the circumstances, I am of the view that once acknowledged (as it was here) in the Tribunal Member's Decision that country of origin information had been considered, it was incumbent on the Tribunal Member, in accordance with the principles set out by Cooke J in *IR v. MJE and another (24th July 2009 [2009] IEHC 353)* to give an account of the nature of that consideration and to detail the weight attached to it and if it were to be rejected (as it appears to have been), the reasons for the rejection.

47. The obligation imposed by reg. 5.1 (a) of the 2006 Regulations and the principle of fair procedures require no less.

48. As stated by Cooke J.,

"The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed It must not be based on a perceived correct instinct or gut feeling as to whether the truth is or is not being told "

"Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated."

49. I adopt the dictum of Mac Eochaidh in *FT v RAT and others* [2013] IEHC 167 "*..the applicant's claim involves references to significant political events in Cameroon which are documented in the country of origin information. It is my view that the Tribunal Member erred in failing to adequately address such claims in the context of these sources.* "

50. Notwithstanding that the applicant was not a political activist unlike the applicant in FT, his status as a shepherd did not negate the Tribunal Member's obligation to adequately address the applicant's claims.

51. With regard to the respondents' reliance on the dictum of MacEochaidh J in *R.O. v. Minister for Justice Equality and Law Reform and R.A.T* [2012] IEHC 573 where he rejected the applicant's criticism of the Tribunal Member's failure to consider country of origin information in the following terms: "*For an applicant to succeed in such a claim, the material (not referred to by the Tribunal) would need to be described and in addition an applicant would have to persuade the court that such material was capable of having an effect on credibility*", I fail to see how the respondents can find solace in that dictum, given that the judge rejected the applicant's arguments in that case on the basis, inter alia, that no country of origin information had been furnished to the Tribunal, which was not the case here.

52. I note the Tribunal Member's reference to the endorsement given by Clarke J. in *N v. RAT* [2009] IEHC 432 to the dictum of

Herbert J. in *Kikumbi v RAT* (High Court 7th February, 2007) as follows: -

> *The probative value (if any), to be given to information or material properly received and considered by the decider of fact may sometimes be ascertained by reference to the cogency of the account itself and the absence of inherent contradictions and errors of substance in that account. Sometimes, it is possible also to compare various elements of the account with extrinsic material which the decider of fact can accept or, which is admitted to be reliable, viz., country of origin information from sources of proven and accepted accuracy and reliability, such as United Nations Reports. Sometimes however there is no yardstick by which to determine whether a particular account or part of an account is credible or not, other than by the application of common sense or life experience on the part of the decider of fact in the context of whatever reliable country of origin information is properly before him or her. Also the decider of fact may have the advantage of having seen and heard the Applicant for asylum relating his or her story, making all due allowances for the various factors indicated by the UNHCR Handbook as uniquely relevant to such an account giver. The obligation to give reasons, as explained by the Supreme Court in F.P. and A.L. v The Minister for Justice Equality and Law Reform[200 I}, does not, in my judgement, require the decider of fact to give reasons why she or he applying such common sense and life experience found that a particular account or aspects of such an account to be not credible. "*

53. I agree with the applicant's counsel's submission that the foregoing dictum does not support the manner in which the Tribunal Member approached the applicant's appeal. The Tribunal Member had a "*yardstick*" in the UNHCR document to assist him in determining, in particular, the credibility of the applicant's evidence (which gave rise to credibility examples four, five and six in the Decision), yet there in nothing in the Decision to indicate that the applicant's account of events was measured against that "*yardstick*".

54. In the circumstances, the Tribunal Member's failure to properly address the applicant's claim in the context of country of origin information available to him is such that it affects the credibility conclusions arrived at in respect of the applicant to such degree it affects the decision in the case.

55. I turn now to the applicant's identity documentation which was before the Tribunal Member.

56. In the Decision it appears as the eighth factor which led to the Tribunal Member being "*generally not satisfied as to the applicant's credibility*", addressed as follows,:-

> *"The Tribunal affords the purported identity and other documents personal to the appellant presented by him no weight in the circumstances and finds, accordingly, that they do not advance his claim in any material respect."*

57. In the context of these proceedings, reference was made in the applicant's written submissions to Regulation 5(3) of the 2006 Regulations and it was argued, inter alia, that in affording "*no weight*" to the applicant's identity certificate the Tribunal Member failed to comply with Regulation 5(3). The respondents dispute that the provision is applicable to the present case and relies on the dictum of MacEochaidh J in *DE & ors v. The Refugee Appeals Tribunal and Ors* [2013] IEHC 304:

58. "*It is of note that Regulation 5(3) forgives the absence of documentary evidence in support of an asylum claim where certain conditions are met, including where the general credibility of the applicant is established. This suggests that it is wrong to rely on the absence of documentary evidence to ground a finding as to the general credibility of an applicant. The legislative scheme strongly suggests that general credibility should be determined before the absence of documentary evidence comes to be examined.*"

59. Regulation 5(3) sets out the statutory framework for how a protection seeker's statements are to be considered where aspects of such statements are not supported by documentary or other evidence. It reads:-

> *"Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met;*
>
> *(a) the applicant has made a genuine effort to substantiate his or her application;*
>
> *(b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given;*
>
> *(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;*
>
> *(d) the applicant has applied for protection at the earliest possible time, (except where an applicant demonstrates good reason for not having done so);and*
>
> *(e) the general credibility of the applicant has been established."*

60. Thus, a plain reading of reg. 5.3 means that where an applicant is found to be generally credible, and provided the other requirements (a-d) of reg. 5(3) are satisfied, an applicant's unconfirmed statements do not require confirmation. In the present case, the applicant provided corroborative material in the form of his national identity certificate, therefore, it was not a situation where there was no documentary evidence of his nationality such as to require the application of reg. 5(3)(a)-(e) to the question of his nationality. In fact, the opposite was at play here, the applicant had documentary evidence to support his Iraqi nationality claim. It is clear from the eighth credibility example in the Decision that the applicant's identity document was rejected on the ground that the Tribunal Member attached "*no weight*" to it. Therefore, I do not consider that reg. 5(3) has any particular applicability to the issue.

61. The question to be determined is whether the Tribunal Member's approach to the identity document was lawful in the context of the requirement on a decision maker pursuant to reg. 5(1)(b) of the 2006 Regulations and the principles of fair procedures. Insofar as the Tribunal Member made specific reference to the identity document in the Decision and gave a view on it, it follows that the document was "*taken into account*" in compliance with reg. 5(1)(b). The question now to be considered is whether he dealt with it in a fair manner.

62. The applicant submits that the Tribunal Member's use of the word "purported" raises serious doubts as to whether he accepted at all that the applicant was from Iraq, an issue which, it is submitted, went to the core of the applicant's claim. The respondents argue that the Tribunal Member "*clearly accepted*" that the applicant was from Iraq and that he was within his rights in not giving weight to

the identity document. The respondents did not point to any specific portion of the Decision which records the Tribunal Member's acceptance of the applicant's nationality. The translated identity document, with photograph thereon, bears the applicant's name and denotes his place and date of birth, his religion and the names and places of birth of his parents. The document bears a circular seal "*Ninawa Nationality and Status Directorate Nationality- Issuance with",* with left hand thumb print thereon. The document itself is described as "*Iraqi Nationality Certificate*."

63. Viewed against the country of origin information which had been furnished by the applicant, namely the UNHCR Handbook on Iraq, the identity document, if authentic, was potentially significant in that it could corroborate his claim to be from one of the Governorates in respect of which the UNHCR raised concerns. To my mind, it was therefore incumbent on the Tribunal Member to clearly state his view on the applicant's claim that he hailed from Niwena. The Tribunal Member's decision on the identity document was, in the words of Mac Eochaidh J. in *A.A.S. v. RAT and others [2013] IEHC 44 " ... required in clear and reasoned terms*."

64. I am satisfied that the Tribunal Member's use of the word "*purported*" in his cursory assessment of the document, indicates, at the very least, that he entertained doubts about the document's authenticity. That was entirely within his remit as the assessor of fact and credibility. However, the circumstances were that the applicant was relying on the document to establish that he was not just from Iraq but from one of the Central Governorates referred to in the UNHCR Handbook. To my mind, the Tribunal Member's attribution of "*no weight*" to the "*purported*" identity document was tantamount to a rejection of the document, without it being expressly stated or the reasons for the said rejection being specified (whether they related to its authenticity or otherwise). The document was prima facie corroborative of the applicant's claim that he was an Iraqi national and hailed from the Ninewa Governorate. It was incumbent on the decision maker to state in his Decision the reason he attached "*no weight*" to the "*purported*" document; merely relying on the other credibility examples (as he appears to have done) cannot justify the rejection where many of the other credibility examples are themselves impaired by reason of the failure to properly consider the applicant's evidence against available country of origin information. In all the circumstances, the Tribunal Member approach to the applicant's identity document breached fair procedures as enunciated in IR v. MJELR, already quoted above.

The challenge to the Tribunal Member's rejection of the applicant's explanation for not seeking asylum in Turkey

The Tribunal Member's seventh example in support of his finding the applicant not credible was as follows:

"*The appellant's failure to claim asylum in Turkey or any other safe country he transited prior arriving in the State and his explanations therefor are not indicative of a well founded fear of persecution* "

The Decision records the evidence given by the applicant in the following terms: "*He contended that he was unaware that Ireland would be his ultimate destination. He claimed that he did not seek asylum in Turkey as he was afraid he would be deported When it was put to him that Turkey undertook to assess asylum claims in more or less the same manner as this State did, the appellant said that he thought his claim would not be received favourably there.* "

Counsel for the applicant submits that the Tribunal Member should have stated the reason for dismissing the applicant's explanation and sought to rely on the dictum of Clark J. in *K.N.Q. (IRAQ) v RAT (14th March 2013 [2013] IEHC 117) "The Tribunal Member's findings on Kurds seeking asylum in Turkey ignored the explanations offered by the applicant for not applying for asylum there and no reasons were given for her decision to disregard his seemingly reasonable explanation*"

In the present case, it is my view that the Tribunal Member's cursory rejection of the applicant's two explanation for not seeking asylum in Turkey is flawed in circumstances where, in particular, the applicant's second explanation for not seeking asylum in Turkey appears not to have been explored further at the hearing. Therefore, it behoved the Tribunal Member, when factoring the applicant's evidence on this issue into his overall conclusion that the applicant was "not credible", to state expressly why the applicant's fear that his asylum application "*would not be received favourably"* in Turkey was rejected.

65. By reason of all of the foregoing I find that the Decision of the Tribunal Member is flawed by reference to the standard of decision making required in cases such as the present, as described by Murray CJ in *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC as follows:-

> *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable .of being inferred from its terms and its context.*
>
> *Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. "*

The challenge to the Tribunal Member's "upholding" of certain of the Commissioner's findings

Counsel for the applicant argued that with respect to examples one and two of the credibility examples recited in the Decision, rather than conducting a de novo hearing on these matters and coming to his own conclusions, the Tribunal Member instead merely upheld findings made by the Commissioner. The Decision records that the Tribunal Member heard evidence from the applicant on the issues which gave rise to findings 3.3.ii and 3.3 iii in the Commissioner's report. This is evident from the phraseology used by the Tribunal Member in examples one and two. There is no merit in the claim that he merely adopted the findings.

Conclusion

As the applicant has made out substantial grounds in this case, I therefore formally grant leave and as this hearing was conducted on a 'telescoped basis', I grant an order of certiorari quashing the decision of the Tribunal and I direct that the matter be remitted for reconsideration before a different member of the Refugee Appeals Tribunal.