

HIGH COURT

[2023] IEHC 197

[Record No.: 2022/778 JR]

BETWEEN:

E.S.O.

APPLICANT

AND

**THE INTERNATIONAL PROTECTION OFFICE, THE MINISTER FOR
JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY
GENERAL**

RESPONDENTS

**JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 24th day of
April, 2023**

INTRODUCTION

1. In these proceedings the Applicant challenges a first instance decision of the First Respondent to make a recommendation pursuant to s. 39(3) of the International Protection Act, 2015 [hereinafter “the 2015 Act”] that both refugee and international protection status should be refused. An appeal against this refusal recommendation has been lodged with the International Protection Appeals Tribunal (hereinafter “the IPAT”) without prejudice to the within proceedings by way of judicial review. At the heart of the Applicant’s complaint is an asserted failure on the part of the First Respondent to properly consider distinct elements of his claim. Specifically, it is complained that the application for protection status was grounded both on his membership and leadership of identified political groupings in Nigeria without separate findings being made in respect of each.

BACKGROUND

2. The Applicant is a Nigerian national who applied for refugee status in the State on the 29th of December, 2021 on the basis of a claimed fear of persecution and serious harm in Nigeria arising from his support of and membership of a group known as the Indigenous People of Biafra (hereinafter “IPOB”) and a branch of that group known as the Eastern Security Network (hereinafter “ESN”). The Applicant stated that he had been a member of the IPOB, a proscribed terrorist organisation in Nigeria, for three years prior to his departure and that two years earlier he had become involved as a leader of the ESN, a branch of IPOB formed to deal with Fulani herdsman attacks. He claimed to have become a leader in the ESN and as a result his name is on a wanted list with the Nigerian Joint Task Force.

3. In the IPO Questionnaire completed by the Applicant in support of his application for international protection, he claimed that his life was in danger because of his membership of IPOB and his leadership position with the ESN. The following exchange is recorded as having occurred at interview:

“Q. 16 Can you tell me in your own words why you are seeking international protection here in Ireland?”

A. The reason I am looking to stay in the country is because the army in Nigeria is looking for me because I am a member of IPOB, I am a leader.

Q.17 What is it you fear specifically about returning to Nigeria?

A. If I go back to Nigeria, they will kill me, because my name is on the wanted list of people marked for them to kill.

Q.18 Can you tell me why your name is on the wanted list?

A. Because I am a member of IPOB, I am a leader and the Fulani people are trying to take over our land. They are looking for me and want to kill me because of this that is why I ran away. They shot my father.”

4. It is clear therefore from the terms of his responses both in his original questionnaire and during interview that the Applicant claimed a fear of persecution and risk of harm not only because of his leadership position but arising from his membership of these organisations.

DECISION

5. In the Report prepared on behalf of the First Respondent pursuant to s. 39 of the 2015 Act grounding the refusal recommendation, the Applicant's claim is summarised as follows:

“The applicant claims that he is a member of the Indigenous People of Biafra (IPOB) for 3 years. 2 years ago he became involved as a leader of the Eastern Security Network (ESN), a branch of IPOB originally formed to deal with Fulani herdsmen attacks.

The applicant claims that because he is a leader in the ESN his name is on a wanted list and as a result the Nigerian Joint Task Force (JFN)”

6. The Report goes into some detail in the consideration of the Applicant's credibility (at pages 5 and 6). References are made to particular replies he gave in his s. 35 interview and references are also made to various COI reports. It is noted in the Report that for two of the three years of the Applicant's involvement with the IPOB, he claims to have been a leader but the decision-maker found that he was vague and often lacking in detail when answering questions about his claim.

7. The decision-maker gives a number of examples of inconsistencies in his account:

- (i) He stated that he knew the Nigerian army were looking for him because they burnt down his house; later he stated that he had been hiding for 6 months because he knew they were looking for him.
- (ii) He then stated that his problems with the Nigerian army started up to a year ago.
- (iii) The decision-maker quotes from a COI report of Africa Centre for Strategic Studies, which stated that *“Nigerian security forces and ESN have clashed in a series of skirmishes in 2021 that have resulted in the deaths of several civilians in what has become known as the Orlu crisis. ESN has inflamed tensions by killing police officers at checkpoints in several locations in the South East.”* The decision-maker finds that in the light of this information, it was not credible that the Applicant would only have involvement in searching the bush for Fulani and not mention any engagement with Fulani herdsmen to drive them away.

8. The Report records that the Applicant's nationality and personal circumstances were accepted but his claim to be on a wanted list due to his involvement with IPOB and the ESN was not accepted:

“given the applicant's inconsistency and vagueness, and the credibility issues mentioned above”.

9. The Report further records under the heading “*Credibility*” as follows:

“In accordance with s. 28 of the International Protection Act 2015, I have assessed the credibility of the applicant's claim having had regard to all relevant matters. The material facts of the applicant's claim are as follows:

The applicant's nationality and personal circumstances;

The applicant was on a wanted list due to his involvement with the IPOB and the ESN.”

10. Accordingly, the only accepted facts relied upon in considering the claim of persecution and real risk of serious harm were:

“The applicant's nationality and relevant personal circumstances, namely he is a 38 year old married Christian man from Mgbowo, Enugu State Nigeria, who has 4 children with his wife.”

11. In particular, it was stated:

“With respect to the applicant's feared persecution as noted in section 2 of this report, the facts that underpin the applicant's fears have been rejected and accordingly there are no grounds upon which to base the feared persecution.”

12. The Report does not expressly address the question of a fear of persecution or risk of serious harm within the meaning of s. 2 of the 2015 Act on the basis of mere membership of the IPOB and the ESN as conclusions are expressed in terms rejecting a claim that the Applicant “*was on a wanted list due to his involvement the IPOB and the ESN.*”

13. Country of origin (COI) material is referenced in the body of the Report and all COI considered is listed on a reference page. The COI records clashes between revived Biafran secessionists, including the IPOB and ESN, and Nigeria’s security forces “*resulting in dozens of deaths*” and the killing of 150 IPOB supporters and members in 2015 and 2016 (Nigeria’s Diverse Security Threats, Africa Center for Strategic Studies, March, 2021), the killing by the military, police and Department of State Services of at least 115 people in the South East between March and June (2020) as part of security operations against the separatist IPOB and ESN (Country Reports on Human Rights Practice in Nigeria, 2021). COI referenced in the Report confirms that separatist agitations in the South were sometimes met with excessive use of force (Human Rights Watch, Nigeria, 2021).

14. Reliance is placed in the Report on the violence in the Northwest of the country to conclude that indiscriminate violence is generally located in that area and as the Applicant is from the South there are no substantial grounds for concluding that he is at risk of indiscriminate violence, if returned. In the context of this finding, no reference is made to the documented violence against members of the IPOB and ESN and no express finding is made that the violence against members of the IPOB and the ESN does not give rise to a risk of indiscriminate violence.

ISSUES

15. The decision of the First Respondent is challenged on the basis that there has been a failure to consider all elements of the Applicant’s claim. Although it was found that the Applicant was not a leader of either organisation and not therefore on a “*wanted*” list, no finding was made as to whether it was accepted that he was a supporter or member of either organisation.

16. The Applicant further complains that COI was relied upon without notice to the Applicant in breach of the maxim of *audi alteram partem* and that there was a failure to properly assess the credibility of his claim having regard to relevant COI addressed to risk associated with membership of the IPOB and ESN.

17. The Respondents do not accept that the decision of the IPO is flawed for the reasons contended but maintain, in any event, that these proceedings should be dismissed in circumstances where an appropriate, alternative remedy exists in the form of an appeal to the IPAT. While the proceedings are out of time, the Respondents further indicate that they have no objection to the grant of an extension of time.

DISCUSSION AND DECISION

Requirement to Rule on Distinct Elements of Claim

18. It is properly maintained on behalf of the Applicant that Member States are under a duty both as a matter of EU and domestic law to assess an application for international protection on an individual basis and having regard to up-to-date information in relation to the country of origin. Section 28(1) of the 2015 Act provides in clear terms for an obligation on the IPO, in co-operation with the Applicant, to assess the relevant elements of the application. Section 28(2) of the 2015 Act provides in like terms for a duty on the IPAT on appeal to assess the relevant elements of the application. This means that the Applicant is entitled to have the relevant elements of his claim assessed at both first instance and on appeal. Elements of the claim which are required to be considered are further prescribed at s. 28(3) and include at s.28(3)(i) the reasons for applying for international protection. Sections 34 and 35 of the 2015 Act provide for a personal interview as part of the examination of the application.

19. It is clear that while the Applicant put forward a specific narrative with regard to his leadership role, it was a core part of the Applicant's claim that he would be persecuted or exposed to serious harm if returned to his country of origin by reason of his membership of IPOB/ESN *simpliciter*. I fully accept that, as established in *M.A.B. v. Refugee Applications Commissioner* [2014] IEHC 64 and recently reiterated in *M.M. v. CIPO & Ors.* [2022] IECA 226, where a claim is advanced based on several elements then a decision should properly make clear and separate findings in respect of the different elements of the claim. Accordingly, in order to properly address the claim of risk based on membership of the IPOB/ESN, the decision maker would have needed (a) to decide whether or not it was accepted that he was indeed a member; and (b) if it was accepted that he was, to decide whether or not he was or would be likely to be subjected to persecution for that reason if returned to his country of origin. Issue (a) would have needed to be addressed by reference to the evidence put forward by the appellant

about his own personal circumstances, while issue (b) would have to be addressed in light of country-of-origin information more generally together with evidence put forward by the Applicant.

20. In *M.M.*, Ní Raifeartaigh J. concluded, having first rejected the argument that there had been an implicit finding that the applicant was not a lesbian in that case on the basis of a careful assessment which included a review of the questions asked (or more particularly not asked), that the decision was flawed because of the failure to consider and make explicit findings in respect of a central claim as follows (para. 88):

“In view of the guidance provided by the court in the A,B and C case, and in view of the central role of the appellant's sexual orientation in her application for international protection, I am of the view that the decision-maker erred in failing to pose and answer the questions: (a) Is the applicant of lesbian sexual orientation?, and (b) If so, is she at risk of persecution or risk to her personal safety if returned to her country of origin? These questions fell to be determined on the basis of the specific evidence submitted by the appellant as well as country of origin information. However, they required clear articulation as issues to be determined, and answer, and this did not occur.”

21. The reasoning which supports this conclusion in *M.M.*, where an element of the narrative was rejected without expressly addressing the question of sexual orientation simpliciter, is expanded upon at para. 91 of the judgment where Ní Raifeartaigh J. states:

“This distinction may appear to be a fine one, but we consider it to be important. It is possible, in principle, that a person might exaggerate or falsify a factual narrative in order to support a claim of a particular sexual orientation, while nonetheless actually having that orientation in reality. The point is that the conclusions should be reached and clearly articulated in respect of whether she is accepted to be lesbian sexual orientation and if so, whether this would pose a risk to her personal safety if she were returned to her country of origin.”

22. The Respondents’ position in this case is that *M.M.* is distinguishable in that the impugned decision in fact considered both elements of the Applicant’s claim as there is a

reference on p. 2 of the decision to the fact that the Applicant claims that he was a member of the IPOB / ESN and that he was a leader of these organisations. It is further contended that in finding that the Applicant's claim was based on being on a wanted list due to his involvement with IPOB and ESN, the First Respondent did not confine the analysis to the claim that the Applicant was a leader of these organisations and therefore on a wanted list but considered also his claimed "*involvement*" be that either a member or a leader. The Respondents argue that by the decision maker only accepting the credibility of the Applicant's nationality and personal circumstances (a Christian man from Mgbowo, Enugu State, South Nigeria), the claim that he was in any way involved with the IPOB and/or the ESN be that as a member or a leader was rejected.

23. While the Respondents maintain that this case falls to be distinguished from *M.M.* because a clear finding of fact was made that the Applicant was not in any way involved with the IPOB or the ESN, this is not what the Report of the Decision records in its terms. In fact, the finding recorded in the Report of the Decision is that the Applicant is not on a wanted list due to his involvement as opposed to a clear finding of no involvement with either of the two groups. It is recalled that the Applicant claimed he was on a wanted list not because of his membership *simpliciter* but because of his leadership role. Properly, the decision-maker ought to have separately addressed the claims of membership and of leadership in a clear manner so that there could be no doubt as to the decision-maker's meaning. Accordingly, it seems to me that the Applicant's argument that there has been a failure at first instance to separately address the distinct elements of the claim made based both on membership and leadership of the IPOB and the ESN has some force having regard to the absence of an explicit finding in the decision. This said, it is not as clear as it was in either *M.A.B.* or *M.M.* that it is unsafe to conclude that the question of membership was considered given reference to the Applicant's claimed membership in the decision itself and the use of the more generic word "*involvement*" in the finding made. This is a more borderline case than either *M.A.B.* or *M.M.* A real issue therefore arises as to what the consequence of this frailty with the decision should be.

Consideration of COI

24. The Applicant maintains a dual significance arising from an alleged failure to consider COI in this case in relation to violence against members of the IPOB and the ESN. In *Z.A. v. IPAT & Anor* [2021] IEHC 416 Burns J. notes (at para. 18):

“Whilst the First Respondent made very significant credibility findings against the Applicant in relation to his claim, its consideration of whether there was a real risk of serious harm pursuant to Article 15(c) of the Qualifications Directive does not relate to such credibility findings but rather is an objective determination of whether a substantial risk of serious harm arises for an individual by reason of indiscriminate violence in a situation of international or internal armed conflict in his home region.”

The Applicant relies on Z.A. to maintain that the failure to properly consider COI is significant not only because credibility findings should be made in the context of relevant COI (a matter returned to below) but also because it is fundamental to a proper consideration of risk of serious harm from indiscriminate violence pursuant to Article 15(c) of the Qualifications Directive.

25. The Respondents maintain that the decision-maker considered the content of the six COI reports (listed at p. 15 of the impugned decision) and referenced them throughout the decision. I reject any suggestion on the part of the Applicant that the fact that supporting COI in each of the Reports which is to similar effect to COI expressly identified must be referred to in the Report to establish that it has been considered. What is clearly important is that the decision maker was aware and considered the fact that COI demonstrates violence against members of the IPOB and ESN groups. It is not necessary to demonstrate that information to similar effect in other COI before the decision maker was separately and individually considered. The fact that one piece of COI is referred to for one purpose without referring to other elements of the same COI material which might tend to support the Applicant, does not mean that this supportive material was not considered. There is no doubt from the terms of the Report of the Decision that information as to violence against members of the IPOB and ESN was considered because COI identifying such violence was quoted in the body of the Decision showing that the substance of this information was considered by the decision maker.

26. The Respondents further maintain that the reference to indiscriminate violence in the Northwest of the country constitutes an implicit finding that COI describing violence against the IPOB and ESN groups, some of which is quoted in the body of the Report itself, does not constitute indiscriminate violence for the purposes of Article 15(c) of the Qualifications Directive. I agree with the Respondents’ submission in this regard and read the reference to the Northwest as a finding that the test in Article 15(c) of the Qualifications Directive was not considered to have been met by COI relating to indiscriminate violence elsewhere in Nigeria including violence documented against IPOB and ESN in the South. Whether this finding is

sound in law and fact is a matter for IPAT on appeal following such further submission on behalf of the Applicant as may be made. I do not consider that grounds for challenging the decision of the IPO in judicial review proceedings is established on the basis that there has been a failure to make a finding under Article 15(c) of the Qualifications Directive expressly directed to COI in respect of violence against IPOB and ESN members. Of course, the correctness of this finding is a matter which it is open to the Applicant to revisit on appeal.

Principle of Audi Alteram Partem

27. In addition, the Applicant claims that there was a breach of the principle of *audi alteram partem* in the decision-making process of the IPO on the basis that COI reports (listed as references 5 and 6 on p. 15 of the impugned decision) were not put or shown to the Applicant until the delivery of the Report. The Applicant claims that had he been made aware of the intention to rely on these reports prior to the making of impugned decision, he would have had an opportunity to point to the irrelevancy of some of the parts relied upon and the relevance of other parts which are supportive of the Applicant's claims of risk arising from mere membership of the IPOB and the ESN. This claim is advanced notwithstanding that the decision-maker clearly references COI which documents the targeting of members of the IPOB and the ESN in the Report and therefore clearly made a decision having considered this COI. Separately, it is complained that the Applicant was not advised that the decision-maker considered his account vague and it is contended that he should have been given an opportunity to address this, particularly where an issue had been identified with regard to translation during the course of the s. 35 interview.

28. The Applicant's essential point with regard to the COI seems to be that had he known the importance to be attached to one element of a particular report, he would have pointed to other elements of the same report which were supportive of his position. *Z.A. v. IPAT* [2021] IEHC 416 was cited on behalf of the Applicant in support of the claim that the Applicant should have been given notice of the COI to be relied upon in the decision and afforded an opportunity to respond. In *Z.A.*, Burns J. granted *certiorari* of a decision on appeal of the IPAT. In her decision Burns J. referred to the decision of Clarke J. in *Idiakheua v. Refugee Appeals Tribunal* [2005] IEHC 150 holding that (para. 16):

“the obligation to fairly draw the attention of the applicant or the applicant’s advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal’s determination.”

29. Burns J. found that (para. 14):

“on the particular facts of this case, the 2018 EASO report had a distinct significance to the applicant. The 2019 EASO report altered that significance.”

30. It is important to note, however, that in *Z.A.* there was a specific reason why the 2019 EASO report, which had “*a distinct significance*” (para. 14), should have been brought to the attention of the Applicant. Indeed, in *Z.A.* the Court referred to the separate statutory duty arising under s. 46(8) of the 2015 Act (a prescribed duty which appears to arise at appeal stage but not first instance) to furnish an applicant with an indication in writing of the nature and source any information relating to the appeal which has come to the notice of the Tribunal in the course of the appeal, presumably encapsulating information which was not already identified through the first stage process.

31. The application of the principle of *audi alteram partem* and the determination of whether it has been complied falls to be considered having regard to the facts and circumstances of each individual case. It seems to me that the Applicant’s claim with regard to breach of the principles of *audi alteram partem* on the facts and circumstances of this case is easily disposed of on an application of established principles. In *B.N.N. v. Minister for Justice* [2009] 1 IR 719 Hedigan J. cited Herbert J. in *D.H. v. Refugee Applications Commissioner* [2004] IEHC 95 (unreported High Court, Herbert J., 27 May, 2004) at p. 19:

“The principle of audi alteram partem does not require the determinative body to debate its conclusions in advance with the parties.”

32. In *B.N.N.* Hedigan J. observed as follows (at para. 33):

“33. It would be completely impossible to reach an expeditious conclusion if a decision-maker was required to debate with the person who is to receive the decision each and

every one of the conclusions on credibility that he was going to reach. Moreover, if a decision-maker was to say to a person, in respect of each dubious comment, “I don’t believe that is true”, the person telling the story would lose the nerve to tell their story, true or false. It is important to bear in mind that the ORAC officer is not conducting a criminal trial. Rather, he or she is conducting an investigative procedure, on an inquisitorial basis.”

33. Hedigan J. continued to state (para. 37):

“...it is not incumbent upon the respondent to put each and every piece of country-of-origin information to the applicant. The respondent’s duty is, rather, to consider the country-of-origin information”.

34. This position was confirmed as a matter of EU law by the CJEU in case *C-277/11 M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*. The Respondents state in their submissions:

“31. The CJEU held that the duty to cooperate under article 4(1) does not require “the national authority responsible for examining an application for subsidiary protection to supply the applicant before adoption of a negative decision on that application ... with the elements on which it intends to base its decision and to seek the applicant’s observations in that regard” (para. 60). This interpretation was not required by the terms or the system of the QD.

32. The court explained that the assessment of article 4QD took place in two separate stages. The first stage concerned the establishment of factual circumstances which may constitute evidence that supported the application (the matters set out in article 4(2)QD), while the second stage related to the legal appraisal of that evidence under article 4(3)QDF. Member States were only required to cooperate in respect of the former pursuant to article 4(1)QD (para. 64-68). The legal examination at the second state was “solely the responsibility of the competent national authority” (para. 70). The requirement to take into consideration COI is set out in article 4(3)QD as part of the second stage.

33. *The CJEU also observed that the QD in no way sought to prescribe the procedural rules applicable to the examinations of an application for international protection or, therefore, to determine the procedural safeguards which must, in that respect, be afforded to an applicant for asylum (para. 73)."*

35. I am quite satisfied that there is no breach of the principle of *audi alteram partem* on the facts of this case arising from the failure to identify to the Applicant which COI information would be relied upon. I accept the Respondents' submission that the information which the Applicant would have highlighted had he been aware of the COI to be relied upon by the First Respondent is information which had in any event been clearly considered by the First Respondent. This much is clear because reference is made to similar COI information which is expressly quoted in the decision and which is to the same effect as the material which the Applicant states it would have highlighted. I am satisfied that in such circumstances there was no obligation on the First Respondent to bring this report to the attention of the Applicant prior to issuing a decision and that no special or distinct reason (akin to that present in *Z.A.*) existed to flag reliance on this particular COI.

36. As for the contended failure of the decision maker, in purported breach of the requirements of *audi alteram partem*, to advise the Applicant that it was considered his account was vague and implausible in light of the COI, I am satisfied that this contention does not withstand scrutiny in this case. The Applicant has submitted that the First Respondent should have informed him that it was believed that his answers were vague and should have pointed to perceived discrepancies in his account to allow him to address these. He claims that it is unsafe to base the negative credibility findings on perceived vagueness and/or contradictions given that the applicant had raised at the s. 35 interview that he had some difficulty communicating with the interpreter. It is also claimed that he was unlawfully denied the benefit of the doubt under Article 4(5) of the Qualifications Directive. It is well established, however, that a decision maker is not required to debate with the person who is to receive the decision every one of the conclusions on credibility that might be made (see *A.T. v. R.A.T.* [2015] IEHC 587). In *B.W. v. R.A.T. (No. 2)* [2015] IEHC 759, Humphreys J. set out six categories of credibility finding (at para. 20) and was of the view that the obligation to put matters to the applicant arose in only two of these categories as follows:

“(i) A point where an aspect of the applicant’s case is not inherently implausible as a matter of probability but where an explanation might reasonably be called for. In such a case, the tribunal might well decide to disbelieve the explanation once an opportunity for it had been afforded, but it must afford that opportunity if it has not already arisen. Into this category falls a decision by the tribunal to cast doubt on the husband’s death certificate because the death certificate is dated the same day as the death. The tribunal says that this “must be seen as unusual and must call into question the authenticity of the document”. When I asked Ms. Martinez how an applicant was supposed to know that a matter like this was of concern to the tribunal, she accepted that normally the tribunal would have to make the applicant aware of that. I find that a matter falling into this category is one that should be specifically put to the applicant if the tribunal is to rely on it. This was not done in the present case.

*(ii) Contradiction or confusion on the face of the papers. Where a decision-maker identifies contradiction or confusion on the face of the material submitted to it, it seems to me that it is not, in general, required to go back to the applicant to give the applicant a further opportunity to address that matter. There must be an onus on an applicant to read all documents and material before the decision-maker and to address, of his or her own motion, any contradictions, inconsistencies or ambiguities in that material (see comments of MacEochaidh J. in *M.A. v. Refugee Appeals Tribunal* [2015] IEHC 528, para. 22). A decision-maker is not required to go back to an applicant in this regard. I would regard a number of the applicant’s complaints in this case as falling under this heading, such as whether those seeking to pressurise the applicant called her on the phone or called to her, and whether her account tended to contradiction and confusion as found by the tribunal.*

*(iii) Points where the applicant already has had an opportunity to deal with the issue. In the case of an appeal to the tribunal, the applicant has already been through the Refugee Applications Commissioner process and would have been put on notice of a number of issues. Whether those issues are the subject matter of a specific adverse finding or are simply raised on the papers is not especially relevant for this purpose, because the onus must be on the applicant to address those issues (see *M.A.*, para. 22). The tribunal, or any decision-maker, does not normally have to give an applicant a specific opportunity to comment on matters of which he or she has already had fair warning. Into this category fall the applicant’s complaints that she had not given any*

account of the Nigerian authorities acting against her, that she had not explained the inaction of the authorities, and that she lacked credibility having regard to her lack of knowledge of her husband's movements. These were all matters on which the applicant was sufficiently on notice having regard to the Commissioner's decision.

*(iv) Where the applicant's account is implausible on its face. A decision-maker is not required to specifically contact an applicant to inform him or her that the account presented is inherently implausible on its face. This is something an applicant must have some onus to address. Implausible stories are, of course, sometimes true, but where a story is or appears to be inherently implausible, an applicant cannot complain too strenuously of invalidity as to the decision unless he or she addresses that implausibility and if necessary provides sufficient supporting information or material to show that an apparently unlikely account is, in fact, one which could reasonably have happened. The points referred to under (iii) above could also be viewed under this heading. (See *T.A. v. Refugee Appeals Tribunal [2014] IEHC 204*, which supports the proposition that simply disbelieving the applicant on an implausible story does not need to be specifically put to the applicant.)*

*(v) Where the decision-maker comes into possession of new information. Whether new information needs to be put to an applicant depends on whether it materially changes the picture before the decision-maker. If there is such a material change, adverse to the applicant, then as a matter of generality that new information should be put (*M.A.*, para. 22). But where new information comes to light after the applicant has had an opportunity to comment, which does not alter the picture before the decision-maker, the decision is not invalid by reason only of a failure to put that information. In the present case, the tribunal carried out its own private research on country of origin information, which was not put to the applicant, but that research did not throw up anything different to the country of origin information which was before the tribunal in the first place. On that basis, there was no breach of duty on the part of the tribunal.*

(vi) Where the finding is one of an absence of evidence. The onus is on the applicant to submit whatever appropriate and available evidence he or she has. If there is a clear omission in the material furnished by the applicant, a decision-maker is not necessarily obliged to go back to the applicant to point out this omission unless it is one which does not inherently call for an explanation from the applicant. In the present case, the

tribunal made a comment that the applicant had not proved her marriage to her deceased husband by producing any certificate in that regard. This is simply a legitimate and probably a reasonably predictable comment arising from the state of the material presented on behalf of the applicant and did not need to be put to the applicant. In any event, reading it in context, it appears to be a comment rather than a specific finding against the applicant. Had the tribunal latched onto a less obvious omission there might have been an onus to draw that specifically to the applicant's attention."

37. I am not satisfied that there was any onus on the First Respondent to put to the Applicant that his account was considered vague and the First Respondent discharged duties in this regard by affording the Applicant an opportunity to answer questions and asking questions in a different way where insufficient information had been given. The record of the s. 35 interview demonstrates that further questions and reformulated questions were put to the Applicant.

38. Even accepting the argument that the finding that the Applicant's account was implausible in the light of available COI would ideally have been put to the Applicant (and I do not accept that it is necessary to identify an account as implausible unless there is something specific in the COI which gives rise to such a necessity), it is noted that a failure to put a matter was not found to vitiate a decision in *B.W.* in circumstances where there were sufficient other negative credibility findings to ground the impugned decision. While the other credibility findings may not be as robust in this case as in *B.W.*, a key point of distinction between this case and *R.A.*, *A.T.* and *B.W.* insofar as credibility findings are concerned, is the fact that this case involves a first instance decision rather than a final decision on appeal. It is also of some significance in my view that the concern as to vagueness and implausibility identified in the Report of the decision maker flowed from the limited nature of responses provided despite opportunity being afforded to the Applicant to elaborate through the rephrasing of questions. The requirements of fair procedures might be otherwise were a direct conflict with COI identified. Such a direct conflict might have required to have been put to the Applicant because of a distinct or specific issue with the claim advanced.

39. While the Applicant reported a concern about translation, it is no part of the Applicant's case that he did not understand a question or that his answers were not fully translated and that matters contained in answers he gave have been omitted. Accordingly, it seems to me that the evidential basis for any substantive complaint in this regard has not been laid. In any event, an

issue with translation is a matter which can be addressed during an oral hearing on appeal in which the Applicant will have the opportunity to ensure that any issue with regard to translation is addressed by correcting the record or elaborating on responses or otherwise as appropriate.

40. It is further recalled that the Applicant has every opportunity on appeal to parse the COI which was before the first instance decision maker. Indeed in *B.W., Humphreys J.* referred to cases on appeal to the tribunal where applicants had already been through the first instance process (then the Refugee Applications Commissioner process) and would have been put on notice of a number of issues which may never have been put to the Applicant but may simply arise on the documents but that this constitutes “*fair warning*” and obviates the necessity on appeal to give the applicant a specific opportunity to comment on such matters (para. 20(iii)) as the applicant is deemed to be sufficiently on notice having regard to the first instance decision. It is open to the Applicant to contend on appeal that the decision maker failed to have proper regard or give proper weight to elements of COI which support the Applicant’s claim. Indeed, routinely in appeal documentation submitted, applicants refer to material already before the IPO or new material to make the case that the first instance decision was wrong in the light of a proper consideration of the COI. The Applicant will also be able to ensure proper and effective translation and with the benefit of translation he will have the opportunity to expand upon or explain his answers during interview.

41. I find the Applicant’s asserted breach of principles of *audi alteram partem* to be untenable on the particular facts and circumstances of this case particularly having regard to the absence of distinct or special significance in the material identified which it is claimed should have been put and the stage of the process at which these proceedings were commenced.

Assessment of Credibility

42. As regards the more general complaint advanced with regard to the assessment of credibility, it is now trite law that the credibility of a claim falls to be considered in the context of relevant COI and a failure to do so renders the decision invalid (see *R.A. v. RAT & Ors.* [2017] IECA 297 and more recently *K(Zimbabwe) v. IPAT & MJE* [2023] IEHC 6). In *R.A. v. RAT & Ors.* [2017] IECA 297 (para. 41) Hogan J. stated:

“41. Although there is no finding as to the origin of the applicant in the decision of the Tribunal, it seems at least generally implicit in that decision that the ORAC’s finding to the effect that he was an Ivorian national who came from Adobo was accepted. In view, however, of the approach taken in cases such as Camara and AMT and the specific requirements of the Article 5(1)(a) of the 2006 Regulations, the failure of the Tribunal to consider the credibility of his claim in the context of relevant COI in itself rendered the decision invalid.”

43. I have already found above that relevant COI was considered and is referenced in the Report of the decision. There is no requirement to parse all elements of COI in order to establish that regard has been had to it, particularly when the Report of the decision discloses an awareness on the part of the decision maker as to the content of the COI.

44. Notwithstanding the Respondents’ submission that the decision maker followed the principles of *I.R. v. Minister for Justice* [2015] 4 IR 144; [2009] IEHC 353 in carrying out the credibility assessment and despite being satisfied that COI was considered, I see a potential problem with the assessment of credibility where an issue is properly identified with the characterisation of the claim and its component elements. Credibility findings are predicated on a correct identification and assessment of the distinct elements of the claim, all of which must in turn be informed by relevant COI. In other words, what constitutes relevant COI is framed by the claim identified for assessment. Where there is a failure to treat distinct elements of the claim in a clear manner, a question arises as to whether credibility findings can properly be divorced from the flawed characterisation of the claim and its component parts. In this case, the distinct elements are closely aligned insofar as they concern involvement with the IPOB and ESN – be it as a leader or member. The COI which requires to be considered as regards either claim does not appear to be materially different, certainly insofar as the information before me would suggest. Nonetheless, I have a concern that the issue with the characterisation of the claim may have tainted the credibility assessment insofar as COI was considered through the prism of a particular understanding of the claim.

45. In sum, therefore, while I have rejected some of the Applicant’s complaint, I see a frailty in the decision of the IPO arising from the failure to deal clearly with the distinct and separate elements of the Applicant’s claim. The question which now arises is whether this issue is of a

nature which would warrant the Court intervening in judicial review proceedings notwithstanding the existence of an alternative remedy in the form of a full appeal to the IPAT.

Alternative Remedy

46. In this case the Applicant has an entitlement to a full appeal, including an oral hearing, to the IPAT. There exists an elaborate statutory appeals process involving a *de novo* consideration of all issues. A serious question arises as to whether a discretionary remedy should be available by way of judicial review in the circumstances, even where a claim which might otherwise be amenable to judicial review is made out. The nature of the issues identified with a decision and the stage of the process at which the issues are identified is of fundamental importance in deciding whether it is appropriate to intervene by way of judicial review. While the issue identified in this case is one which has been amenable to judicial review in other cases cited, with the notable exception of the decisions in *M.A.B.* and *Stefan*, the case-law cited on behalf of the Applicant concerned second instance or appellate decisions. Accordingly, while the courts have been persuaded to intervene in judicial review in respect of issues pertaining to the characterisation of distinct elements of the claim or the assessment of credibility, such as those identified in this case, this does not mean that it is appropriate to do so where a case is amenable to appeal in a manner which is equally capable of curing the identified flaw(s).

47. The parties adopt diverging positions as to whether I should intervene by way of judicial review where the flaws complained about in these proceedings are found. For their part, the Respondents squarely rely on the principle set out in *State (Abenglen Properties)* [1984] I.R. 381 and a line of authority including *B.N.N. v. Minister for Justice and Equality & Ors.* [2009] 1 IR 719 indicating that, generally, alternative remedies should be exhausted before resorting to judicial review. The fundamental principle urged on behalf of the Respondents is that where Parliament has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the courts, *certiorari* should not issue when use of the statutory procedure for the correction of error is adequate and more suitable to meet the complaints on which the application for *certiorari* is grounded. It is the Respondents' position that the Applicant has an adequate and more appropriate remedy on the facts of the present case in a statutory appeal to the IPAT. The Applicant does not agree but maintains that this case falls outside the *B.N.N.* line of authority on the basis that the asserted flaws identified on behalf of the Application go to the jurisdiction of the IPO to make the challenged Recommendation. It is contended in

reliance on *Stefan v. Minister for Justice* [2001] 4 IR 203, that the Applicant is entitled to two fair hearings and should not be exposed to a decision on a material part of his claim being made for the first time on appeal.

48. It is true that in *Stefan v. Minister for Justice*, the Supreme Court found that the existence of a fair appeal does not cure an unfair hearing. This was in circumstances where the original decision was made in breach of fair procedures resulting in a decision against the appellant on incomplete information. In that case, a full section of the questionnaire described as “*not immaterial*” was omitted and therefore not before the decision maker. The Supreme Court found that once it is determined that *certiorari* may be granted, the Court retains a discretion in all the circumstances of the case as to whether an order should issue. The circumstances identified in the judgment in that case as relevant to the exercise of a discretion in judicial review proceedings included the existence of an alternative remedy, the merits of the application, the consequence to the applicant if an order that is not granted and the degree of fairness of the procedures.

49. In *Abenglen*, Henchy J. – with whom Griffin and Hederman JJ. Concurred – noted that in the Planning Acts, the legislature has envisaged p. 18):

“the operation of a self-contained administrative code, with resort to the Courts only in exceptional circumstances.”

50. He stated in this regard (p. 21 to 22):

“[W]here Parliament has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for certiorari is grounded.”

51. In *Z v The Minister for Justice, Equality and Law Reform* [2008] IEHC 36, McGovern J. observed with regard to the statutory scheme under the immigration code as follows (para. 8):

“The Oireachtas has put in place a statutory scheme for dealing with asylum applications which includes a right of appeal from decisions of the RAC. While there may be circumstances in which an error made by the RAC should properly be dealt with by an application for judicial review, the Courts should only grant leave to an applicant where the issues cannot adequately or conveniently be resolved before the RAT.”

52. It is clear therefore that the statutory scheme established by the Oireachtas in the area of asylum and immigration may be compared to that established under the Planning Acts and the observations of Henchy J. in *Abenglen* may be said to apply thereto by analogy. In *B.N.N. v. Minister for Justice* [2009] 1 I.R. 719, the High Court emphasised (with reference to the First Respondent’s predecessor) that (para. 45):

“it is only in rare and limited circumstances indeed that judicial review is available in respect of a decision of the Refugee Applications Commissioner”

53. The Court found that an had to demonstrate (para. 45):

“a clear and compelling case that an injustice had been done and that it is incapable of being remedied on appeal to the Refugee Appeals Tribunal.”

54. In his judgment in *B.N.N.*, Hedigan J. cited a significant number of asylum cases in which the Court had refused to grant certiorari (or leave) on the basis that the matters raised were of the type that might be raised in the course of an appeal, relating – by and large – to the quality of the decision rather than the defective application of legal principles including *Kayode v The Refugee Applications Commissioner* [2005] IEHC 172; *Akpomudjere v The Minister for Justice, Equality and Law Reform and Ors* (unreported, Feeney J., High Court, 1st February, 2007); *Chukwuemeka v The Minister for Justice, Equality and Law Reform and Anor.* (unreported, Birmingham J., High Court, 7th October, 2007); *Olayinka v The Minister for Justice, Equality and Law Reform* (unreported, Birmingham J., High Court, 27th May, 2008); *Anochie v The Refugee Applications Commissioner* [2008] IEHC 261; *Akpata v The Refugee Applications Commissioner* (unreported, Birmingham J., High Court, 9th July, 2008).

55. From these cases, it is clear that in the normal course only a flaw which is so fundamental as to deprive the decision maker of jurisdiction is sufficient to support an application by way of judicial review. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the RAT. If such a clear and compelling case is not demonstrated, the applicant must avail of the procedure that has been set up by the Oireachtas. By way of example of cases which might be amenable to judicial review, Hedigan J. identified situations where only a partial appeal is available with the result that the injustice complained of may be incapable of being remedied on appeal.

56. Subsequently, in *O(F) v RAC* [2009] IEHC 300, Cooke J. restated the test governing court intervention by way of judicial review where an appeal lies as follows (para. 8):

"only in the rare and exceptional cases where it is necessary to do so in order to rectify a material illegality in the report which is incapable of or unsuitable for rectification by appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, will have the effect that the issue or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time on the appeal. "

57. Again, in *J.M. (Mhlanga) v R.A.C.* [2009] IEHC 64, Cooke J. referred to the possibility of a flaw or illegality being such that a rehearing (para. 26):

"would result in a material issue not being reheard but being heard for the first time upon the appeal."

58. O'Malley J. referred to these two decisions of Cooke J. in *M.A.B. v. RAC* [2014] IEHC 64 when granting an order of *certiorari* against the RAC based on a finding that there had been two fundamental errors in law in the impugned decision. First, there had been no finding on a core fact of the applicant's claim, namely whether or not he had been a member of the Zaghawa tribe, and second, the decision maker had applied the wrong legal test, requiring the applicant to demonstrate a "*convincing reason*" rather than a real likelihood of persecution. There are several distinguishing features between this case and *M.A.B.*, most materially as regards the

common feature in both cases, namely the alleged failure to make a finding on an element in the case. It is clear from the judgment that in *M.A.B.* that opposition papers had been filed in that case on the basis that the claim for tribal membership had been rejected, whereas during the hearing before O'Malley J. the respondent's position changed and it was instead argued that the applicant could appeal on the basis that tribal membership had been accepted. O'Malley J. notes (at para. 49) that this change was presumably indicated to the Court on instructions that it had not in fact been intended to reject the claim of tribal membership in the first instance decision. She states:

"49. The original reading of the respondents' legal representatives seems to me to have been that the report embodied a negative finding on this issue - hence the points made in the Statement of Opposition and the written submissions. However, I consider that the stance taken at the hearing was different and arose, presumably, on the basis of instructions to the effect that no such finding had been intended. The respondents now rely instead upon the decision in HPO and say that the applicant can proceed with his appeal on the basis that no adverse finding was made against him on this issue."

59. The issue was revisited more recently in *M.M. v. Chief International Protection Officer, Minister for Justice and International Protection Appeals Tribunal* [2022] IECA 226. Four legal issues were addressed by the Court of Appeal, namely:

- I. Whether the 2015 Act required a single IPO to be involved throughout the entire first instance process;
- II. Whether an addendum to the s. 35 interview to cover permission to remain matters could be added at a later stage to the transcript of the s. 35 interview;
- III. Whether there had been a failure to provide reasons on why the principle of non-refoulement did not apply; and
- IV. Whether had been a failure to make a finding on a fact which was central to the applicant's claim.

60. The Court of Appeal found that the first two of these issues related to the statutory process particular to a first instance decision and this could not have been addressed on appeal. The fourth issue was similar to one of the issues raised in *M.A.B.* and was the only issue on

which the applicant in *M.M.* was successful. The third issue was rejected precisely because the applicant was challenging a first instance decision, rather than a decision on review.

61. On an application of the principles identified in the case law it is clear that the existence of a pending appeal is not a bar to a remedy in judicial review proceedings, but it is a most compelling factor in the exercise of the Court's discretion. To borrow from the words of the Supreme Court in refusing leave to appeal on the issue of alternative remedy, in *O.M.R. v. R.A.C.* [2017] IESCDET 14 it is little more than common sense that it ought to be rare and exceptional cases which would justify an application for leave to seek judicial review of the decision of the Commissioner. It follows that the mere identification of a legal flaw which might properly ground an order of *certiorari* is not enough and factors including the merits of the case as well as a risk of injustice require to be considered. The Court should be slow to grant relief by way of judicial review where an appeal pathway exists if it is satisfied that the appeal can provide an effective remedy and judicial review is not, in all the circumstances, the more appropriate remedy.

62. The decision-making process under the 2015 Act is conducted in accordance with prescribed procedural safeguards. These safeguards operate to ensure a full right of appeal and oral hearing in this case which should operate to ensure that the Applicant's application is only determined finally in circumstances where the decision-maker has been invited to cure the identified failure to expressly address distinct elements of the claim in the first instance decision. This is not a case where only a limited or curtailed appeal is available. While I accept that the fact that a full rather than limited appeal is available is not necessarily determinative, I consider the Applicant's reliance on *M.A.B. v. Refugee Applications Commissioner* [2014] IEHC 64 to be misplaced. In that case, the Court (O'Malley J.) found the existence of a full appeal to be an incomplete answer where it meant that an issue would be determined for the first time as follows (at para. 50):

"50. I do not consider that this would constitute a satisfactory resolution in this case. HPO involved a case where the appeal was on paper only and it was open to the applicant to argue, and indeed to the Court to find, that his claim as to his religion must be taken to have been accepted, there being no explicit rejection of it. In the instant case, there has been no formal concession as to the question by the respondents, simply a statement that there has as yet been no negative answer to it. The appeal would be a

full oral hearing before the Refugee Appeal Tribunal, which is independent of the other respondents. In such a hearing the Tribunal would not be bound by the Commissioner's findings in any respect and would be free to conduct a fresh assessment. That means that the question would be determined for the first time at the appeal – in other words, that there would not in the true sense be a rehearing on an issue that is central to the applicant's claim."

63. This case can be distinguished from *M.A.B.* in a material way. There has been no similar shift in the Respondents' position in this case. The Respondents have consistently maintained that the claim to membership has been considered and determined in the negative by the IPO in the determination made regarding the Applicant's claimed "*involvement*" with the IPOB and ESN. Whilst the decision is not as clear as it should be in this regard, it is certainly open to being read in the manner contended for on behalf of the Respondents. It is not, therefore, necessarily the case, even though the decision is imperfectly articulated, that the decision on appeal would be a first determination of a material issue in the case. There is no doubt in this regard that the IPO had the benefit of a questionnaire and interview notes which clearly show a claim articulated both on the basis of membership and leadership, considered COI in which reference is made to violence against members of both IPOB and the ESN and determined the application in the negative by rejecting the proposition that the Applicant on a wanted listed because of his involvement with either organisation. I have not been satisfied that there was any part of the Applicant's claim that was not explored in the decision-making process such that a fair outcome on appeal could be said to be prejudiced because it was being addressed for the first time. This also puts this case in a different class to *Stefan* because it cannot be said that a material part of the case has simply been omitted from the decision maker's considerations. The issue here is with how the decision-maker characterised the claim. Even in this regard, from a merit's perspective, it is a borderline case and the Respondents' position that all elements of the claim were determined in clear terms, although not accepted by me, was not un-stateable.

64. It seems to me that the errors alleged by the Applicant in the present case, which identified errors flow from a failure to clearly articulate distinct findings in respect of both membership and leadership claims, are not so fundamental as to have deprived the First Respondent of jurisdiction in a manner which would warrant intervention by way of judicial review. On a proper framing of the distinct elements of the claim identified for assessment,

consideration of COI in relation to the risk arising from membership of IPOB and the ESN, the matters identified on behalf of the Applicant to ground the within proceedings can be addressed during the currency of an oral appeal hearing but in circumstance where the application can also be determined on its merits.

65. It is recalled that other issues arising in relation to translation, the absence of an opportunity to respond to issues which were not notified to the Applicant and the weight to be attached to distinct elements of COI relevant to the claims and the test to be applied can also be fully addressed on an appeal, in a way that cannot be achieved in judicial review proceedings. These factors, in my view, make an appeal the more appropriate remedy. It is the more appropriate remedy because the IPAT can address the alleged defects identified to ground with within application by way of judicial review but can then also proceed to determine other issues which cannot be resolved in judicial review and can determine the appeal on its merits, which this Court could never do.

66. As the system for managing refugee applications contains its own appeal mechanism and that appeal is fully capable of correcting each of the identified errors in this case, I am satisfied that the IPAT provides an adequate alternative and more appropriate remedy in this case in the light of the issues raised and their merit. I am also satisfied that there is no imperative of justice or fairness which would require relief by way of judicial review.

CONCLUSION

67. Although some frailty has been identified with a first instance decision in this case, such frailty as has been identified can adequately be addressed in an appeal to the IPAT without risk of injustice to the Applicant. This is not an exceptional case warranting an order of *certiorari* of the first instance decision.

68. Accordingly, I refuse the relief sought and dismiss the application.