Neutral Citation: [2015] IEHC 176

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1444 J.R.]

BETWEEN

S. K., A. F. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, S.K.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 6th day of March, 2015

1. The applicants sought an extension of time in which to bring these proceedings and I am satisfied, from the contents of the first named applicant's affidavit, to grant the application.

2. This is a telescoped hearing of an application for leave to apply for judicial review together with substantive relief, in effect, an order of *certiorari* quashing the decision of the first named respondent affirming the recommendation of the Refugee Applications Commissioner that the applicants not be declared refugees and notified to the first named applicant by letter dated 24th September, 2010.

Background

3. The applicants are a Pakistani mother and child who arrived in the State on 9th September, 2009, and applied for asylum on 19th October, 2009. The first named applicant claims a fear of persecution in Pakistan as a result of the response to her decision to abandon her religion (Islam). The first named applicant claims that she began to question Islam whilst at university and this led to numerous rows with her parents. She claims that they forced her into an arranged marriage with a husband who harassed her, denied her food, placed restrictions on her and was physically abusive. She claims that after she became pregnant, numerous attempts were made to harm her in an attempt to cause her to miscarry, in circumstances where she had refused to abort her daughter. Her in laws as well as her husband were verbally and physically abusive. This situation continued after her daughter was born. The first named applicant claimed that this led to her leaving home after an incident where her mother in law attempted to smother her. She sought assistance at the school where she worked and was given accommodation there for herself and her daughter. After her in laws informed the school authorities that she was not a follower of Islam, she lost her job. This was in May 2009.

4. Following that the first named applicant and her child went to Lahore after a fatwa had been issued against her. She remained in Lahore for four months and she claims that she was assisted by her brother and sister in law (resident in Ireland) in obtaining a visa to come to Ireland. The first named applicant claims that she believed that things would quieten down and had intended to return to Pakistan. However, after her arrival in Ireland, her brother went to Pakistan to ascertain the position and on his return advised her not to go back as her situation had not improved.

5. While in Pakistan and prior to relocating to Lahore, the first named applicant had gone to the police but they did not assist her, calling her "a bad woman". The first named applicant claims that if she and her daughter are to return to Pakistan, she fears that her husband or his family will kill them. Furthermore, as someone who has renounced her religion, the first named applicant claims she will suffer State persecution and that State protection will therefore not be available to her.

Procedural History

6. The first named applicant completed an ASY1 Form on 21st October, 2009, and on 2nd November, 2009, she completed the application for refugee status questionnaire.

7. She underwent a s. 11 interview on 12th November, 2010 with the assistance of an interpreter.

8. The s. 13 report of the Refugee Applications Commissioner (dated 16th December, 2009) issued on 14th January, 2010.

9. In her report, the Commissioner noted the history of persecution as recounted by the first named applicant and quoted from country of origin reports which stated, *inter alia*, as follows:-

> *"Domestic violence was widespread and serious problem. Husband reportedly beat, and occasionally killed their wives. Other forms of domestic violence included torture and shaving. In laws abused and harassed married women…"*
>
> *"Following an objective analysis of….country of origin information, it would appear that domestic violence remains a problem in Pakistan. Furthermore, a disbelief in Islam could make a woman's circumstances more difficult."*

10. However, the Commissioner rejected the credibility of the first named applicant's claim on a number of grounds: She noted that the first named applicant's contention that her problems emanated from her disbelief in Islam and that she had not been a Muslim for several years. She noted however from country of origin information that Pakistan required religious affiliation to be listed on passports. The applicant had designated her religion as Muslim on her passport which issued on 28th March, 2009. The Commissioner rejected the first named applicant's explanation that she herself had not filled in the passport noting that the first named applicant had several university degrees and it was thus difficult to accept that she would not complete her own forms to obtain a passport. It was also noted that the first named applicant wore a headscarf for the duration of the interview. While stating that it was not possible to say with any degree of certainty whether the first named applicant had denounced Islam, the aforementioned issues nevertheless undermined the validity of her assertions in that regard. The Commissioner also found it difficult to understand, given the family circumstances outlined by the first named applicant, how she could have had control not only of her own documents but those of her husband when applying for the passport for her daughter which issued in December 2008.

11. The Commissioner also found it unusual that while the first named applicant claimed she had lost both her and her daughter's passports since their arrival in Ireland, she was able to produce a photocopy of the visa page of her passport to the offices of the ORAC subsequent to her interview. The Commissioner found it unusual "*that the applicant could produce this evidence if her passport is in fact missing*".

12. The Commissioner also made the following findings:-

> *"It would appear the applicant arrived to this State in early September 2009. She was asked why she waited until 19 October to seek asylum. She stated 'I came here just for a change. I did want to go back. But then my brother contacted me and told me it was not safe. Everybody is still searching for me. Also I was worried that my visa would expire. I always wanted to go back, but then my brother told me it was not safe.'*

During the course of the applicant's interview, she had stated she fled [ ]after a Fatwa was issued against her. She stated she feared she would be killed. She described how she had no contact with her parents after they refused to offer their support when her husband beat her for the first time… She described living a life of isolation in Lahore for four months.

Given the situation the applicant described, it is difficult to understand how she had an intention to return to Pakistan when she first arrived, and only decided to apply for asylum when her brother told her it was not safe there …A delay in seeking asylum may indicate a lack of subjective fear of persecution, the reasoning being that someone who was truly fearful would claim asylum at the first opportunity. The applicant's case is based on incidents that allegedly occurred prior to her departure from Pakistan, yet she waited nearly six weeks after her arrival before seeking asylum. The applicant's delay in seeking asylum raises concerns with regards to her stated subjective fear. She has not provided reasonable explanation for failing to seek asylum immediately after her arrival."

13. The cumulative effect of the Commissioner's findings led to "*a significant credibility deficit*". Thus, as the first named applicant's general credibility was not established, she had "*failed to satisfy the well founded fear element of the convention*".

14. Notwithstanding the above finding, the Commissioner considered the availability of national protection. It was noted, having regard to country of origin information, that State protection would be difficult for a woman allegedly abused by her husband. On the question of internal relocation, noting the first named applicant's level of education, the Commissioner found it both possible and reasonable that she and her daughter could internally relocate elsewhere in Pakistan, for example Lahore.

15. The s. 13 report went on to make the following finding under s. 13(6) of the 1996 Act:-

> *"The applicant's general credibility has not been established. Having regard to the above, I find that Section 13(6)(c) of the Refugee Act 1996 (as amended) applies to this application, in that 'the applicant without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State'."*

16. On 28th January, 2010, the Refugee Legal Service furnished a Form 2 notice of appeal to the Refugee Appeals Tribunal. It enclosed an email version of a letter written by the applicant's sister- in- law which, it was submitted, was "*corroborating evidence of the applicant's claim*". It was also submitted, *inter alia*, that the application of the s. 13(6)(c) finding was erroneously applied to the first named applicant in circumstances where she had applied for refugee status when it became evident that the situation in Pakistan had worsened and that it would be unsafe for her and her daughter to return home.

17. On 4th February, 2010, further submissions were made on the applicants' behalf and extracts from country of origin information were submitted in respect of: women living alone in Pakistan; divorce; domestic violence; honour killings; freedom of religion; blasphemy; and apostasy.

18. By letter dated 17th February, 2010, the Refugee Appeals Tribunal was furnished with a medical report and a psychological report in respect of the first named applicant, together with letters from her brother and sister- in -law in support of her claim.

19. By letter dated 15th April, 2010, the Tribunal wrote to the applicants' solicitor raising certain perceived inconsistencies in the first named applicant's claim. The Tribunal Member queried four matters:-

> (i) He noted that in the first named applicant's questionnaire, she had stated that she had lost her job prior to relocating to Lahore in May 2009 and that she did not speak English. The applicant was queried about correspondence dated respectively 28th April, 2009 and 26th April 2009 from her and her sister in law to the Honorary Consulate of Ireland which represented that the applicant was an English teacher, that she was in employment as of those dates and that she expected to return to Pakistan for the start of the school term in July. In the event that the representations made were false, the first named applicant was asked to explain why asylum was not immediately sought on arrival in the State.
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> (ii) The first named applicant's attention was brought to the statement in her questionnaire that she had never travelled outside Pakistan prior to her arrival in Ireland. A prior passport was brought to her attention which suggested that she had exited from Lahore airport on 5th November, 2004, and where the visa page of the passport showed two stamps for the UAE (dated 2nd December, 2004 and 5th December, 2004). Other exit and entry stamps were also evident on the passport including a visa for Saudi Arabia.

20. The first named applicant was furnished with copies of the passport and letters in question.

21. The applicants' solicitor responded by letter on 21st April, 2010, advising:-

> (i) That the applicant was an English teacher in a primary school but taught at a very basic level and was not proficient in English as was common among teachers at primary level in Pakistan.
>
> (ii) At the time the letters were written to the Honorary Consulate, the applicant had not lost her job and was not expecting the situation in Pakistan to become so serious that she could not return.
>
> (iii) The first named applicant had not known about the asylum process on arrival in the State or that she could have applied for asylum immediately on arrival. The communication from her brother as to the situation in Pakistan had precipitated her application for asylum.
>
> (iv) The first named applicant maintained that she never travelled outside of Pakistan previously. The visa stamps in her

previous passport were explained in the following terms:-

> *'The stamps and visas for UAE and Saudi Arabia are due to the fact that she was supposed to go to UAE and Saudi Arabia with her husband. These were journeys organised by her husband to attempt to refresh client's thoughts about Islam and religion. He made all the relevant travel arrangements and visa applications. Client instructs that when she found out that these trips had been organised, she refused to go. Her husband decided to go on the trips anyway and took his sister, our client's sister-in- law,[ ], instead. Client instructs that [ ]travelled on her (client's) passport. The passport contains the client's photo (page. 1 of passport) but on the visa for Saudi Arabia is a photo of [ ](page 10 of passport). Our client is unaware as to how this was done as she did not have any involvement in the procurement of the visa."*

22. The Refugee Appeals Tribunal, in its decision dated 2nd September, 2010, rejected the applicant's appeal on credibility grounds.

23. The principal findings of the Tribunal Member may be summarised as follows:-

(i) The first named applicant's explanation for the absence of her passport, namely that her daughter used to play with and lost it, was found to be "*utterly incredible*". It simply "*beggar[ed] belief*" that the first named applicant, educated to triple Master's degree level, would have left both her and her daughter's passports to her two year old as play things. Given that the first named applicant made photocopies of some pages of the passports, it was "*implausible*" that she would then "*allow her two year old daughter to play with the document, allowing the originals to go missing, and then not report the matter to anyone*."

(ii) The copy of the first named applicant's visa application for Ireland disclosed that she previously held a passport valid from 2004 to 21st May, 2009. The Tribunal Member found that this document disclosed "*startling*" information that "*fundamentally undermines the Applicant's claim to have a well founded fear of persecution in Pakistan, on account of her renouncing of the Islamic faith*". The Tribunal Member noted that the passport disclosed an "*Umra*" visa (a Muslim pilgrimage to Mecca) for Saudi Arabia with entry and exit stamps dated December 2004. In this regard, he stated:

> *"I have personal experience of applying for and being issued with a Saudi tourist visa. I have similar personal experience of entry and leaving the Saudi State. I am well aware of the process in obtaining the visa, and indeed had to answer queries that were raised by the Saudi authorities, before a visa even issued. Similarly, all documentation (passport and visa) was subject to examination on both entry to and exit from Saudi Arabia. I do not accept that the Applicant's account is any way credible. I do not accept that her sister in law could have applied for a visa, had that visa inserted on the Applicant's passport, and then been admitted to and then given leave to depart Saudi Arabia – all while allegedly (fraudulently and illegally) travelling on the Applicant's passport.*
>
> *I find that the evidence strongly suggests that the Applicant visited Saudi Arabia on an Umra visa in December, 2004. I find that this flies in the face of her evidence that she renounced Islam some years ago."*

The Tribunal Member thus found that the first named applicant's credibility "*has been seriously undermined by her travel to Saudi Arabia on an Umra visa in Decembe,r 2004*".

(iii) The Tribunal Member found it "*inconsistent with the applicant's account of being involved in an abusive and evidentially controlling marriage for five years, that she would be in a position to go behind her husband's back and uses his documents to fraudulently apply for and obtain a passport and visa on behalf of her daughter*". Accordingly, this "*must count against her credibility*".

(iv) The Tribunal Member noted that the application for asylum was made on 19th October, 2009, twelve days after leave to remain in the State had expired and over a month after the applicants' arrival in the State. The assertion in the letter of 4 February 2010 that, consequent upon her brother's confirmation that the situation in Pakistan had not improved, the first named applicant had become a refugee sur place was rejected. This was not compatible with the first named applicant's claim to have renounced Islam years prior or with the history she gave of a violent and abusive marriage, including an allegation of attempted murder by her husband.

(v) The Tribunal Member noted that the claim that she became a refugee sur place directly contradicted the first named applicant's assertion that she fled to Lahore in 2009, following the issue of a fatwa against her and the alleged loss of her job in May 2009. He concluded that if matters could not be said to have come to a head with the alleged issuing of a fatwa against her mid 2009, the first named applicant had "*burned her bridges*" by applying for a passport and visa for her child behind the back of her husband and fleeing to Lahore. In taking this action "*she had effectively abducted her child*" and taken that child "*to another country, apparently without the knowledge or consent of her husband, the child's father*". It was "*utterly incredible*" that she would claim she intended to return to Pakistan in those circumstances. It was not accepted that she only decided to make a claim for asylum following information given to her by her brother "*(who had allegedly visited Pakistan in 2009)".* The Tribunal Member found that as an educated person, the first named applicant could not have been unaware of asylum. It was thus not indicative of a person fleeing their country of origin with a well founded fear of persecution that she would remain in Ireland for over a month without making a claim. This counted against the first named applicant's credibility. Consequently, the reasons for not claiming asylum at the frontiers of the State were not accepted and the Tribunal Member had regard to s. 11B(d) of the 1996 Act in assessing the first named applicant's general credibility.

(vi) The first named applicant was not generally credible in relation to her alleged renunciation of the Islamic faith; the alleged problems with her family; her account of an arranged marriage and subsequent mistreatment; her account of her sister in law travelling to Saudi Arabia on her passport in December 2004; her account of obtaining a passport and visa for her daughter without the consent and knowledge or her husband; her failure to apply for asylum at the frontiers of the State or soon after; or in relation to her claimed fears, should she return to Pakistan.

(vii) The Tribunal Member did not accept that the first named applicant had abandoned her husband or "*dishonoured*" him as claimed in the letter of 4th February, 2010. If the first named applicant was living with her daughter from late 2009, the Tribunal Member did not accept that her husband would allow the matter of the abduction of his child to go

unreported so that the child could have left Pakistan with her mother undetected, when departing Pakistan in early September 2009.

(viii) Neither applicant was found to have a well- founded fear of persecution, "*looking to the future*".

(ix) The Tribunal Member stated that he had regard to country of origin information furnished on behalf of the first named applicant and also to the information appended to the s. 13 report. He stated that he considered the information appended to the letter of 4th February, 2010, furnished by the applicant's legal representatives and that he had regard to the medical reports which had been furnished in aid of the appeal. The Tribunal Member found nothing in the psychologist's report to address "*any of the numerous questions as to the Applicant's credibility".* The report of the general practitioner which stated that the first named applicant's scars were "*consistent with her story*" could not be regarded as diagnostic or conclusive and did not refer to the Istanbul Protocol. It did not assist the applicant's claim or address the numerous and serious credibility doubts found by the Tribunal Member.

The Challenge to the Decision

24. The challenge can be distilled as follows:-

(i) The documents submitted on behalf of the first named applicant were given no weight by the Tribunal Member. In particular, the explanation furnished by her brother accounting for the delay in applying for asylum was ignored. Moreover, the Tribunal Member wholly failed to consider the history given by the applicant in light of country of origin information placed before him.

(ii) The finding regarding the absence of the applicant's passports was made without stating the reason for the rejection of the explanations proffered, and was in any event, a finding unrelated to the core claim.

(iii) The finding concerning the first named applicant's travel to Saudi Arabia was an error of significance, particularly where the applicants were denied the benefit of an oral appeal. It is submitted that the first named applicant's explanation for the Saudi Arabia entries on her passport was wholly unconsidered.

(iv) The finding with regard to the first named applicant's ability to obtain a passport and visa for her daughter behind her husband's back was based on conjecture and a misrepresentation of the evidence and, in any event, was a peripheral matter.

(v) The finding that the first named applicant's husband "*would have allowed the matter of the abduction of his child to go unreported*" was speculative and based on conjecture.

(vi) The Tribunal Member listed a host of elements of the applicant's story, found to be incredible without offering any reason for those findings.

25. The overarching ground of challenge against the Tribunal Member's findings is that they were made in the absence of an appeal process conducted in accordance with the principles of natural and constitutional justice. Firstly, the applicants were deprived of the opportunity of an oral hearing with legal representation. Secondly, the absence of an oral hearing meant that that the applicants did not have the opportunity to engage with the Tribunal Member in the context of certain views expressed by the Tribunal Member in the Decision. Had an oral hearing been available to the applicants, this engagement could have taken place. It is submitted that where no oral hearing is available to the applicants, and where the decision of the Tribunal will turn on issues of credibility, the only way in which the Tribunal can operate in accordance with constitutional and natural justice is for it not to make credibility findings or alternatively, for it not to make findings over and above the credibility issues identified at first level instance (the s. 13 report). The applicants contend that the credibility findings made by the Tribunal were in many respects substantially different to the credibility findings of the Commissioner. In those circumstances, the first named applicant had no opportunity of even having a s. 11 interview with regard to the said credibility findings, although it is acknowledged that in respect of certain matters, the first named applicant was written to on 15th April, 2010. This, however, did not address the deficit of constitutional and natural justice, in circumstances where the Tribunal Member went on to make new credibility findings.

Consideration

26. Section 13 of the Refugee Act 1996 (as amended) in part provides:-

"(5) Where a report under subsection (1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in subsection (6), then the following shall, subject to subsection (8), apply:

(a) the notice under paragraph (b) of subsection (4) shall, notwithstanding that subsection, state that the applicant may appeal to the Tribunal under section 16 against the recommendation within 10 working days from the sending of the notice, and that any such appeal will be determined without an oral hearing;

(b) notwithstanding paragraph (c) of subsection (4), where the applicant has not appealed against the recommendation within 10 working days after the sending of a notice under paragraph (b) of that subsection, the Commissioner shall, as soon as may be, furnish the report under subsection (1) to the Minister.

(6) The findings referred to in subsection (5) are—

(a) that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee;

(b) that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded;

(c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable

after arrival in the State;

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

(e) the applicant is a national of, or has a right of residence in, a safe country of origin for the time being so designated by order under section 12(4)."

27. As pointed out by Clark J. in *S.O.M. v. Refugee Applications Commissioner & Ors* [2005] IEHC 218:-

> *"The combined effect of s. 13(5) and 13(6) (as inserted by s. 7 of the 2003 Act) is to impose significant limitations on the extent of the appeal which will be available to an applicant to the Refugee Appeal Tribunal ('RAT') where, in addition to making a recommendation that the applicant concerned should not be afforded refugee status the RAC makes one of a number of specified findings [under s. 13(6)]."*

28. The applicants were denied an oral hearing on the basis that the first named applicant had "*without reasonable cause failed to make an application as soon as reasonably practicable after arrival in the State*" (s. 13(6)(c)).

29. In the course of oral submissions, counsel for the applicants argued that the s. 13(6)(c) finding was made by the Commissioner "*on very thin grounds*". He acknowledges, however, that no challenge by way of judicial review was made to that finding which effectively deprived the applicants of an oral hearing of their appeal to the Refugee Appeals Tribunal.

30. In the course of these proceedings, the court was referred to a considerable body of case law where the ramifications of an appeal by way of paper review only have been the subject of consideration.

31. Counsel for the applicant opened the decision of Cooke J. *in S.U.N. (South Africa) v. Refugee Applications Commissioner & Ors* [2012] IEHC 338, which was delivered on 30th March, 2012. The case concerned a challenge to the Commissioner's finding that the applicant should not be afforded an oral hearing on grounds set out in section 13(6)(e). The judgment of the learned judge is instructive for its comprehensive analysis of the question as to whether an oral hearing is a necessary ingredient at the appeal stage of the asylum process and for its consideration of the problem which presents where the Commissioner makes a negative recommendation on the asylum application on grounds of credibility while simultaneously including the finding under s. 13(6) of the Act, which relegates the appeal to a papers only appeal.

32. In the course of his judgment, Cooke J. referred to the Supreme Court decision in *V.Z. v. Minister for Justice* [2002] 2 I.R. 135, where McGuinness J. stated:-

> *"I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The appellant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross-examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross-examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing."*

33. That case concerned the asylum process (the Hope Hanlon procedure) which was the precursor of the 1996 Act. In *M.O.O.S. v. RAC & Ors* [2008] IEHC 399, Birmingham J. was of the view that the dictum of McGuinness J. in *V.Z.*, was equally applicable, post the 1996 Act, and he stated:-

> *"I realise of course that McGuinness J. was speaking in the context of an earlier set of procedures, the Hope Hanlan Procedures, but the principles she sets out seem entirely unaltered."*

34. As observed by Cooke J. in *S.U.N.*, the asylum procedure in question in *V.Z.* was not one in which the personal credibility of the applicant had been a material issue. He made reference to his decision in *X.L.C. v. Minister for Justice* [2010] IEHC 148, where in the context of what constituted an "*effective remedy*" for the purposes of Council Directive 2005/85/EC of 1st December, 2005 (the Procedures Directive), he stated that that Directive:-

> *"…does not require that an appeal or effective remedy against a decision taken on an asylum application involve any fresh interview or any oral hearing (see Article 39). Indeed, it is to be noted that the Procedures Directive does not require that an applicant be allowed to remain in the Member State concerned pending the outcome of any appeal."*

35. He went on to state:-

> *"The exclusion of an oral hearing does not preclude the applicant giving evidence. He is entitled to require the Tribunal to consider such testimony as he wishes to have taken into account by way of written statement. The absence of an oral hearing is only a disadvantage where the contested issues of fact depend upon an appreciation of the personal truthfulness of an applicant."*

36. In a decision of 9th February, 2011, *H.I.D. v. Refugee Applications Commissioner & Ors* [2011] IEHC 33, again addressing the question of what constituted an effective remedy in the context of an appeal to the Refugee Appeals Tribunal, Cooke J. stated:-

> *"Furthermore the remedy takes the form of a full appeal on both matters of fact and law in which the appellant can put forward specific grounds by way of challenge to the ORAC report, advance legal submissions and offer new information including new or up to date country of origin information. Save for cases in which it has been excluded in one of the circumstances listed in s. 13(6) of the 1996 Act, the appellant is entitled to be heard in person by the Tribunal member. Even in appeals without oral hearing the appellant is entitled to introduce his or her own new written testimony and that of other witnesses. It is not a requirement of the remedy prescribed in Article 39 of the Procedures Directive that an appeal by way of de novo rehearing be provided. Indeed, it is noteworthy that it is clear from paragraphs 3(a) and 4 of Article 39 that an appeal may take place when the appellant is no longer personally present in the Member State and be by way of re-examination of the first instance decision rather than by way of de novo rehearing. It is also to be observed that the power of the Tribunal under s. 16(6) of the 1996 Act to require further information or enquiries from the ORAC meets the objectives envisaged in paragraphs 2(b) and 3 of Article 8 of the Directive."*

37. In the case of *Sen He v. Minister for Justice & Ors* (Unreported, High Court, 7th October, 2011), Hogan J., in determining the applicant's argument that ORAC had acted disproportionately in drawing a negative credibility inference for the purposes of s. 13(6)(c) of the 1996 Act, had cause to consider whether the applicant's case would be unfairly hindered without an oral appeal. After quoting the judgment of McGuinness J. in V.Z., he stated:-

> *"The key point is that the applicant must be given a fair opportunity to make his case on appeal. In the present case, the critical questions are whether the applicant's credibility is, first, undermined by a failure to make a claim for asylum several years after his arrival in the State and, second, whether the applicant has exhibited sufficient commitment to Catholicism such as might be said to give rise to a well founded fear that the applicant would suffer persecution if returned to China. It has to be said that these are relatively straightforward issues, at least so far as the undisputed facts of this case are concerned. In this regard it is important to stress that the applicant has already had the opportunity of giving oral evidence before the Commissioner in respect of the delay question and that the appeal will be against the Commissioner's adjudication in respect of that question. I find it hard to say that merely because there will be no oral appeal in a case such as the present one that the procedures adopted are thereby necessarily unfair."*

38. The circumstances which might give rise to unfairness were averted to in *S.U.N.* where, *inter alia*, the dictum of Clark J. in *S.O.M. v. Refugee Applications Commissioner* was considered. Cooke J. put it thus:-

> *"36. The potential of s. 13(5) to work an injustice where a subs. (6) finding is included in the s. 13 report was also adverted to by Clarke J. in Moyosola v. Refugee Applications Commissioner [2005] IEHC 218. In considering the arrangements under the Act of 1996 as they had been amended by the Immigration Act 2003, he noted one curious feature of the system:-*
>
> > *'It would appear that where the RAT hears an appeal in a case to which s. 13(6) applies, the only options open to the Tribunal are to allow the appeal or affirm the decision of the RAC. It does not appear that the case can be referred back to the RAC. This raises difficult questions as to the jurisdiction of the RAT in a case where there is as.[sic] 13(6) finding which is based in material part on a view as to credibility. If the RAT feels, for example, that such a finding (i.e. as. 13(6) finding) was not justified but nonetheless has doubts as to the credibility of the applicant the RAT cannot, apparently, conduct an oral hearing to satisfy itself on credibility. How should it then act. I would leave a consideration of this question to a case where it directly arises.'*
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> *Clearly therefore, Clarke J. was alive to the potential problem posed by the exclusion of an oral hearing on appeal when doubts are raised as to the reliability of a finding of lack of personal credibility in a s.13 Report.*
>
> *37. Clarke J. went on to consider whether that statutory scheme failed to comply with the principles of constitutional justice having regard to the particular sequence of events that occurred in that case. He held:*
>
> > *'Where a report of the RAC contains a finding in relation to one of the matters specified ins. 13(6) so as to deprive the applicant concerned of an oral appeal in circumstances where that finding is at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned, it is necessary, in accordance with the principles of constitutional justice, that prior to the making of any such recommendation including any such finding the RAC will have afforded the applicant concerned the opportunity to deal with any matters which might influence such adverse credibility finding.'*
>
> *He thus held that the scheme of the Act was not incapable of being operated in a manner consistent with the principles of constitutional justice provided that, where it is contemplated that as.[sic] 13(6) finding will be made on the basis of lack of credibility, there is an obligation to reconvene the s. 11 interview so that the applicant has an opportunity of rebutting the basis upon which the lack of credibility finding is to be made. The s. 13 reports in that case were quashed upon that basis namely, on the basis of a failure to comply with the principle audi alteram partem at first instance and not the ineffectiveness of the appeal remedy or the unfairness of the appeal procedure."*

39. As regards the specific issue which presented for consideration in *S.U.N.*, Cooke J. stated:-

> *"40. Where, as in the present case, a claim for asylum has been rejected in a s. 13 report upon the basis that the applicant has been found not to be telling the truth, the issue of personal credibility is clearly fundamental to the appeal and, accordingly, to the character of the appeal procedure as providing a remedy which is effective to rectify the basis upon which the claim has been rejected. Where, as here, the events and facts described by an applicant are of a kind that could have taken place (as opposed to matters which are demonstrated to be impossible or contradicted by independent evidence), but have been rejected purely because the applicant has been disbelieved when recounting them, it is, in the judgment of the Court, clear that the effectiveness of the appeal remedy as a matter of law is dependent upon the availability to the applicant of an opportunity of persuading the deciding authority on appeal that he or she is personally credible in the matter.*
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> *41. This is all the more obvious where the removal of the opportunity to avail of an oral re-hearing is the result of a factor which has no necessary or logical connection with the issue to be raised on appeal. Where personal credibility is the sole or primary ground for rejection of an application it is usually only in the s.13 report that the applicant realises that his credibility is in issue and crucial to his claim. The adverse presumption combined with the removal of his opportunity to rectify the personal impression he makes on the decision-maker tips the balance of proof against him in a way which is unfair in the sense that it results from a consideration which has no necessary connection with his conduct, testimony or the inherent nature of his claim namely the fact of his nationality.*
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> *42. If the present applicant had the nationality of a country which was not designated as a safe country and had based the claim for asylum on exactly the same facts and events, his appeal would entitle him to an oral re-hearing. It might be said that there is some logical connection between the removal of the oral hearing on appeal and some of the other findings covered by s.13 (6). Thus, for example, if an applicant's claim has been based upon false and misleading information there may be some logic and justification for considering that he has forfeited an entitlement to be heard once again. Similarly, a significant delay in making an application for asylum may give rise to the inference that the applicant is not genuinely a refugee and justify a presumption to that effect.*
>
> *…*
>
> *45. It follows, in the judgment of the Court, that where the Commissioner has a discretion (as has been found above) as to the inclusion or non-inclusion in the s. 13 report of a statutory finding under s. 13(6), the obligation to ensure that an*

applicant has access to an effective remedy by way of appeal under s. 16 to the Tribunal requires that the finding under paragraph (e) ought not to be included when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon lack of personal credibility.

46. From the conclusion the Court has reached above in relation to Article 39 of the Procedures Directive it effectively follows that for the same reasons the second limb of the preliminary issue must also be decided in the applicant's favour. The denial of an oral hearing which is otherwise available to asylum seekers as part of a statutory appeal remedy in a case where assessment of personal credibility is the sole or central issue challenged in the s.13 report, by reason only of a factor (nationality,) which has no rational connection to role of a hearing in the appeal, renders the procedure, in the judgment of the Court, unfair to a degree which is incompatible with the guarantee in Article 40.3 of the Constitution."

40. All of the above quoted cases involved a challenge to the recommendation of the Refugee Applications Commissioner in circumstances where, for various reasons pursuant to s. 13(6), the applicants were denied the benefit of an oral hearing on appeal. As has already been observed, in the present case there was no challenge to the Commissioner's recommendation, albeit it contained the finding under s. 13(6)(c) as part of the rejection of the asylum claim on credibility grounds. Therefore, insofar as counsel for the applicant argued that the RAC failed to adopt the type of approach advocated in *S.U.N.,* that argument has merely the status of an observation, in the absence of any challenge having been made to the s. 13 report.

41. However, what can be gleaned from the above-cited case law is that the courts are alert to the limitations which a papers only appeal process places upon an appellant where issues of credibility require to be addressed by the appellate body. That being said, there is no merit in the argument that a papers only appeal should require the Refugee Appeals Tribunal to make no credibility findings. With regard to the present case, at a minimum, the Refugee Appeals Tribunal had the findings made by the Commissioner, the arguments set out in the notice of appeal, the further written submissions, the medical and psychological reports and the country of origin information which had been furnished prior to the examination of the appeal.

42. The essential question here is whether the Refugee Appeals Tribunal's examination of the appeal was in accordance with the principles of constitutional and natural justice. The removal of the right to an oral hearing by the inclusion of a finding under s. 13(6) of the Act does not entitle an examination of the appeal to be considered otherwise than in accordance with the principles of natural and constitutional justice. It seems to me that the dicta of Cooke J. in *H.I.D.* and *S.U.N.*, in particular, while upholding the concept that an effective remedy does not necessarily require an oral hearing, nevertheless underscore the principle that the appeal process must be conducted in accordance with the principles of fairness and natural and constitutional justice. The courts are not blind to the potential disadvantage of a papers-only appeal when issues of credibility fall to be considered by the Refugee Appeals Tribunal.

43. In *U.P. v. Minister for Justice, Equality and Law Reform & Ors*, Barr J., in a judgment delivered on 26th November, 2014, stated:-

"The court is satisfied that this is a case where it is appropriate to permit the applicant to seek certiorari of ORAC's decision rather than pursue the statutory appeal to the RAT. This is due to the fact that the findings made pursuant to s. 13(6)(c) of the Refugee Act 1996 (as amended), has the effect of denying the applicant an oral hearing before the RAT. Where there negative credibility findings made against the applicant, the loss of the right to an oral hearing is a very serious matter and would put the applicant in a very disadvantageous position in relation to his appeal."

44. In *V.M. (Kenya) v. RAT & Ors* [2013] IEHC 24, Clark J. stated:-

"22. It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing. For instance, had this particular appeal not been blighted by extraordinary delays, the initial interview and possibly also his appeal would have been considered in the context of a child who could not even turn to his parents for protection. His mother had left and his father was an active Mungiki adherent prepared to lose his wife and daughter in pursuit of Mungiki beliefs. Instead, arising from the delays, by the time the appeal was considered the applicant was no longer a vulnerable seventeen year old asylum seeker but a 25 year old faceless adult whose claim was, quite bizarrely in the Court's view, found to have had no basis and thus confined to a paper based appeal.

…

25. In conclusion, the Court is satisfied that the Tribunal decision is flawed by reason of an irrational finding on the central issue of state protection, by a breach of fair procedures and a breach of statutory duty and should be quashed. The appeal will be remitted to the Tribunal for fresh consideration by a different Tribunal Member. As a postscript, the Court observes that should a Tribunal Member so desire, he / she has the power under s. 16(6) of the Refugee Act 1996, for the purposes of his / her functions under the Act, to request the Commissioner to 'make such further inquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary'. The Court is unaware of any authority which prevents a Tribunal Member from seeking a re-interview of an applicant under s. 11 of the Refugee Act 1996 on specific matters not previously raised by the ORAC, in cases where a finding has been made under s. 13(6). In expressing these views, the Court is mindful of the emphasis placed on the right to be heard by the Court of Justice in its decision in MM v. The Minister (Case C-277/11, 22nd November 2012) and by Hogan J. in his recent follow-on decision in the same case (MM v. The Minister [2013] IEHC 9)."

45. It is in the context of the applicants' entitlement to have their appeal determined in accordance with the principles of natural and constitutional justice that the process afforded to them must be examined. This court is not concerned with determining the first named applicant's credibility; that is a matter solely reserved to the first instance assessor and, on appeal, to the Refugee Appeals Tribunal.

46. A comparative analysis of the s. 13 report and the Tribunal's decision shows that the Tribunal Member did not confine himself to the credibility issues raised in the s. 13 report. This is particularly evident in the case of the first named applicant's previous passport and the information which that document yielded regarding a visit to Saudi Arabia for religious purposes. This issue was not addressed in the s. 13 report. Counsel for the respondent submits that insofar as the Tribunal Member made adverse credibility findings against the first named applicant on this issue, (and indeed which was found to have seriously undermined her claim to have a well- founded fear of persecution on account of her renouncing of the Islamic faith), such a finding was open to the Tribunal Member in circumstances where the matter had been specifically raised in correspondence and where the first named applicant had been given an opportunity (which she availed of) to respond to the queries raised. Moreover, counsel for the respondent submits that this finding, having been raised with the applicant whose response was found wanting, is effectively a stand- alone finding which went to

the heart of her credibility. It is argued that given that she was found wanting in this regard, the entirety of the first named applicant's claim falls away and does so in circumstances where she was afforded constitutional and natural justice.

47. On the other hand, counsel for the applicant argues that there should have been further engagement on this matter, which, it is submitted, would have occurred had the applicant had an oral hearing.

48. With regard to the Tribunal Member's rationale for his finding on the Umra visa, I am of the view that he should have afforded the first named applicant a further opportunity to engage on this issue, prior to arriving at his finding in the terms in which he did. In particular, I note that his adverse finding is infused with his own experiences as a visitor to Saudi Arabia. It seems to me that had there been an oral hearing it is probable, given the Tribunal Member's own experiences as a visitor to Saudi Arabia, that he would have queried the applicant's explanation for the presence of an Umra visa on her passport. The applicant and/or her legal representative would have had an opportunity to make submissions on the issue, as outlined by her counsel to this court. I refrain from repeating them, as they are not matters which concern this court, as they seek to address the observations made in the Decision. Whether they would have held sway with the Tribunal is a matter entirely for the Tribunal. Suffice to say that I am satisfied, given the restricted scope of the appeal, that if the Tribunal Member was going to rely on his personal experience as a visitor to Saudi Arabia, the dictates of fairness required the Tribunal Member to apprise the first named applicant of this matter, before relying on his own experience (as he did) as part of his rejection of her explanation for the existence of the Umra visa.

49. It is also somewhat perturbing that the Tribunal Member believed it was appropriate to make a finding that the first named applicant had "*effectively abducted her child*" and that the Tribunal Member went on to "*not accept that her husband would have allowed the matter of the abduction of his child to go unreported, so that that child could have left Pakistan with her mother (the applicant) undetected, through the various security checks, when departing Pakistan in early September 2009*". This was not an issue which was addressed by the Tribunal in its letter of 15th April, 2010 to the applicants' solicitor. In my view, before the Tribunal Member adverted to such matters in the decision, they should have been addressed with the first named applicant. This is so because the Tribunal Member ventured into the realm of speculation in asserting his view of the husband's likely course of action, and did so in circumstances where the applicant had made specific claims regarding the nature of her married life. The issue of the first named applicant having effectively abducted her child was not addressed in any shape or form in the s. 13 report. To my mind, this made it all the more imperative that before impugning the first named applicant's credibility on the issue of how she could have left Pakistan in circumstances (as surmised by the Tribunal Member) where the authorities would have been alerted to the child's abduction, she should have been given an opportunity to know that this was something which was of concern to the Tribunal Member.

50. With regard to the failure of the Tribunal Member to make reference to the first named applicant's brother's letter in the context of assessing the six week delay in seeking asylum, counsel for the respondent submits that there is no requirement on a Tribunal Member to refer to all aspects of the evidence and, in any event, counsel argues that the first named applicant's affidavit does not disclose how her brother's letter corroborates the applicant's explanation, to the extent necessary for the Tribunal to refer to it. I do not find merit in counsel's submission on this issue. A perusal of the papers in this case shows that the brother's letter was a component of the first named applicant's appeal in the same way as were the medical reports and the country of origin information. Whatever the weight that might be attributed to it (and that was a matter entirely for the Tribunal Member), the letter merited consideration. This was especially the case given that what the Tribunal Member was presented with was a papers only appeal. In coming to this conclusion, I am conscious of what Cooke J. stated in *X.L.C. v. Minister for Justice* (already quoted), namely that an appellant "*is entitled to require the Tribunal to consider such testimony as he wishes to have taken into account by way of written statement*".

51. I am also satisfied that a mere statement in the Decision that the Tribunal Member had considered country of origin information was not an appropriate treatment of the country information relied on by the first named applicant in aid of her appeal. In as much as it was suggested by counsel for the respondent that the dictum of Peart J. in *F. v. RAT* could apply to the present case, I reject that submission in circumstances where the Tribunal Member himself did not invoke that dictum and where he stated that he had "*regard*" to country of origin information, albeit he did not, in the course of the Decision, allude to the nature of that regard or express a view as to the weight he afforded the information.

52. Overall, I am satisfied that the "*extreme care*" which the consideration of a papers only appeal necessitates (as referred to by Clark J. in *V.M.*), was not afforded to the applicants' appeal in this case. Thus, the absence of that extreme care, together with the failure of the Tribunal Member to further involve the first named applicant prior to rendering his Decision, convinces this Court that substantial grounds have been made out which warrant the granting of leave in this case and the granting of an order of *certiorari*.

53. Accordingly, I formally grant leave and will give an order quashing the decision dated 2nd September 2010. The matter must be remanded back to a different member of the Refugee Appeals Tribunal for consideration. It goes without saying that the appeal remains a papers only appeal.