THE COURT OF APPEAL

Neutral Citation: [2017] IECA 296

Record Nos. 2016/289 and 2016/453

Finlay Geoghegan J.
Peart J.
Hogan J.
Between:

BW (Nigeria)

APPLICANT/APPELLANT

- AND–

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

RESPONDENTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 15TH DAY OF NOVEMBER 2017

1. There are two appeals for determination. Firstly, there is BW's appeal against the that part of the order of the High Court (Humphreys J.) dated 27th November 2015 which refused her application for reliefs by way of judicial review of the decision of the Refugee Appeals Tribunal that she is not entitled to a declaration of refugee status (Appeal No. 2016/289). Secondly, there is the respondents' appeal against an order made by the High Court (Humphreys J.) dated 6th November 2015 permitting the applicant to amend her statement of grounds during the course of the hearing itself by the inclusion of an additional ground as set forth in the said order (Appeal No. 2016/453). Before addressing these appeals I will provide some factual background.

Some factual background

2. The applicant came to this country on the 17th March 2007 but did not apply for asylum until 27th September 2011 following her arrest by An Garda Siochana for failure to produce identification documentation when requested to do so. This four and a half year delay explains why her appeal to the RAT against the recommendation of the RAC that her application for refugee status be refused was a papers-only appeal, and not by way of oral hearing (see s.13(6)(c) of the Refugee Act, 1996, as amended). She accepted that her application was late and that she had no entitlement to an oral hearing. She submits nevertheless that the RAT was obliged to take particular care where the appellant has no opportunity to respond to concerns in the mind of the Tribunal, particularly where some of those concerns had not been raised at her ORAC interview, and have resulted in adverse credibility findings by the Tribunal. I will return to that question.

3. Her claim for asylum was based on a fear of persecution arising from the shooting dead of her husband in Nigeria on the 2nd October 2006. It appears that he was the leader of a political group in the Niger Delta region named 'the Asatoro Group' which was opposed to the government, and that he was killed by supporters of the government. She claimed that each group blamed the other for her husband's death. She claimed that members of the Asatoro group visited her house after the shooting looking for money and documents which they claimed her husband had stolen from them, and told her that she would be killed also if she did not hand over the money and documents. She was forced to flee her home, and was also in fear of her husband's family who blamed her for her husband's death. She fears for her life if she were to return to Nigeria.

4. At her ORAC interview it was put to the applicant that research carried out by ORAC had not disclosed any group operating in Nigeria under the name 'Asatoro', and that the absence of such information "casts doubt on the existence of this group". She was asked if there was anything she would like to say in response. She replied that this was very surprising, and added: "there are things that happen that aren't on the internet. You can't even get the internet to work in that area".

5. The s. 13 Report prepared by ORAC indicates that certain documents were submitted by the applicant, which included a photocopy of a Medical Certificate of Cause of Death of the applicant's husband, two pages of information relating to the Niger Delta People's Volunteer Force, one page of information relating to the Asatoro Group to which was attached a copy judgment purporting to be from the Supreme Court of Nigeria referred to in that single page document. The author of the Report comments "ORAC is unable to verify the authenticity of these documents".

6. ORAC considered that the applicant's claim may constitute a severe violation of basic human rights, and therefore may be considered persecutory in nature, and could, subject to the well-foundedness of the claim, satisfy the persecution element of the refugee definition. In the s. 13 Report ORAC examined whether a well-founded fear had been established, and concluded that it was not. It concluded also that it was difficult to accept that there was no mention of the Asatoro group in any of the available country of origin information, and that "this serves to undermine the credibility of her claim".

7. ORAC also considered the documentation submitted by the applicant, and concluded that the lack of reference to the Asatoro group in the Supreme Court judgment submitted (which related to a bail application by a man named Asari who with others was facing charges of treasonable felony arising from incidents in 2004 and 2005) undermined the applicant's credibility. Other groups are mentioned in the report of the judgment but not the Asatoro group. At interview the applicant had stated that her husband had also been arrested for a period of one week in 2005, and on other occasions. However, ORAC concluded that it was difficult to accept that he would have been released if he was wanted for crimes serious enough to be considered a treasonable felony. ORAC stated that this served to undermine the credibility of the information provided by the applicant in relation to the Asatoro group which in turn served to undermine the credibility of the applicant's claim.

8. At interview the applicant was asked about her fears of what might happen to her if returned to Nigeria. She stated that the government in Nigeria believes that she is also a member of the Asatoro group since her husband was a member. It was put to her that it was difficult to accept that if this was the case, why she had not been arrested. She stated that she was questioned by the police at the time about her husband's involvement with the Asatoro group. But ORAC stated in the report that it appeared that she had been treated fairly by the police and had not been detained. The applicant was asked why, if she had been treated fairly then, she would not be treated fairly again in the future if returned. She replied that the police would not treat her fairly when the

documents they were looking for had not been provided to them.

9. ORAC concluded that the applicant had not provided sufficient evidence to indicate that she was at risk from the Nigerian authorities. Its overall conclusion in relation to a well-founded fear is expressed in the final sub-paragraph of paragraph 3.3 of the report (page 5 of 7) as follows:

> "With regard to significant aspects of the applicant's claim, as laid out above, the applicant's statements have been found to be lacking in coherence and plausibility, and her general credibility has not been established. As such, it is not considered that the applicant has credibly established her claim within the meaning of Regulation 5(3) of the European Communities (Eligibility for Protection) Regulations 2006. Having regard to the above analysis of the application, as well as the finding in paragraphs 3.3.2 below [that relocation was not available to the applicant], it is considered that the applicant has not demonstrated a well-founded fear of persecution in Nigeria."

10. An appeal was lodged with the RAT on 29th November 2011. The grounds were simply stated, being that the RAC erred in fact and in law, but without specifying in what way this occurred. In addition it was stated that further information and supporting evidence was on its way from Nigeria and would be provided within two weeks. In due course this was provided by the applicant's solicitor by letter dated 8th December 2011. It comprised a copy of the "Independent Monitor" newspaper of the 9th October 2006 which carried a report on page 6 of the shooting dead of the applicant's husband on the 2nd October 2006, describing him as "the leader of the "Asatoru Group one of the plethora of autonomous smaller militias operating in the Niger Delta … ". It stated also that his widow [naming the applicant] "is hunted by the police and the family of her late husband in connection with circumstances surrounding her husband's death". The solicitor stated also that he held the original of the newspaper should any further validation of same be required.

11. It would appear that by letter dated 17th January 2012 the RAT asked for the original newspaper and this was duly provided by letter dated 30th January 2012. That letter refers also to some concern raised by the RAT regarding the cause of death of the applicant's husband. It would appear that while the RAT accepted that the Certificate as to Cause of Death referred to him having died from a haemorrhage and subsequent heart failure, they had a concern that it did not indicate the cause of the haemorrhage, and did not therefore corroborate the applicant's statement that he had been shot as she was claiming. The solicitor's letter stated:

> "You have raised a concern regarding the cause of death of [applicant's husband]. It is indicated on the death certificate that he suffered from a haemorrhage and subsequently from heart failure. It is asserted by [the applicant] that these events stemmed from the shooting of her husband and that the death certificate indicated the actual concluding medical definitions for the cause of death and not the reasons why these conditions occurred.
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> [The applicant] also states that there are other reasons as to why the death certificate may not have elaborated on the cause of death, including the fact that the political circumstances surrounding [her husband's] death are complex and that many individuals, even in the medical profession, are not above the influence of duress or threat. It would seem clear that there is violent unrest in [the applicant's] home province and that she feels central to a lot of the difficulties that have emerged leading up to, and since, the death of husband."

12. It is certainly curious, to say the least, that until the hearing of this appeal neither the applicant, the ORAC, the RAT, nor any of the legal personnel in the case on either side, appear to have noticed that the Certificate as to Cause of Death under the heading "Primary cause [of death]" which was exhibited and is before this Court actually states "Haemorrhage/Gun Shot" and not simply "Haemorrhage" as the cause of death. The reference to "Gun Shot" is clearly relevant to the credibility of the applicant's case as it is corroborative of her claim that her husband was shot, giving rise to her own well-founded fear of Convention persecution should she be returned. However, it was not referred to in the decision of the RAT, nor in the High Court, including in the second judgment delivered by the trial judge on the 27th November 2015 on the substantive issues in these proceedings. Neither is it referred to in the notice of appeal and therefore ought not to be had regard to on this appeal.

13. The RAT considered this appeal. As stated, it was a papers-only appeal. The appeal was refused. The recommendation of ORAC that the applicant should not be declared a refugee was affirmed for reasons appearing in the RAT's decision dated 15th March 2012 which was notified to the applicant by letter dated 22nd March 2012.

14. Much reliance is placed by the applicant in this appeal on the fact that the Tribunal member has stated towards the end of his Decision:

> "*Cumulatively*, the Applicant has not put forward a coherent and consistent subjectively and objectively well founded fear of persecution for a Convention reason."[Emphasis added]

15. Within the decision there are a number of reasons identified for the finding that the applicant's account lacked coherence, plausibility and credibility. The applicant argued in the High Court that some of those reasons were bad reasons. Indeed on this appeal, Mark de Blacam SC, counsel for the applicant, in a meticulous analysis of the Tribunal's decision, submitted that there appeared to be some fourteen reasons underpinning the RAT's decision, nine of which were submitted to be bad reasons. It was submitted that since the decision itself stated that it was on a cumulative basis that it was considered that the applicant had not made out a well-founded fear of persecution both subjectively and objectively, the decision had to be quashed if this Court agreed that one or some of the reasons are bad, since the Tribunal member did not say what weight was being attached to any particular reason.

16. The statement of grounds filed at the commencement of these proceedings contained the following ground:

> "The Tribunal erred in law and in fact in determining the appeal of the Applicant on the basis of adverse credibility findings, and in particular in casting doubt on the authenticity of documents supportive of the Applicant's claim. Such documents included a death certificate for the husband of the Applicant and a newspaper report which contained, inter alia, a photograph of the Applicant."

17. Given the brevity with which this ground is stated it was perhaps not surprising that in the light of the more expansive grounds relied upon by the applicant in oral submissions made to the trial judge, the respondents argued that the applicant had strayed beyond the ground relied upon in her statement of grounds.

18. In view of the objection taken by the respondents in this respect an application was made to the trial judge, albeit at that very late stage of the hearing, to amend the statement of grounds by the addition of the following ground:

> "The decision should be quashed because (a) it contains findings which were arrived at unfairly and/or were erroneous and/or irrational including in particular finding that the applicant had failed to produce supporting newspaper evidence and the finding regarding the date of the applicant's husband's death certificate and (b) those findings cannot be severed because the decision was cumulative and the tribunal failed to specify the weight to be attached to the elements of that decision."

19. The trial judge allowed the amendment, and indicated that he would give his reasons at a later date. He provided those reasons in his first judgment delivered on the 17th November 2015 [2015 IEHC 725] ("the first judgment"). As stated in para. 1 above, the respondents' appeal against that judgment and order is before this Court for determination, together with the applicant's appeal against the trial judge's substantive determination refusing the reliefs sought by her on foot of the amended statement of grounds. I will return to the respondents' appeal in due course.

20. The trial judge delivered his judgment on the substantive claims on the 27th November 2015 [2015] IEHC 759 ("the second judgment").

21. He rejected the complaint by the applicant that the decision was fundamentally flawed on account of what was stated at p. 16 of the decision, namely that *"the applicant had put forward no objective country of origin information, viz. newspaper reports or police or medical reports to corroborate or substantiate her claims linking her deceased husband to well-known Niger Delta resistance groups"*, given that there was no doubt that the applicant's solicitor had provided the original newspaper of the 9th October 2006 already referred to in which a report was contained which referenced the killing of the applicant's husband and described him as the leader of the Asatoru group, and described that group in turn as "one of a plethora of autonomous smaller militias operating in the Niger Delta … ". He noted that this very newspaper article was referred to earlier in the Tribunal's decision at p. 13 thereof.

22. The applicant had complained also that in several instances the Tribunal had made adverse credibility findings where reliance was placed on matters which had not arisen before ORAC, and therefore were matters where no opportunity had been provided to her to respond to the RAT's concerns. For example, in relation to the Certificate as to Cause of Death of her husband, the Tribunal stated:

> "In addition [to the concern expressed that the cause of death disclosed, namely haemorrhage and heart failure, was inconsistent with her claim that he was shot] the Tribunal is of the view that the issuance of a death certificate from hospital on the day of death of the deceased must be seen as unusual and must call into question the authenticity of the document."

23. In relation to this matter, the trial judge stated that he was satisfied that this was something that the applicant was entitled to have specifically put to her if the tribunal intended to rely upon it, so that she would have an opportunity to comment upon it or provide an explanation, and that this had not been done. At para. 21 of his judgment, he stated:

> "…… while I find that there was no substance to the vast majority of the complaints made by the applicant under the heading of breach of fair procedures, the Tribunal should have, and failed to, put its concerns regarding the veracity of the death certificate to the applicant specifically, because the certificate was not inherently implausible on its face, so the applicant could not reasonably have foreseen that the Tribunal would have had an issue with its validity. I will deal with the effect of this failure later in this judgment."

24. The trial judge returned to the issue of the death certificate at paragraph 25 of his judgment, stating:

> "As regards the finding that it was unusual, tending to incredible, that a death certificate would be issued on the same day as a death, I do not think that such a finding could be arrived at without some knowledge of the practices of hospitals in Nigeria. No such knowledge appears on the face of the decision. I therefore find that this aspect of the decision is irrational in the legal sense, as well as having been arrived at by an unfair process as I have held."

25. The trial judge then went on to consider whether a decision which is based on a number of reasons cumulatively must be found to be invalid if one of those reasons is found to be flawed, and where no indication is given by the decision-maker as to the weight attributed to the flawed reason, or the extent to which it was relied upon for the overall decision. He referred to what he described as *"two divergent strands of approach to the question of how to approach in multi-element decision in these circumstances"*. He referred first of all to the approach adopted by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 [2015] 4 I.R. 144, and to a number of judgments which followed the I.R. approach, and then went on to refer to the alternative approach which he described as the 'Keagnene approach', referencing the judgment of Herbert J. in *Keagnene v. Minister for Justice, Equality and Law Reform* [2007] IEHC 17. I will return to these decisions and the trial judge's consideration of them in due course. For the moment I will simply state that the trial judge concluded that the *I.R.* approach was the correct approach, and that, applying that approach, he was *"of the view that the unsustainable finding regarding the date of the applicant's husband's death certificate is minor in the overall context and that the decision can be tenably sustained on the basis of the remaining credibility findings and upon reading the decision in the round"*.

26. While the applicant on this appeal lays particular emphasis upon the trial judge's conclusions in relation to her complaints in relation to the statement in the decision that no country of origin information such as newspaper reports had been provided by the applicant, and also on the fact that she was given no opportunity to address the Tribunal's concerns about the date of the Certificate of Cause of Death being the same date as that of her husband's death itself, further issues were raised by the applicant in relation to several other reasons within the Tribunal's decision.

27. For example, the Tribunal stated that in her interview with ORAC the applicant had stated that within one or two weeks of her husband's death members of the Asatoro group came looking for money and documents (Q.39), whereas the newspaper report dated 9th October 2006 which her solicitor submitted to the RAT (and which therefore had not been before the ORAC, hence she was not asked about it) stated that *"the men who killed her husband called her on the phone immediately after the attack demanding money and documents in the possession of her husband"*. The Tribunal stated that *"the inconsistency between the Applicant's account to the Commissioner and the newspaper account is stark and in the view of the Tribunal strikes at the integrity of the account put forward by the Applicant"*. The applicant submits that if this inconsistency was of such significance to the integrity of the applicant's account, requirements of fairness mandated that the Tribunal provide the applicant with an opportunity to address the concern, particularly where this was a papers-only appeal, and particularly where the newspaper article had not been before the ORAC when the applicant was interviewed. This is submitted to be a bad reason underpinning the Tribunal's adverse credibility finding, and since the Tribunal stated that cumulatively the applicant had failed to put forward a coherent and consistent well-founded fear of persecution, and since it cannot be discerned from the decision how much weight should be attributed to this particular reason, the decision as a whole is flawed and should be set aside.

28. Having referred at para 19 of his judgment to the high level of care required on a papers-only appeal to ensure that no unfairness was caused to an applicant, the trial judge stated:

> "It seems to me that the need for fairness requires that if a point on which the applicant has not previously had a fair opportunity to comment (including an opportunity inherent in the duty to explain a glaringly obvious matter actually known to the applicant) it should be specifically put to the applicant …".

29. He went on at the commencement of para. 20 to state:

> "This does not, however, mean that every new point must be put to the applicant, or that the tribunal cannot make any additional credibility findings and is confined to those made by the Commissioner unless the applicant is specifically notified of the point. It seems to me that whether the applicant needs to be notified of the issue will very much depend on the nature of the new point and the category into which it falls".

30. The trial judge then referred to a number of such categories including at (ii) under a heading "Contradiction or confusion on the face of the papers". That category was addressed in the context of the issue referred to at para. 28 above (*i.e.* the alleged inconsistency between the applicant's account and the newspaper report in relation to contact from the Asatoro group after the killing of her husband). In that regard he stated:

> "(ii) 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 the applicant to read all documents and materials 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."

31. The applicant on this appeal submits that while this statement may be correct in relation to a case where such inconsistency has been identified at the earlier stage of examination by ORAC and has been put to the applicant, it is not correct where ORAC did not for example have the newspaper article in question, and the question of inconsistency had therefore not been identified.

32. In the same vein is a complaint by the applicant in relation to another reason given by the Tribunal for concluding that her credibility was undermined. It relates to what she said at her ORAC interview concerning threats and physical attacks upon her by members of her husband's family who, she says, were blaming her for her husband's death. In this regard, the Tribunal stated:

> "The Applicant additionally claims to have been threatened by her husband's family who believed the Applicant was responsible for her husband's death. The Applicant's interview evidence in this respect is somewhat confused. She states she was physically attacked by her husband's family who believed she should not have married her husband and had brought bad luck on him. "The minute my husband got shot they said I was an instrument in their brother dying … They did not want my brother to marry him and now I have killed him". (Interview. Q. 41) The Applicant claims to have been flogged by a member of husband's family. The Applicant is specific that these events occurred on the day they heard her husband was killed.
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> The Applicant left her husband's house on the day her husband was killed and moved to Ahoada to her family's house on the same day that her husband was killed. She sustained a mark on her leg from a motorcycle when making the move. When asked if husband's family molested her in Ahoada she stated "they didn't even want to see me. They were happy I was out of that family". (Q.51)
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> The narrative, in so far as it relates to the threats and alleged attacks from her husband's family, tends to contradiction and confusion. In this respect the Applicant's credibility is undermined."

33. The complaint made by the applicant in relation to the above conclusion is that this was not a point of confusion or lack of credibility that was identified by ORAC in its s. 13 report, and in those circumstances, where the Tribunal was reaching this conclusion for the first time, procedural fairness required that its concerns be drawn to the attention of the applicant so that she had an opportunity to comment upon them, notwithstanding that this was a papers-only appeal. It is submitted that this is an additional reason within the Tribunal's overall decision on credibility which is flawed, and again, it is submitted that since the overall decision on credibility was made cumulatively, and it is not possible to know the weight or significance was given to this particular reason, the decision as a whole must fall.

34. A further issue raised by the applicant was that in its decision the Tribunal stated that she had produced a document purporting to be a death certificate for her husband, but that she had not lodged any marriage certificate proving her marriage to him. Again, the submission is that at interview by the RAC no issue was raised about her marriage and that she had not provided a marriage certificate in order to prove her marriage to her husband, and that insofar as the failure to produce a marriage certificate may have fed into the adverse credibility finding, it was procedurally unfair not to have raised that matter so as to provide her with an opportunity of furnishing a marriage certificate which had not previously been requested.

35. The trial judge dealt with the marriage certificate issue at para. 20(vi) of his judgment under the heading "Where the finding is one of an absence of evidence". In this regard he stated:

> "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 materials 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."

36. The trial judge concluded, on the basis of the *I.R.* principles referred to, that while the issue of the date of the death certificate

ought to have been put to the applicant as a matter of fairness, it was a minor issue in the overall context and that the decision could be tenably sustained on the basis of the remaining credibility findings and upon reading the decision "in the round".

37. Having considered carefully and in considerable detail the judgment of Cooke J. in *I.R*, and other decisions that followed it, as well as the competing principles stated by Herbert J. in *Keagnene*, as to the correct approach where a decision is multi-factorial or cumulatively based, the trial judge concluded that *I.R* represented the correct approach, and summarised his conclusions as follows:

> "65. Having regard to the foregoing I conclude in summary that:
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> (i) the approach to be followed as a correct statement of the law is reflected in *I.R.* and its progeny, and amounts to a test that it is for the court to assess whether the decision can be tenably sustained in the absence of the invalid reasons, having regard to the importance, in the view of the court, of the valid reasons, based on reason and common sense and the court's reading of the decision as a whole, regardless of whether the issue impacted in some sense on the core claim, or whether the decision-maker expressed the decision as cumulative or failed expressly to attach weight to individual reasons;
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> (ii) Insofar as *Keagnene* and its progeny, identified above, suggest that the court cannot be aware of the weight attached to individual factors by reason either of an absence of express weight being attached to such factor by the tribunal, or by reason of the decision being, or being expressed to be, cumulative, or by reason of the matters impacting on the core claim, that is not an approach I would propose to follow as I consider that it does not represent an approach consistent with the *I.R.* approach, as set out above;
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> (iii) I would also decline to adopt, for similar reasons, an approach which is based on attempting to divine (in the absence of material to that effect) what precise weight the tribunal *would have* assigned to the valid factors in the absence of the invalid ones (other than in so far as this is indirectly done on the *I.R.* approach by reading the decision in the round), on the grounds that such a test is unworkable, subjective and [is] not in practice a justiciable test at all. [Italics in original]
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> (iv) The appropriate test does not involve the court in forming its own view as to whether or not it would have made the underlying decision. This would be impermissibly to step into the shoes of the decision-maker. What it involves is the court deciding, as a matter of reason and common sense, and on reading the tribunal's decision in the round, whether the invalid reasons are major *and go to the core of the decision (as opposed simply to impacting upon, in the sense of being relevant or potentially relevant to, the core claim), or alternatively phrased, whether the decision can be tenably sustained on the basis of the valid decisions.* This conclusion can only be arrived at by an examination of the decision overall and the extent to which the court considers in that context and as a matter of reason and common sense that invalid reasons are *major or minor*, when read in the context of that overall decision. The mind of the decision-maker is not to be assessed by some form of complex speculation as to the weight he or she would have attached to the precise individual invalid factors (what Cooke J. referred to in the above-quoted passage as "attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination"), but simply reflected in the exercise of reading the decision in the round. The upholding of the conclusion in a partly invalid decision can be carried out even if the decision is cumulative, and it does not depend on any express assignment of weight by the decision-maker to the individual factors.
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> (v) Applying the *I.R.* approach to the present case, I am of the view that the unsustainable finding regarding the date of the applicant's husband's death certificate is *minor in the overall context* and that the decision can be tenably sustained on the basis of the remaining credibility findings and upon reading the decision in the round." [Emphasis added]

38. Following the delivery of his second judgment, an application for leave to appeal was made by the applicant. Following a hearing in that regard, the trial judge acceded to that application for reasons explained in his third judgment delivered on the 21st December 2015, and he certified the following for appeal as a question of exceptional importance:

> "Whether, in the case of a decision that is supported by a number of reasons, one or more of which are unsustainable, the overall conclusion can be upheld if the court considers, as a matter of reason and common sense, and on reading the decision in the round, that the invalid reasons are not major and do not go to the core of the decision, even if: (a) despite not being major and not going to the core claim, they could be said to impact upon, in the sense of being relevant or potentially relevant to, the core claim; (b) the decision is cumulative; or (c) there is no express assignment of weight by the decision-maker to individual factors."

Fair procedures on a papers-only appeal

39. While the ORAC included in its report a finding that the applicant had delayed in making her application for a declaration of refugee status for the purposes of s. 13(6)(c) of the Refugee Act, 1996, as amended, resulting in the applicant having no entitlement to an appeal by way of an oral hearing – indeed a conclusion which the applicant has not contested - she nevertheless remains entitled to an effective appeal remedy in accordance with the purpose and objective of Directive 2005/85/EC ("the Procedures Directive"). She was also entitled to be afforded fair procedures under Article 40.3 of the Constitution. Her rights in these respects are not diluted or reduced by the fact that she could not require an oral hearing. This is of particular importance where adverse credibility findings have been made against an applicant which have been found to undermine the credibility of her account of events upon which her alleged fear of persecution are based, and which have led to her application being refused.

40. In some cases on a papers-only appeal, the matters which have led to an adverse credibility finding have been made by ORAC, and will already have been put to the applicant at interview by ORAC, and are included in the s. 13 report, and she will therefore have had an opportunity of addressing these concerns during the ORAC process, and perhaps afterwards in correspondence and/or by providing further information. In such cases, where there is a papers-only appeal, the Tribunal will have before it all the material provided to ORAC, including the application form, the notes of interview, any documents and material provided by the applicant in support of her account, including relevant country of origin information. Even in such cases, the Tribunal must still take particular care to ensure that fair procedures have been applied to the consideration of the appeal. As was stated by Clark J. in *V.M. (Kenya) v. Refugee Appeals Tribunal & ors* [2013] IEHC 24, the Court, on an application for judicial review in relation to a papers-only appeal "… therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his/her claim".

41. A particular difficulty arises for the tribunal dealing with a papers-only appeal where the tribunal member considers that the appellant's credibility may be called into question by certain matters appearing from the papers before the Tribunal, but which have not formed the basis for any adverse credibility comment or finding by the ORAC in its s. 13 report and are matters which were not put to the appellant during the procedures before the Commissioner. Do the requirements of an effective appeal remedy and/or fair procedures to which the appellant is entitled require that the appellant be provided with some opportunity to address such new concerns which she has not previously had an opportunity to address since they were not previously raised at the ORAC stage of the process? If so, what form does that opportunity take? Should she be asked to address the concerns by correspondence? Should the matters of concern be put to her at some form of oral hearing? Does every new matter of concern need to be put to her in some manner, no matter how trivial or tangential, or should such an opportunity be confined to concerns which are important to the overall conclusion as to credibility and therefore the success or failure of the appeal?

42. These are questions the answers to which are to some extent fact-dependent, and each case will need to be considered on its own facts. But it can be stated as a general principle that where an issue of concern emerges for the first time on a papers-only appeal in relation to a matter which the appellant has not already had a fair opportunity to address, either because it was not put to her at interview, or because perhaps it may have arisen for whatever reason only after the ORAC process had ended, and that concern is in relation to something which is *material* to the basis on which asylum is being sought, and therefore to the decision whether or not she be granted a declaration of refugee status, she is as a matter of fair procedures entitled to an opportunity to address it. Whether that opportunity requires some form of oral hearing in relation to the concern, or whether it can be dealt with fairly and adequately in writing will depend on the particular facts. It will be a matter to be considered by the Tribunal member in any individual case. But the principle is the same. If the concern is a material concern – one that has the capacity to affect the outcome of the appeal – then the appellant is entitled to a fair opportunity to address the concern where that opportunity has not already been provided.

43. In this regard generally I would refer to the judgment of Cooke J. in *S.U.N. v. Refugee Applications Commissioner* [2012] 2 I.R. 555 in which he addresses in a number of differing contexts the entitlement to an effective appeal with particular reference to cases where personal credibility is a central issue, and whether that requires an oral hearing, or whether there may be cases where a papers-only appeal will suffice for the purpose of complying with the State's obligations in accordance with the Procedures Directive and fair procedures generally. It is a lengthy, detailed and comprehensive judgment, albeit with reference to a somewhat different factual background.

44. In *S.U.N.* Cooke J. having stated that an oral hearing is not always an essential ingredient of a fair appeal, then referred to his own judgment in *X.L.C. v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 148 where he stated that the Procedures Directive:

> "29. … does not require that an appeal or an effective remedy against a decision taken on an asylum application involve any fresh interview or any oral hearing (see art. 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."

45. However, Cooke J. went on to state at para. 37 of the same judgment:

> "37. 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".

46. In addition, he referred to the judgment of Clarke J. in *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218 in which, *inter alia*, he considered whether the statutory scheme failed to comply with the principles of constitutional justice having regard to the events in that particular case. He referred to a passage at pp. 15-16 of the judgment of Clarke J. as follows:

> "Where a report of the R.A.C. contains a finding in relation to one of the matters specified in s. 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 R.A.C. will have afforded the applicant concerned the opportunity to deal with any matter which might influence such adverse credibility finding."

47. Having referred to this passage, Cooke J. went on to state:

> "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 a s. 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."

48. In the present case, clearly the applicant had an opportunity before the RAC to address certain issues that were raised relevant to her credibility. In such instances it is unnecessary to provide a second opportunity, by way of oral appeal or otherwise, to explain or otherwise address those issues of concern. However, there are other matters by reference to which the Tribunal called into question the applicant's personal credibility when dealing with the appeal. Some of these matters were matters drawn attention to for the first time in the tribunal's decision itself. To that extent, those particular findings can be considered to be first instance findings, since they were not the subject of comment or conclusion in the s. 13 report and recommendation. It is in that context that what is stated by Cooke J. at para. 40 of his judgment in *S.U.N.* is relevant. He stated:

> "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 an appeal that he or she is

personally credible in the matter."

49. These passages underscore the importance, as a matter of fair procedures, attaching to the requirement that where some matter is giving rise to a concern as to credibility on the part of the decision-maker, the applicant must be given a fair opportunity of addressing that concern before any adverse finding of credibility is made against her. That obligation is fulfilled where the particular issue(s) is raised at first instance during the ORAC process. In that case, it is unnecessary that she be provided with another opportunity during a papers-only appeal process to again address the same issue of concern as to credibility, though the applicant is surely to be permitted should she wish to do so, to submit any further material relevant to the concern.

50. But different considerations arise where for the first time on the papers-only appeal the tribunal considers that some matter of significance, not previously raised or addressed during the ORAC process, speaks to the question of the applicant's personal credibility. In such a case the Tribunal is considering a significant matter for the first time in the entire process. Fair procedures demand, in my view, that some opportunity be provided to the applicant to address such a concern before it is relied upon for an adverse credibility finding. Where this does not occur the finding in question may have to be set aside, particularly where that finding is objectively material to the basis for a conclusion that the applicant lacks credibility, and the decision on appeal is to uphold the recommendation of the RAC to refuse a declaration.

51. The appellant on appeal to this Court, as she did in the High Court, has identified a number of matters within the Tribunal's decision which were relied upon for its conclusion that she lacked credibility, and which are matters never raised with her either by the Commissioner at first instance, or during the appeal process by the tribunal. Accordingly, since she was given no opportunity to address those concerns in advance of an adverse credibility finding being arrived at, in breach of her entitlement to fair procedures, she submits that each such finding should be found to be unlawful and set aside. I have identified those matters earlier in this judgment. With the exception of the issue as to the date of the death certificate, the trial judge did not consider that the matters identified were of sufficient importance that the appellant should have had an opportunity to address them as a matter of fair procedures. I am afraid I must disagree.

52. It will be recalled (see para. 28 above) the Tribunal stated that in its decision (p.13 thereof) *"the inconsistency between the Applicant's account to the Commissioner and the newspaper account is stark and in the view of the Tribunal strikes at the integrity of the account put forward by the Applicant"*. The newspaper had not been before the ORAC, and was only later submitted to the Tribunal by the applicant's solicitor. ORAC had never suggested to the applicant that her story was confused in relation to her husband's killing. This asserted inconsistency appeared for the first time in the decision itself. The applicant had no opportunity of addressing the concerns which it gave rise to in the mind of the tribunal. It is clearly something which assumed an importance for the tribunal since it states that it *"strikes at the integrity of the account put forward by the Applicant"*. The question of whether or not her husband was killed as she described is at the heart of the applicant's claim to be a refugee. Without her being found credible in relation to that central question there was little hope of success. Any perceived inconsistency between what she said to the RAC at interview and what is contained in the newspaper report had to be put to her in some fashion in order to provide her with a fair opportunity to be heard in relation to it. It did not necessarily have to be provided by way of oral hearing. But the least it required was that the concern be brought to her attention and that she be invited to comment upon the concern and address it. I have little doubt that if the newspaper had been available to the RAC prior to the interview, and the applicant's account at interview was inconsistent with what was stated in the newspaper, the applicant would have been challenged in that regard and thereby provided with an opportunity to respond.

53. Another matter not mentioned by the ORAC at interview or even in its s. 13 report, and which was raised by the Tribunal for the first time in its decision was the fact that at no stage had the applicant provided a certificate of her marriage to her late husband. Given that the centrality of her husband having been killed to her claim for asylum, the statement in the Tribunal's decision immediately following a statement that she had lodged "a document purporting to be a death certificate for her husband" that "she has lodged no certificate, verifying or proving her marriage to [her husband] represents an expression of concern which touches upon the question of her credibility". In my view, the trial judge was incorrect to describe it as merely a comment, as if it was to be attributed no significance whatever. He also erred, in my view, when he dismissed the applicant's argument on the basis also that the onus was on her to produce a marriage certificate. Perhaps she ought to have, but she should not in my view be taken as knowing that if she did not do so, and was not asked for it, a negative view would be taken as to her credibility. After all, it does not appear that it had ever been disputed that she was married to the deceased at the time of his death

54. In my view, there was no need for the Tribunal to mention the absence of a verifying marriage certificate if it was something of little or no significance. As it must be taken to have been something of some significance at least in relation to credibility, the absence of a marriage certificate is something which should have been put to the applicant as a matter of fair procedures, where it was being relied upon by the tribunal. In so far as the absence of a marriage certificate was put into the basket of concerns which led to an adverse credibility finding on a cumulative basis, I would remove it from the basket so to speak, as it could not be relied upon in the absence of fair procedures being accorded to the applicant.

55. In relation to the death certificate, I agree with the trial judge that the question of its authenticity arising from the concern on the part of the tribunal that its date was the same date as the date of the death itself was something that ought to have been put to the applicant before it was relied upon for an adverse credibility finding. It had not been raised during the ORAC process. Again this finding must be set aside and cannot be considered on any cumulative basis for the adverse credibility findings against the applicant. I leave aside completely any consideration of the significance of the word "gunshot" which appears beside the word "haemorrhage", as this was overlooked by everybody it would seem, and was adverted to only in submissions on this appeal.

56. I would lastly refer to submissions made in relation to that part of the Tribunal's decision where the member states "… the applicant has put forward no objective country of origin information, viz. newspaper reports or police or medical reports to corroborate or substantiate her claims linking her deceased husband to well known Niger Delta resistance groups". It is submitted that this finding is irrational given the undisputed fact that the applicant's solicitor sent the original of a newspaper containing a report of the death of her husband which, it is submitted, did link her husband to the Niger Delta Peoples Volunteer Force. The trial judge dealt with this submission by making reference to the paragraph which followed that finding, and to an earlier part of the tribunal's decision in which the member is dealing with inconsistencies between the account of his death given by the applicant and that which is contained in the newspaper report. His conclusion on this ground was expressed as follows:

> "15. The applicant's complaint is essentially that because the applicant did put forward a newspaper report which the tribunal had regard to in an earlier part of its decision, the tribunal fell into fundamental error by stating at this later point that the applicant had failed to put forward newspaper reports linking her deceased husband to 'well-known Niger Delta resistance groups'.

> 16. However, the meaning of this latter phrase appears to be explained by the following paragraph of the decision, in which the tribunal states that country of origin information does not mention the 'Asatoro' organisation.
>
> 17. I therefore can only read the statement about the failure to produce newspaper reports as meaning that in the view of the tribunal, the applicant had failed to put forward reports linking her husband to a 'well-known' resistance group as opposed to any resistance group. The tribunal was clearly aware of the linkage to the 'Niger Delta People's Volunteer Force' as that is referred to … in the very next paragraph of the tribunal decision."

57. I consider that the trial judge fell into error is rejecting the ground of complaint put forward by the applicant in the way he did. I do not consider that it is correct to say that what is stated in paragraph 16 of the judgment disposes of the issue raised. The country of origin information referred to by the trial judge in para. 16 relates to country of origin information "submitted by the Commissioner" and not by the applicant. It must refer to information gained as a result of ORAC's own researches which it told the applicant at interview had not revealed any organisation known as Asatoro. The paragraph in question states:

> "Country of origin information submitted by the Commissioner does not mention the Asatoro organisation. Researchers carried out by the tribunal consulting reputable sources United States State Department report, Amnesty International, Accord, Freedom House, failed to reveal any mention of the Asatoro organisation."

58. Since the trial judge's conclusion at para. 17 rests upon what he stated at para.16 by his use of the word "therefore", his conclusion on this issue cannot stand.

59. In my view the Tribunal erred when it concluded that the applicant had put forward no objective country of origin information "viz. newspaper reports …". She did in fact produce a newspaper report which does state that "the leader of ASATORU Group one of the plethora of autonomous smaller militias operating in the Niger Delta Region of Nigeria under the control of Niger Delta People's Volunteer Force leader… has been shot dead by unknown gunmen on 02/10/2006" and then proceeds to name the applicant's husband as a person who was financing the activities of the Niger Delta People's Volunteer Force. In addition, her husband is named in the heading of the article which states that he was shot dead by unknown gunmen. So the article itself clearly reports that the applicant's husband was the person shot dead and links to that particular organisation. The newspaper article may be regarded as objective country of origin information linking her deceased husband to that particular group. It is erroneous to conclude otherwise, and the Tribunal's conclusion in this regard cannot stand. In so far as this conclusion by the Tribunal in all likelihood fed into the cumulative finding that the applicant's account of her husband's killing lacked corroboration, consistency and credibility, it also must be removed from the basket of findings upon which the tribunal's cumulative adverse credibility finding depends.

Decisions reached on a cumulative basis

60. It remains to determine what effect the removal of these findings from the basket of findings relied upon cumulatively by the tribunal has on the overall adverse credibility finding. Can that adverse credibility finding survive the removal of these particular elements in circumstances where the Court cannot put itself into the shoes of the decision-maker and form its own view as to the weight that may or may not have been given to any particular finding?

61. These are issues that have been considered by the courts previously. The trial judge, as I referred to earlier, addressed them by reference to the two somewhat divergent judgments, namely that of Cooke J. in *I.R.* and that of Herbert J. in *Keagnene*, and concluded that he preferred the approach of Cooke J. in *I.R.* As part of his conclusions at para. 65 of his judgment (already set forth in full at para. 38 above) he referred to the Court's task in the following way:

> "(iv) The appropriate test does not involve the court in forming its own view as to whether or not it would have made the underlying decision. This would be impermissibly to step into the shoes of the decision-maker. What it involves is the court deciding, as a matter of reason and common sense, and on reading the tribunal's decision in the round, *whether the invalid reasons are major and go to the core of the decision* (as opposed simply to impacting upon, in the sense of being relevant or potentially relevant to, the core claim), or alternatively phrased, whether the decision can be tenably sustained on the basis of the valid decisions."

62. I respectfully disagree with the trial judge's statement that the court must look at the decision in the round in order to see if the invalid reason as are "major and go to the core of the decision". I think such an approach leads to the very thing that the trial judge stated earlier in (iv) above, namely to the judge stepping into the shoes of the decision-maker. His use of the word "major" may have resulted from the use by Cooke J. of that word's antonym in Cooke J's statement in *I.R.* that "the reasons [for a lack of credibility finding] must relate to the substantive basis of the claim made and not to *minor* matters or to facts which are merely incidental in the account given". In my view it is incorrect for the trial judge to equate the idea of reasons being "major" with them relating to "the substantive basis of the claim made". For a reason to relate to the substantive basis of the claim, it must in my view simply be "material" to the basis of the claim. To so describe it avoids the danger of giving it weight as such, as does the attribution of "major". It is true that Cooke J. used the word "minor" but it is clear from what follows his use of that word that it is used in the sense that the matter which is "minor" is something that is not material to the applicant's account and therefore not something that should speak to the credibility of the account or her credibility generally.

63. In relation to the present case therefore, where a negative credibility finding was arrived at on a cumulative basis, taking into account a number of different reasons for doubting credibility, the Court must satisfy itself that the reasons behind the decision which have been found to be unlawful reasons or "bad reasons" as so described by Mr de Blacam, were *objectively material* to the substance or core of the applicant's account, or whether they relate to matters incidental to the substance or core of the claim. If the impugned reasons are material, they must be put in some way to the applicant before they can be relied upon to support the decision, even cumulatively. If they are not so put, they cannot be counted in the basket of reasons which have formed the cumulative basis for the decision. They must be removed.

64. At the heart of the applicant's application is her assertion that her husband was shot and killed. It is a critical matter. If she is not believed in relation to that, her application is doomed to failure. It follows that anything which could corroborate that assertion is material to her application, and her credibility. The newspaper article was clearly material to the important issue of whether or not her account that her husband was shot and killed is credible.. It is also material to the question of her husband's alleged links to the Asatoru group. That newspaper article was not before the RAC when the applicant was interviewed. If the Tribunal member felt that the account of events in the newspaper rendered the applicant's own account to be confused or lacking clarity, to the extent that it called into question her credibility, fair procedures required that she be given an opportunity to address those concerns should she wish to do so.

65. The Tribunal stated that the applicant had provided no country of origin of information in the form of newspapers etc. That was

not correct. She had provided a newspaper report of the incident that forms the basis for her claim. In my view that reason was material to the decision, and must therefore be removed from the basket of reasons forming the overall cumulative decision as to the applicant's credibility.

66. In its decision the Tribunal remarked upon the fact that the applicant had not provided a marriage certificate. Given that the applicant's case relies upon Mr W being the applicant's husband, the question of whether or not she was in fact his wife is clearly material to her application and her own credibility. If the absence of a marriage certificate was something upon which some reliance was being placed for the overall decision, and I consider that it must have been since it was mentioned, it was something material, and a matter that ought to have been raised in some way with the applicant before any adverse credibility decision was made.

67. The trial judge considered that the single reason which he found to be flawed, namely that relating to the date of the death certificate which had not been put to the applicant, was a minor matter only, and therefore not such as to invalidate the decision which when read "in the round" could be tenably sustained by the remaining reasons.

68. As I have said, I consider that the trial judge somewhat mischaracterised the judgment of Cooke J. in *I.R.* by stating the test in terms of "whether the invalid reasons are major and go to the core of the decision (as opposed simply to impacting upon, in the sense of being relevant or potentially relevant to, the core claim)". It is more correct to say that they must relate to something 'material'.

69. However, even where there is a single fact, which is incorrect, within a decision as to credibility reached on a cumulative basis, or where the decision maker has failed to take into account some material fact, or where no opportunity was provided to the applicant to comment upon some matter of material concern to the decision maker upon which in part the adverse credibility finding was based that may not *of itself* be sufficient to justify setting aside the overall decision as to credibility. It may be that the flawed fact is simply overwhelmed by the other correct facts such that the decision remains tenably sustained when read in the round, and therefore ought not to be quashed. It is worth noting in this regard what was stated by Cooke J. in *I.R.* at para. 11, sub-paras. (4) to (8) of his judgment ([2015] 4 I.R. 144,152) as follows:

> "(4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighted. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.
>
> (5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bare a legitimate connection to the adverse finding.
>
> (6) The reasons must relate t the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given.
>
> (7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.
>
> (8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in this regard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person."

70. Every case must be considered on its own facts when assessing the materiality of any particular error. In the present case there are a number of reasons within the overall adverse credibility finding which I have considered to be flawed since they are based upon matters of concern to the decision maker, which the applicant was provided with no opportunity to address or otherwise comment upon, and which are material to the applicant's case and to her credibility. The greater the number of such reasons that are found to be flawed, the more likely it is that the foundations of the overall decision reached on a cumulative basis are undermined to the extent that it must be set aside. The applicant's case was that she had been married to the deceased, and that he had been murdered. As it had never been suggested that the applicant had not been so married, the Tribunal member could not in such circumstances fairly draw adverse credibility inferences from the absence of a marriage certificate. The failure to consider the newspaper article was also unsatisfactory. After all, if the newspaper article was indeed authentic, it would provide powerful evidence that the applicant's account was indeed correct.

71. I consider therefore that the appeal should be allowed and the decision of the RAT must be quashed for the reasons stated since fair procedures were not afforded to the applicant.

The respondents' appeal against the order permitting an amendment to the applicant's statement of grounds

72. It is important to recall that the application for judicial review came before the trial judge by way of a so-called 'telescoped' hearing where leave had not already been granted. In other words the leave application was combined with the hearing itself. The applicant submits therefore that normally prior to being granted leave an applicant may at any time add to the grounds in respect of which leave is being sought. There can be no doubt about that. In such circumstances it is submitted that the applicant was entitled to seek to have her ground amended since leave had not already been given, and albeit that the need to amend them only arose from objections made by counsel for the respondents in response to the submissions of counsel for the applicant.

73. There is no doubt that in a case where leave is granted in advance of a substantive hearing for judicial review, the applicant is confined to arguing such grounds as have been permitted by that leave order, unless the Court permits an amendment. It is clear also that where such an applicant seeks to amend the statement of grounds he is subject to the same time limits under O. 84 RSC. If the application to amend the statement of grounds is made after those time limits have expired, good reason will have to be shown as to why the new grounds were not included in the application for leave at the outset of the proceedings.

74. In the present case there was no such first application for leave. The substantive hearing took place on foot of the statement of grounds as filed at the commencement of the proceedings. Submissions were prepared by each side in advance of the hearing. There is no suggestion by the respondents that they were disadvantaged or taken short in any way by the late amendment application. The applicants' submissions were made and responded to, the latter's including one which asserted that the applicant's legal submissions strayed beyond the grounds contained in the statement of grounds.

75. The trial judge heard the application to amend the statement of grounds so as to cover the submissions actually made. He decided to grant the application, indicating that he would give his reasons in writing at a later date. This he did in a written judgment

("the second judgment") on the 17th November 2015.

76. The trial judge relied heavily upon the judgments of the Supreme Court (Fennelly J.) in *Keegan v. Garda Siochana Ombudsman* [2012] 2 I.R. 570, and of the Supreme Court (O'Donnell J.) in *O'Neill v. Appelbe* [2014] IESC 31 for his conclusion that the amendment should be permitted in the interests of justice between the parties, especially where no prejudice was relied upon, and so that the Court could be in a position to adjudicate upon the real issues between the parties. He considered that the grounds sought to be included by way of amendment were arguable. Indeed they had been argued before him by this stage of the proceedings. He considered that as far as the need to explain the failure to have already included the new grounds was concerned, "a very light threshold" applied particularly where the need arise from a failure on the part of the applicant's legal team to include the new grounds. He stated that in accordance with Keegan "good reasons need to exist for a party to be deprived of the opportunity to raise an important point".

77. The trial judge was satisfied that despite the lateness of the application to amend, there was no prejudice existing which outweighed the desirability that the applicant's case should be argued to the fullest extent possible as it had been in the oral submissions which by that time had already been made.

78. In my view the trial judge was correct to permit the statement of grounds to be amended. It is of course a matter of discretion. The trial judge had heard the case almost to a conclusion by the time the respondents made their objection. He was in a good position to appreciate by that point the significance of the issues in the case and the arguments made, and therefore whether the justice of the case pointed to permitting the amendment. He considered the relevant authorities. He appropriately considered and applied the relevant test for the proper exercise of that discretion by reference to the three limbs of the Keegan test: arguability, explanation and the absence of irremediable prejudice.

79. I would refuse the respondents' cross-appeal against the order permitting the statement of grounds to be amended.