Neutral Citation: [2015] IEHC 65

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1194 J.R.]

BETWEEN

H. K.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

NOTICE PARTY

Judgment of Ms. Justice Faherty delivered on the 5th day of February 2015

1. This is a telescoped hearing in which the applicant seeks, inter alia, an order of *certiorari* quashing the decision of the first named respondent dated 30th June 2010 and which issued on the 7th July 2010.

Background

2. The applicant is a national of the Democratic Republic of Congo (DRC). He arrived in the state in August 2009 and made an application for refugee status in the following claimed circumstances:

3. The applicant was born in 1984 in DCR, had approximately 20 years in education, is married and worked in retail until April 2009. He claims his problems commenced in February 2009 when his cousin who was a member of FDLR asked to stay with the applicant whilst he made arrangements to leave DRC. According to the applicant, it was not safe for his cousin to stay in DRC because of his membership of FDLR and the Congolese authorities wanted to eliminate him. The applicant claims that his cousin came to live with him on the 23rd March 2009 and stayed for one month. The applicant claims that he apprised his neighbour that his cousin was staying with him and he had told his neighbour that his cousin wanted to abandon his membership of FDLR and start a new life. The applicant claims that in April 2009 his neighbour came to his house and said that the applicant's cousin was a threat to the neighbourhood and requested that he, the cousin, be sent away. At the end of April some men had come to his house armed with weapons. They tied up the applicant and his cousin and put them into a truck which conveyed them to a military camp. During this time in the military camp the applicant was asked why he was helping Hutu rebels in DRC. The applicant had told the secret service that his cousin was intent on leaving DRC to make a new life for himself. While at the camp, the applicant suffered beatings and was kicked. He claims he was transferred with his cousin to a prison in Goma but on arriving they were separated. He said the conditions in the prison were primitive but he was in a cell by himself. He claims in total that he was detained for 3 ½ months. He was told that he was going to be transferred to a prison in Katanga where he would be executed or detained for life. After two months in prison he became ill and was examined by a doctor and was told he would have to have surgery for the removal of his appendix. He stayed in hospital for two weeks under armed guard and went back to prison where he got sick again. He was brought back to hospital where it was discovered he had malaria, typhoid fever and other diseases. During this time he was visited by a contact who told the applicant that a rich client had decided to use his money to have him released. On the 17th August 2009 the applicant and his contact left the hospital after handing over money to two guards. They travelled by motorbike to Rwanda, then went to Kigali and from there took a flight for Sudan with a stopover in Nairobi Kenya and then onto Abu Dhabi before eventually arriving in Ireland. On arrival the applicant spent a day in Dublin city and did not apply for refugee status until the person who had accompanied him left the country. The applicant claimed that he fears returning to DRC because he faces either life imprisonment or the death penalty.

Procedural history

4. The applicant commenced his application for refugee status on the 20th August 2009. His section 8 interview was conducted on the 21st August 2009 and he completed a questionnaire on the 30th August 2009. The applicant was interviewed by the Refugee Appeals Commissioner on the 16th October 2009, 5th November 2009 and 16th November 2009. On the 19th January 2010, the applicant was issued with the s. 13 report of the Refugee Appeals Commissioner refusing him refugee status. The applicant duly appealed to the Refugee Appeals Tribunal and the decision of that body dated 30th June 2010 issued to the applicant on the 7th July 2010, affirming the recommendation of the Refugee Applications Commissioner that the applicant should not be declared a refugee.

5. The Tribunal decided the applicant's appeal primarily on the question of credibility.

The challenge to the decision

6. The applicant challenges the decision of the Tribunal Member on a number of grounds which can be distilled into two broad categories, the alleged failure of the Tribunal Member to take relevant matters into account and alleged errors of fact made by the Tribunal Member.

The failure to consider the full extent of medical and psychiatric evidence adduced before the Tribunal

7. On the 4th May 2010, in advance of the hearing of the applicant's appeal before the Tribunal which took place on the 31st May 2010, the applicant's then legal advisors furnished the Tribunal with a number of documents including a SPIRASI Report prepared by

Dr. Clara O'Flaherty dated 27th April 2010. It is submitted on behalf of the applicant that in reaching his decision, the Tribunal Member failed to consider the full extent of the medical and psychiatric evidence in the SPIRASI Report and it is submitted that the Tribunal committed a material error of fact and failed to exercise appropriate vigilance and care in finding that merely "*the report made reference to an appendix scar and states the applicant suffered with mild to moderate depression, as an element of PTSD mild to moderate depression*." This, the applicant contends, was an inaccurate summary of a report which ran to some nine pages. It is argued, in particular, that the Tribunal Member failed to have regard to other findings made by the SPIRASI examining physician, detailed, inter alia, in the report:-

> *"On examination of his abdomen there was evidence of a large appendectomy scar…...*
>
> *I examined his wrists for evidence of scars from ligatures, there were no scars but the absence is not inconsistent with his history as there may have been no laceration of his skin by the ligatures and hence no scarring.*
>
> *On examination of his loco-motor system:*
>
> > *1. He was notably stiff for his age on rising from his chair to standing. He had tenderness around his left shoulder and significant restriction of movement of his left shoulder especially in abduction and elevating his left arm above his head. He had severe pain when he attempted to move past this range of movement. His right shoulder was similarly affected, but not to the same extent.*
> >
> > *2. He had stiffness and pain in his left elbow. There were two scars on his left elbow on the posterior aspect. Those were hyper-pigmented and had ragged irregular shape.*
> >
> > *3. He had stiffness and pain with his lumber back movements and had decreased range of movement in flexing and extension.*
>
> *He also described referred pain from his back pain anteriorly to his lower abdomen and into his scrotal sac bilaterally and pain extending down into the right thigh anteriorly.*
>
> *He stated that the problems with his left shoulder began after his arrest and developed during interrogation, where his wrists were tied behind his back and he was often left lying in unnatural positions for several hours, causing pressure and strain to his shoulders and elbows and wrists. The current condition of his shoulders and spine is consistent with such a history.*
>
> *The scars on [his] left elbow are consistent with his description of falling backwards after receiving a blow to his chest while seated. He stated his left elbow met a rough surface and was lacerated in two places. His left elbow also needs further investigation and treatment."*

The examining physician's opinion of the applicant's mental health was summed up as follows:

> *"In my opinion, [the applicant] suffers with mild to moderate depression with anxiety and some features of PTSD. This would be consistent with the traumatic experiences he alleges he sustained in the DRC. In my opinion, his depression is related to his inability to cope with the nature of his alleged experiences at the hands of the Congolese authorities and his reduced ability to integrate and to adjust to his life here in Ireland"*

8. The applicant further submits that save a short inaccurate summary of the report, no findings were made by the Tribunal Member regarding the said report.

9. The respondent argues that the Tribunal Member made reference to the physical and psychological findings in the report such that it cannot be contended that the Tribunal Member did not consider it in full and submits that it is the sole preserve of the Tribunal Member to assess its probative value. In particular, the respondent referred to the doctor's conclusions: "*overall it is my clinical opinion that his physical and psychological problems as aforementioned are consistent with and related to his alleged detention and ill treatment by government and security personnel in the DRC*." In arguing that report could not be said to be confirmatory of the applicant's account of how he came by his physical and psychological injuries, the respondent relied on dictum of Birmingham J in *M.E. V. Refugee Appeals Tribunal* [2008] IEHC 192 where he states:-

> *"25. In response, the Presenting Officer submitted that the report was not in a specialist format (which I take to mean that it was not a consultant's report), nor was it a report from SPIRASI, nor does it deal with any element of torture or persecution. The reference to SPIRASI refers to the humanitarian NGO that works in Ireland with refugees and asylum seekers, with special concern for survivors of torture. When reporting following a medical examination, it is their practice to report in terms of the Istanbul Protocol, which puts forward a scale to assist in the assessment of the significance of medical reports.*
>
> *26. The Tribunal Member commented that the medical report was "of no probative value, in the sense" - as she put it - "that it does not assist as to how the Applicant received the injuries as therein specified". She went on to note that there was no photographic record of the applicant's back injuries. In the present proceedings it was submitted on behalf of the applicant that the report was a document of real importance and that it was not open to the Tribunal Member to take the view that the report was of no probative value, certainly not without providing a clear and reasonable explanation for that conclusion.*
>
> *27. In my view, the assessment of whether a particular piece of evidence is of probative value, or the extent to which it is of probative value, is quintessentially a matter for the Tribunal Member. In this instance, there were a number of factors present which could have led the Tribunal Member to the conclusion that she reached…*
>
> *28. The medical report spoke of the injuries as being "consistent with" a beating with a light rod or stick. If one follows the approach of the Istanbul Protocol, this would mean that while the injuries were "consistent with" such a beating, there are also many other possible causes (see paragraph 186). Even if one accepted that the injuries were caused by the method described (i.e. a beating with a light rod or stick), the report offers no assistance as to where, when and in what circumstances the injury was caused. The report is indicating that it was possible that the injuries were caused as*

described but does not elevate that to a probability."

10. It is clear that in the M.E., the court took cognisance of the fact that the Tribunal Member specifically addressed the probative value of the medical report and, given the particular circumstances in that case, that was sufficient for the court to uphold the manner of the Tribunal's assessment of the medical evidence.

11. As regards the present case, it cannot be said that the SPIRASI Report was not averted to by the Tribunal Member in that he records in paragraph 2 of the decision that "*a SPIRASI Report was put in evidence*" and in para. 4 under the heading "*Submissions*", the Tribunal Member records that "*the Tribunal was asked to reassess the case and to consider the SPIRASI Report which corroborates the applicant's evidence that he was badly treated in prison*."

12. Finally, there is the reference in the s. 6 analysis as follows:-

> *"He put in evidence a SPIRASI Report. The report made reference to an appendix scar and states that the applicant suffers with mild to moderate depression has an element of PTSD mild to moderate depression."*

The issue to be determined here is whether the Tribunal Member's summary of the report was sufficiently accurate and whether, to paraphrase Cooke J. in *Pamba v RAT*, the court is able to assess the validity of the process by which the Tribunal Member reached the conclusion he did notwithstanding the absence of a more expansive consideration of the SPIRASI report. Again, adopting the approach taken by Cooke J. in *Pamba*, the question to be determined is whether there was an unlawful failure by the Tribunal Member to state reasons why the report did not alter the view which the Tribunal Member clearly took of the applicant's credibility, or rather lack of credibility.

In the first instance, I am in agreement with counsel for the applicant that it was not open for the respondent counsel, in written submissions, to say that the Tribunal Member's "summary of the findings of the SPIRASI report were not inaccurate, and given its lack of probative value the first respondent was fully entitled to make the findings with (sic) he did regarding it, and in doing so did not disregard the evidence nor make any error sufficient to invalidate his decision", in circumstances where the Tribunal Member did not recite with any sufficient degree of accuracy the scale of the examining physician's findings and where the Decision does not recite what view the Tribunal Member took of the said report. I am satisfied that the present case can be distinguished, in part at least, from the circumstances which presented in the case of *M.E v. Refugee Appeals Tribunal* as in the latter, the conclusion reached with regard to the medical report at issue in that case is clearly recorded in the decision.

In the present case, the decision maker's analysis alludes to "*an appendix scar*", the diagnosis of "*mild to moderate depression*" and recites that the applicant has an "*element of PTSD*"; it is apparent that the Tribunal Member took cognisance of the report to that extent. There is however no reference to the applicant's "*anxiety disorder*" or, more particularly, the other physical findings as recorded in the report. Had the report been confined to the mental health findings, and noting that they were referred to in the Decision (albeit without reference to one specific aspect), then it may well be that the approach of Cooke J. in *Pamba* would be appropriate, namely that the probative value of the report (reporting as it does in terms of the lower end of the Istanbul Protocol) could not be said to be so incompatible with the credibility findings made by the Tribunal Member as to require a distinct statement of reasons as to why it did not operate to change the Tribunal Member's mind on issues of credibility. However, the applicant alleges physical manifestations of alleged ill-treatment in the form of two scars on his left elbow and other physical *sequelae*, recited in detail in the SPIRASI report. These were not adverted to by the Tribunal Member. Save the appendectomy scar (which is to a large extent incidental), there is no reference to any of the physical findings. Indeed, the phraseology used in the Decision suggests to the reader that the only matters averted to by the examining physician were the appendectomy scar and mild to moderate depression and the PTSD element. To my mind, this constitutes a material error on the part of the Tribunal Member.

I note that the elbow scars and the other physical findings are described in the report only as "*consistent with*" (again at the lower end of the Istanbul Protocol) the applicant's description of how they were acquired. This phraseology indicates that, in the words of the Protocol, "*the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes*".

In *Pamba*, Cooke J. states:

"It is true, of course, that an item of evidence, particularly a medical report, may be such as will call for an explanation in the statement of reasons for a Tribunal decision of this kind, where it is discounted when the evidence is weighed. But for that to be the case, the report must on its face present some specific finding or conclusion which is incompatible with the rejection of some aspect of the applicant's claim.

This can, for example, be the case where the credibility issue relates to a claim to have suffered torture or some form of injury. In such a case, a medical report which by reference to the Istanbul Protocol confirms that the applicant bears marks or scars which could corroborate, with varying degrees of probability, how the injuries were inflicted ,their location age and so on, may be so pertinent to the issue of credibility as to require an explanation if rejected."

With regard to the Istanbul Protocol, while the SPIRASI report findings in this case indicates only that it is possible that the injuries the applicant claims to have suffered occurred in the manner he alleges, I am not persuaded, given the error here, that it would be in the interests of fairness to follow the approach adopted in *ME.v. RAT* (already quoted), in the absence of any indication in the Decision of the probative value attached to the report by the Tribunal Member or, at the very least, in the absence of a more accurate recital of the physical findings (in conjunction with the mental health findings) in the report which may well have satisfied the court (even absent a specific rejection and stated reasons for the rejection) that the Tribunal Member had considered the entire report and weighed the medical findings in the balance. I am not so satisfied here, given the somewhat half-hearted manner in which the report was referred to. For the court to be satisfied that all of the findings in the report were considered, some indicator was required to that effect in the Decision. The Tribunal Member was obliged to record the probative value attached to the report or, as I have indicated, at the very least set out an accurate summary of its contents in the Decision, which was not done. An incomplete summary cannot suffice; it is not an adequate substitute for what appears to be a rejection of the report, as there is no persuasive indicator present on the face of the record that the *entire* report was considered. In these circumstances there is no way of being satisfied that the medical evidence before the Tribunal was weighed as it ought to have been. It is not for this court to speculate how its probative value might have been assessed by the Tribunal Member.

13. In *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 353 wherein Cooke J sets out guidelines for an administrative decision maker when assessing credibility.

14. The fourth principle enunciated by Cooke J in I.R. reads as follows:-

> *"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."*

15. Principle 9 states:-

> *"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."*

16. I find that the Tribunal Member's treatment of the SPIRASI report satisfied neither of the aforesaid principles. The error is such that it affects the decision in the case.

The alleged failure of the Tribunal Member to consider certain matters when doubting that the applicant helped his cousin

17. The Tribunal held that it was difficult to accept that the applicant having knowledge of what the FDLR stood for would nonetheless have accommodated his cousin in the manner described by the applicant. The applicant submits that in making this finding the Tribunal acted in breach of fair procedures by failing to consider and assess the following relevant matters:

> a) The applicant's statement in his questionnaire that his cousin was trying to break from the FDLR and "*had decided to lay down his arms and start a new life*" and the applicant's evidence at the s. 11 interview to the same effect;
>
> b) The applicant's evidence at his s.11 interview that in Africa a cousin is like a brother, that there is in effect a cultural obligation to assist one's cousin and that the applicant would risk his life for him;
>
> c) The applicants evidence at his s. 11 interview that he did not fully believe that the FDLR were involved in human rights abuses to the extent to which they were so accused by the government;
>
> d) The applicant's evidence at his s. 11 interview that at the time he did not think he was putting his life in danger by accommodating his cousin as the government did not have proof of the FDLR being among the population.

18. In refuting that there is any basis to impugn the Tribunal Member's decision on this ground, the respondent submits that the Tribunal Member, having conducted an oral hearing with the applicant, was entitled to make findings of fact based on the oral testimony of the applicant and the materials placed before the Tribunal. There was, in particular, reliable country of origin information which clearly showed that the reputation of the FDLR was well known throughout DRC. It is submitted that the Tribunal Member was entitled to conclude that the applicant's stated belief that he was not aware of the activities of the FDLR undermined his credibility. Overall, I do not find merit in the applicant's arguments that the Tribunal Member failed to take into account relevant matters when he arrived at the decision he did regarding the assistance given by the applicant to his cousin. There is no obligation on a Tribunal Member to recite in the decision each and every facet of the applicant's account of events, be it set out in the questionnaire, s.11 interview or otherwise. What is required is that there is a rational basis for the conclusion reached by the Tribunal Member on the issue and in this instance I am satisfied that the Tribunal Member's recital, in part 3 of the Decision, of the applicant's testimony that his cousin was intent on starting a new life is a sufficient indicator that he took cognisance of the applicant's reasons for helping his cousin. Moreover, it was entirely within jurisdiction and within the bounds of rationality for the Tribunal Member to conclude that the applicant, being an educated man, must have been aware of what the FDLR stood for and of their alleged activities in DRC.

19. The alleged failure of the Tribunal Member to consider relevant matters when finding it was not credible the applicant told his neighbour that he was hiding his cousin.

The Tribunal Member stated as follows:-

"*It is not credible that (the applicant) told his neighbour who is a civil servant that the applicant was hiding a member of the notorious FDLR*". It is submitted that in so finding the Tribunal breached fair procedures by failing to consider and assess the following relevant matters:-

> a) The evidence given by the applicant at his s. 11 interview and the statement at p.5 of the applicant's notice of appeal to the effect that the applicant believed that the neighbour was a trusted friend, his only friend in Goma and he confided in him that his cousin was staying as the neighbour would know someone was staying and that would cause suspicion;
>
> b) The statement in the applicant's questionnaire that the applicant felt close to his neighbour giving their shared origins.

20. There is no merit in the applicant's challenge on this basis. The Tribunal clearly took cognisance of the explanations proffered by the applicant by stating:-"*When questioned as to why he would do such a foolish thing the applicant replied that his neighbour was "the only friend he had in Goma*". I am not persuaded that the failure to allude to the applicant's and the neighbour's shared origins or the applicant's concern about his neighbour becoming suspicious if not apprised as to who was staying with the applicant is of sufficient relevance or seriousness as to impugn the conclusion arrived at by the Tribunal Member on the issue.

Alleged material errors of fact

21. The applicant submits that the Tribunal Member materially erred in fact in making a finding that the applicant's evidence that his neighbour was the only friend he had in Goma was "*inconsistent with his later evidence that after he was arrested, a friend, a valued client, gave $3000 to soldiers to have the applicant released*". In his grounding affidavit the applicant avers as follows:-

"*The Tribunal has erred in fact here. In fact my said client friend was based in Belgium, not Goma, and the amount of money paid was $2000 not $3000. The correct position was clear from the papers and the evidence before the Tribunal.*"

22. Both the applicant and respondent counsel agree that the reference in the decision to the amount of money paid being $3000, when in fact it was $2000 did not constitute material error of fact, and I am in agreement therewith.

23. The issue to be determined is whether the Tribunal Member erred materially when he found the applicant to be inconsistent in the

evidence he gave regarding his friendships.

24. Insofar as the applicant described the nature of his relationship with a person whose money, he claimed, was used to secure his release from prison, this description is given in the course of his s. 11 interview in the following terms:-

"Q: Last time at the interview… I asked you about your relationship to[ ] and I would like to discuss this again.

Where does this man live?

A: His is installed in Belgium. But he travels he moves around a lot and is often in asia, but he has belgium nationality.

Q. And how long did you know this man for?

A. I met him at the end of 2008. September, November is when I met him.

Q. And it was a business relationship, is this correct?

A. Yes. and we would see each other apart from work, we became friends.

Q. And where did he live in DR Congo, when you were friendly with him?

A. When he was in Kinshasha he was in the hotel Memling, when he was in Goma, he was in hotel versaille."

25. A reading of the Tribunal Member's rationale for finding the applicant inconsistent suggests that the applicant, at one stage of his evidence, claimed to have one friend in Goma but at a later stage gave evidence that another friend (in Goma) gave money to the soldiers to have the applicant released. I am not satisfied, based on the contents of the applicant's s. 11 interview and indeed the Tribunal Member's recital of the applicant's evidence in part 3 of the decision, that the Tribunal Member was entitled to find the applicant was inconsistent, given that the overall thrust of the applicant's information concerning the individual concerned was that he was a client who became a friend and who, it would appear, was not based in Goma save on occasions. The error of fact made would appear to be that the Tribunal Member was of the view that the applicant had two friends resident in Goma when in fact only one was resident there. Having said that, I do not believe the error made by the Tribunal Member to be an error of fact of the magnitude claimed by the applicant where it is the case that the client was a friend of the applicant's, as attested to by the applicant himself in the course of the s. 11 interview and presumably in the course of his oral evidence to the Tribunal Member. Overall, I am not convinced that this finding of inconsistency, of itself, is sufficient to impugn the decision arrived at by the Tribunal Member.

The alleged failure of the Tribunal Member to assess relevant evidence before making an adverse credibility concerning the medical attention provided to the applicant.

26. The Tribunal Member found as follows:-

> *"[The applicant] claims he was detained, beaten and informed that he was going to be transferred to another prison where he would be either executed or die in jail. Nonetheless the applicant states that when he was in jail he got so ill that a doctor was called who took samples and confirmed a couple of days later that the applicant was suffering from appendix [sic]. Five days later he was brought under armed guard to an outside hospital where an operation was successfully completed, and he was returned to jail only to be readmitted to hospital a short while later from where he escaped. It is not credible that the authorities in DRCongo would lavish such medical attention on someone to save his life on two occasions if the same authorities were going to transfer him to a jail where he would either be executed or die."*

27. It is submitted that the Tribunal Member made this speculative finding in breach of fair procedures by failing to consider and assess evidence given by the applicant both in his Questionnaire and at his appeal hearing.

28. In particular, the applicant relies on the information he relayed in his Questionnaire, as follows:-

> *"The authorities didn't want to call a doctor because I was possibly going to be executed. So there was no need to worry about my health. One of them said I might be useful giving information on the FDLR in the city and decided to call a doctor at the hospital of GOMA on Tuesday 26 May 2009.*
>
> *Doctor [ ] examined me…He came back the next day and told the prison authorities that I had an acute appendicitis and that I needed immediate surgery.*
>
> *The prison authorities refused again. As the doctor insisted regularly and every day, I was transferred to Goma Hospital on 31 May 2009, and received surgery on the same day. I was transferred because of the lack of proper facilities in the hospital. The doctor requested that I stay at the hospital until the thread ablation, which happened on Thursday 11 June 2009 and Saturday 13 June I went back to prison according to a decision taken by the ANR, until I could recover and be transferred to the [ ] region. During the 2 weeks I spent at the hospital, the assistant of my client [ ] visited me, dressed up as a doctor because my room was watched over by 2 soldiers."*

29. The respondent argues that the Tribunal Member's finding that it was not credible that the authorities in the DRC would expend such monies in order to save the applicant's life on not one but two occasions is fully rational and was one for him to make on the evidence that was before him. It is further contended in the written submissions: "As for what the applicant may or may not have said at the oral hearing of his appeal, the respondents note that there is no affidavit sworn in the present proceedings as to what oral evidence the applicant tendered at the oral hearing of his appeal before the first respondent, or to contradict any findings by the first respondent on any such oral evidence he heard at the said appeal hearing."

30. Insofar as part 3 of the Tribunal Decision recites the evidence tendered by the applicant regarding his sojourn in hospital, it is as follows:-

> *"He claims that after two months in prison he got ill and was examined by a doctor and was told he would have to have surgery for the removal of his appendix. He stayed in hospital for two weeks under armed guard and went back to prison*

where he got sick again. The doctors decided to bring him back to hospital where it was discovered he had malaria, typhoid fever and other diseases. He was visited by[a] contact who told the applicant that a rich client had decided to use his money to have him released. On 17th August the applicant and his contact left the hospital after handing over money to two guards."

31. There is no discernable means of ascertaining whether the applicant tendered evidence at his oral hearing to the effect that the prison authorities afforded him hospital treatment because they felt the applicant could be of benefit to them with the provision of information. However, it is the case that the applicant did provide this information in his replies to the Questionnaire. I have already stated that a failure to recite every aspect of the applicant's case in the decision could not render a decision invalid. However, given that the applicant's account of his prison experiences could not be described other than as relating to his core claim, it seems to me that in deciding to reject as not credible the applicant's evidence that the authorities would have afforded him hospital treatment while at the same time having decided he would either be executed or die in prison, it was incumbent on the Tribunal Member to expressly take account of the explanation tendered by the applicant as to why he received such care. That explanation was not so beyond the bounds of credibility that it entitled the Tribunal Member to ignore or not consider it. The Tribunal failed to take account of the matter and I am satisfied that this failure is of sufficient seriousness as to affect the decision on credibility made in the case. The applicant's claim about the change of mind of the prison authorities, if credible, had the potential to alter the view taken by the decision maker on this aspect of the applicant's core claim.

The Tribunal Member's failure to take into account relevant matters when finding that the applicant did not give a coherent reason for not seeking for asylum in countries he transited and in relying on the very short delay by the applicant in applying for asylum to reject credibility.

32. The Tribunal Member made the following assessment:-

"The applicant claims a client of his company gave him a Belgian passport to travel and in Sudan he was introduced to another man who brought him to Ireland and he did not have to pay any money. When asked why a client would spend such a large amount on the applicant he replied "he wanted me to work for him". This is hardly credible. The applicant states, that he arrived here and he spent two days in the country before applying for international protection and told the Tribunal that his agent did not want him to apply until the latter left the country. The Tribunal does not find the evidence of his journey, the non payment of same and the arrival here to be credible. His delay in applying for status here and his lack of a coherent explanation for not seeking international protection in the countries he traversed is not credible. Section 11(B) of the Refugee Act 1996 (as amended) applies."

33. The applicant argues that when finding that the applicant failed to give a coherent reason for not seeking asylum in any of the countries he transited, the Tribunal Member failed to take account of the applicant's mental state as evidenced by the SPIRASI report. Furthermore, it is contended that in rejecting the applicant's account of the assistance rendered to him in the course of his journey, the Tribunal Member failed to take account of the submissions made on the applicant's behalf in the notice of appeal to the Tribunal, as follows:-

"It is submitted that the applicant's failure to recall the details on the false passport that he travelled on to Ireland should go to his general credibility. It is further submitted that the applicant travelled with an agent and he confirmed *on consultation* that his travel documents were taken from him each time he presented them at immigration control and that he did not question the agent as to his final destination as he was fleeing persecution and did not want to jeopardise his journey. It is submitted that the applicant did not seek help or protection in any of the countries he transited through as he was relying on the advice of his trafficker and was in fear of his life."

34. The applicant also argues that there was no obligation on him to apply for asylum in transit countries and contends that s. 11(B) (b) was not relevant as he did not make a specific claim that Ireland was the first safe country he arrived at.

35. The respondent argues for the applicability of s. 11(B) (b) of the 1996 Act and further notes that the SPIRASI report does not assist the arguments made by the applicant as the claimed psychological difficulties post- dated his arrival in the State.

36. While the respondent counsel's description of the psychological difficulties as post dating his entry into this state does not altogether tally with what is set out in the report, I am not convinced by the argument that the applicant's mental state was a factor that should have been taken into account by the Tribunal Member when he was deciding whether or not the applicant gave a coherent explanation for not seeking international protection in the countries he traversed prior to coming to Ireland. There is no suggestion in the recital of evidence given by the applicant, as set out in the Decision, that the applicant cited psychological impairment as the reason for his not having sought protection prior to arriving in Ireland and it is not suggested here that he gave such evidence. Nor do I consider that the SPIRASI report sufficiently probative such that the mental state findings therein (which at least were alluded to in the Decision) should have weighed on the decision maker when analysing the applicant's evidence as to his itinerary.

37. On the issue of the applicant's two day delay in applying for asylum, that this was considered in the context of credibility seems to me to impute seriousness to the delay that was not warranted, particularly when the applicant provided an explanation which does not seem implausible.

38. It was not disputed that the Tribunal Member, in referring to s. 11(B) of the 1996 Act had in mind s. 11(B)(b). I accept the applicant's submission that insofar as there was reliance on this provision of the Act in arriving at the conclusions on the applicant's credibility, the Tribunal Member was in error in so doing, as there is no suggestion in the present case that the applicant specifically claimed Ireland was the first safe country he encountered after leaving his country of origin. In this regard, I rely on the dictum of Mac Eocdaigh J. in *F.T v RAT* [2013] IEHC 161, alluded to by the applicant's counsel in the course of the hearing.

39. "*The provisions of s. 11(B)(b) of the Act are applicable where a claim is made by an applicant that Ireland was the first safe country he encountered after he or she departed his or her country of origin. No such claim was made by the applicant in this case. It is, of course, perfectly permissible for a decision maker on an application for international protection to have regard to the failure of an applicant to seek refuge in a safe country encountered en route to Ireland. However, given the mandatory terms in which s. 11(B) of the Act is expressed……it seems to me that the provision should only be cited in connection with credibility where its strict terms are met*"

40. Had this been the only error on the part of the Tribunal Member, it would not of itself be sufficient impugn the Decision but the overall conclusion arrived at in the Decision cannot stand for the reasons set out herein.

Conclusion

As the applicant has made out substantial grounds in this case, I formally grant leave and as this is a telescoped hearing, I will make an order quashing the decision and I direct that the matter be remitted to the Refugee Appeals Tribunal for consideration before a different Tribunal Member.