THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 343

[2022 No. 1092 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

F. B. C.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 7th day of June, 2024.

INTRODUCTION

1. This is the judgment of the court in judicial review proceedings brought by the applicant in which he seeks orders quashing a decision of the International Protection Appeal Tribunal ("*the Tribunal*") which affirmed a recommendation by an International Protection Officer ("*IPO*") that the Minister reject his applications for refugee status and subsidiary protection.

2. The basic contention was the applicant claimed to be from Ghana, and that he had been persecuted and feared further persecution because he was an openly gay man. Those contentions were substantially rejected during the international protection process. The rejections were made on the basis of findings that impugned the credibility of the applicant's accounts of persecution, and, more significantly, that impugned the credibility of his contention that he was gay.

3. As will be explained in more detail in this judgment, I have concluded that the applicant should not succeed in this action. That decision is based, first, on the limited role of this court in reviewing a decision of the Tribunal; second, on an assessment that the process before the Tribunal was fair; and third, my findings that the Tribunal member properly directed herself on the manner in which credibility findings should be made.

4. The assessment of the credibility of assertions about sexual orientation undoubtedly are sensitive and difficult; but they are assessments that have to be made. The Oireachtas has directed in effect that such assessments are to be carried out by the IPO and if required by the Tribunal. In this case, the Tribunal conspicuously endeavoured to carry out the assessments by reference to the appropriate standards, had access to and considered the documents submitted by the applicant, identified before the hearing matters that needed to be clarified, heard the oral evidence of the applicant, and afforded the applicant an opportunity to submit further documents after the hearing.

PROCEDURAL HISTORY

5. The proceedings were commenced by an *ex parte* application on 16 December 2022. On 23 January 2023, the applicant was granted leave to apply by way of application for judicial review. In his statement of grounds, the applicant seeks an order of *certiorari* quashing a decision of the first-named respondent dated 11 November 2022 and which was made pursuant

to section 46 (3)(a) of the International Protection Act 2015 ("*the Act of 2015*"). In that decision, the Tribunal affirmed a recommendation made by the IPO that the applicant should be refused a declaration as a refugee and refused subsidiary protection status.

6. The essence of the applicant's case is that he is a Ghanian national who was born in 1986. The essential basis for his application for refugee status is his contention that, as put in the Statement of Grounds, *"the applicant claims to be a gay man and to fear persecution in Ghana by reason if his sexuality."*

7. The procedural history of his interaction with the international protection process is as follows:-

(a) The applicant arrived in Ireland on 17 February 2020 and sought international protection immediately on arrival at Dublin Airport.

(b) The applicant completed all the relevant forms and questionnaires and was called for interview at the International Protection Office on or about the 11 April 2022.

(c) Prior to his interview at the International Protection Office the applicant submitted a letter from his GP dated 4 April 2022, and he provided some additional supporting documents and photographs at his interview.

(d) On 27 June 2022, the IPO issued a decision refusing refugee status, subsidiary protection and leave to remain. The applicant appealed the decision by Notice of Appeal.

(e) On 15 September 2022, the Tribunal made a direction pursuant to s. 42 (8) of the Act of 2015 directing the applicant to address a number of queries in writing.

(f) On or about 17 October 2022, the applicant's solicitor sent submissions on his behalf to the Tribunal.

(g) On 19 October 2022, the Tribunal provided the applicant's solicitor with copies of documents that had been provided by the applicant directly to the IPO.

(h) On 20 October 2022, the applicant's appeal was heard by audio visual link.

(i) Arising from issues that arose in his appeal hearing, the Tribunal permitted the applicant to submit further evidence, and the applicant provided a further letter from a GP and two letters (described as "*Confirmation Notes*") that he claimed were from sources in Ghana.

(j) On or about 16 November 2022 the applicant received the decision of the Tribunal dated 11 November 2022 affirming the decision of the IPO that recommended refusing him both a declaration as a refugee and a declaration as a person eligible for subsidiary protection.

THE CORE ISSUES

8. The applicant contends that the Tribunal erred in law in determining that his account was not credible. That argument was grounded on a number of contentions:

a. First, it is asserted that that the findings made by the Tribunal were disproportionate and/or based on conjecture or stereotypes. Furthermore, it is asserted that the adverse findings were founded on an assumption or a conjecture about the experience of a gay man.

b. Second, it is asserted that the Tribunal erred in law and breached the principles of fair procedures in making adverse findings against the applicant's credibility without putting them to the applicant for response or explanation.

c. Third, it is asserted that the Tribunal decision was unreasonable or irrational in terms of the adverse credibility findings.

9. For their part, the respondents fully stand over the determination of the Tribunal and dispute the applicant's characterisation of the Tribunal's decision and reasoning. In essence, the respondents contend that the process and decision must be treated as a whole, and that the

decision should not be parsed or analysed in a fragmented manner. When viewed in that context, the respondents contend that both the process and the ultimate decision were lawful, fair and reasonable.

10. In their submissions, the legal representatives of the applicant reduced the issues to be determined by the court to three issues: -

(1) Whether the assessment of the applicant's credibility was founded upon conjecture, speculation and/or stereotypes in respect of LGBTQ people;

(2) Whether the applicant was provided with fair procedures and matters of significance put to him; and

(3) Whether there was an unreasonable reliance on the accuracy and reliability of *"google maps"* and entirely peripheral issues.

11. The respondents contended that the central issue in the case before the Tribunal was the credibility of the applicant, and therefore there was a further overarching question to be addressed:-

> *"Was the first named Respondent entitled to find, on an examination of the totality of the evidence and representations submitted by and on behalf of the Applicant, that his account was not credible?"*

12. The respondents acknowledged that the critical context for the applicant's application for protection is that homosexual sex is criminalised in Ghana, that the country of origin information clearly reveals that gay men may face extreme discrimination and homophobia in that country, and that physical and violent homophobic attacks against LGBTQ people are common.

PRELIMINARY ISSUE

13. As noted above the impugned decision made by the Tribunal was dated 11 November 2022 and was provided to the applicant under a cover letter dated 16 November 2022. The proceedings themselves were filed on 14 December 2022 and opened by way of an *ex parte* application before this court on 16 December 2022.

14. Hence, by the date when the proceedings commenced the 28 day statutory period for judicial review expired on 14 December 2022, and it was necessary for the applicant to seek a two-day extension of time. In circumstances in which this was not opposed, or opposed with any force, by the respondents, it seems to me fair and necessary to grant the extension.

THE STATUTORY FRAMEWORK

15. In *I.X. v. Chief International Protection Officer and Ors* [2020] IESC 44, O'Donnell J. (as he then was) described the overall scheme of the system established the International Protection Act 2015 in the following terms: -

> *"[59] The 2015 Act effected a radical, and welcome, restructuring of the process for decision-making on applications for asylum, subsidiary protection, and leave to remain and other related issues. The fact that there existed three separate systems for the assessment of claims for asylum subsidiary protection and leave to remain had been criticised as creating confusion and delay and encouraging legal challenges. One object of the legislative scheme introduced by the 2015 Act was, therefore, to provide a single decision-making process with, where appropriate, provision for appeal. In order to achieve this, the Act created the status of IPO, appointed by the Minister, who is required by the statute to be independent, and to make a recommendation on an application for asylum or subsidiary protection and which recommendation may be the subject of an appeal to an independent appeals body, the International Protection*

Appeals Tribunal ("IPAT"). This reflects the requirements of European law controlling applications for asylum and subsidiary protection. Leave to remain is a matter of domestic law and a matter for the discretion of the Executive, exercised in this case by the Minister, and the Act therefore constitutes the IPO as, also, an officer of the Minister for the purposes of such an application…"

THE ROLE OF THE COURT

16. It was common case that the task of the court is not to make any independent decision on the applicant's credibility or in any sense to substitute its view for that of the Tribunal. As noted by the Supreme Court in *E.D. (a minor) v. Refugee Appeals Tribunal and Ors* [2017] 1 IR 325 at para. 46:-

> *"…It follows that the scope of review which is permissible is limited to identifying errors which, in accordance with the relevant jurisprudence, are sufficient to render the administrative decision under review unlawful. There are, in accordance with that jurisprudence, a range of basis upon which the High Court, exercising its judicial review role, might come to such a conclusion. In the particular context of this case two such bases are potentially relevant. First, it might be said that, having regard to the findings of fact of the R.A.T. and the conclusion that, as a matter of law, a claim based on fear of persecution had not been made out, was not sustainable. In such a circumstance the High Court does not require to go behind the findings of fact of the relevant administrative body but rather considers whether, accepting those findings of fact, the conclusion reached was legally correct."*

17. Essentially, the question is whether the decision that was actually made was one which was open to the decision-maker. In the context of situations in which the Tribunal must assess

the credibility of an applicant, this is largely a matter for the Tribunal itself to decide. As noted in *S.Z. v. The Refugee Appeals Tribunal and Ors* [2013] IEHC 325 at para. 19:-

> *"…The Tribunal Member was entitled to weigh inconsistencies and reject general credibility for the reasons stated above and if this has the effect of not deciding the applicant's core claim, in my view, such an approach is lawful. Alternatively, it is possible to characterise the rejection of the applicant's credibility as a rejection of the applicant's core claim in as much as it is possible to say that the applicant was not believed about important aspects of his account and such findings cumulatively signal that the applicants entire asylum claim is rejected for want of credibility."*

18. Similarly, in *I.R. v. The Minister of Justice Equality and Law Reform and The Refugee Appeals Tribunal* [2009] IEHC 353, Cooke J. noted that an adversarial dispute about the assessment of the credibility of oral testimony is one of the most difficulty challenges faced by a decision maker. As noted by the court, at para. 3:-

> *"It is because in such cases the judgment of the primary decision-maker must frequently depend on the personal appraisal of an applicant, that it is not the function of the High Court in judicial review to reassess credibility and to substitute its own view for that of the decision-maker. Its role is confined when a finding of lack of credibility is attacked, to ensuring that the process by which that conclusion has been reached is legally sound and not vitiated by any material error of law."*

19. To that end and having reviewed an extensive body of case law, Cooke J. set out at para. 11 the principles that could be said to emerge from the case law as a guide to the manner in which evidence going to credibility ought to be treated and the review of conclusions on credibility to be carried out: -

> *"1) The determination as to whether a claim to a well-founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-*

maker and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision-makers.

2) On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.

3) There are two facets to the issue of credibility, one subjective and the other objective. An applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded.

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 weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.

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 bear a legitimate connection to the adverse finding.

6) The reasons 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.

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 disregard 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.

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

10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."

ASSESSMENTS OF CREDIBILITY ON QUESTIONS OF SEXUALITY

20. In addition to the general observations above regarding the proper approach to assessments of credibility, there is now a body of caselaw and professional guidance on how a tribunal should approach assessments of the credibility of claims regarding a person's sexuality. Various courts on various occasions have noted that determinations as to the credibility of an assertion that an applicant has a well-founded fear of persecution arising from their status as a member of the LGBTQ community is a particularly difficult and sensitive matter. The correct approach to such assessments of credibility, taking into account important jurisprudence from the CJEU, was considered by Ní Raifeartaigh J. in the Court of Appeal in

M.M. v. Chief International Protection Officer, The Minster for Justice and The International Protection Appeals Tribunal [2022] IECA 226.

21. In *M.M.*, Ní Raifeartaigh J. sets out the structure of the 2015 Act in detail. No issue arises in this case as to the particular interpretation of particular provisions within the 2015 Act. Rather, as noted above, the focus of the case is on the determination of issues of credibility of the applicant. In that regard, and in the context of a disputed finding of credibility regarding sexual orientation Ní Raifeartaigh J. noted the following:-

> *"[83] None of the above is to underestimate the challenges presented to a decision-maker in reaching a conclusion about an applicant's sexual orientation. It may be a most difficult and sensitive task in many cases. Indeed, it was precisely with the difficulties of testing an applicant's assertion of sexual identity in such cases that the CJEU grappled the A, B, and C case.* [Joined Cases C-148/13, C-149/13 and C-150/13]*"*

22. Because the reasoning of the Court of Appeal in *M.M.* is directly relevant to the questions arising in this case, it is worthwhile setting out the analysis of the court in some detail:-

> *"[84] In A, B and C, the referring court posed a question as to the proper method of assessing the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application was based on a fear of persecution on grounds of that sexual orientation. The legal context was that of Article 4 of Directive 2004/83 (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees) as read in the light of the Charter. The court commenced by refusing the proposition that the national authorities must treat a declared sexual orientation to be an established fact and held that such a declaration by an applicant is "merely the starting point in the process of assessment of the facts*

and circumstances envisaged under Article 4 of Directive 2004/83". The court accepted that refugee applications on the basis of sexual orientation may be subjected to an assessment process. It is clear therefore that an assertion of a particular sexual orientation is a starting point rather than an endpoint in the process.

[85] The court went on to say that the methods used by the competent authorities to assess the evidence submitted in support of those applications must be consistent with the provisions of Directive 2004/83 and 2005/85 and with the fundamental rights guaranteed by the Charter. (Directive 2005/85 has now been recast as Directive 2013/32 – the "procedures" directive previously referred to in this judgment). The court also made clear that the assessment of facts must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant, including factors such as background, gender and age, in order for it to be determined whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

[86] The court specifically addressed, inter alia, verifications carried out by competent authorities based on stereotype as to sexual orientation, including an applicant's knowledge of supportive organisations. In this regard, it should be noted precisely what the court said:-

> *[60.] As regards, in the first place, assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on*

stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant for asylum.

[61.] In that respect, it should be recalled that Article 4(3)(c) of Directive 2004/83 requires the competent authorities to carry out an assessment that takes account of the individual position and personal circumstances of the applicant and that Article 13(3)(a) of Directive 2005/85 requires those authorities to conduct the interview in a manner that takes account of the personal and general circumstances surrounding the application.

[62.] While questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.

[63.] Therefore, the inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility, inasmuch as such an approach would be contrary to the requirements of Article 4(3)(c) of Directive 2004/83 and of Article 13(3)(a) of Directive 2005/85.

[…]

[72.] Having regard to all the foregoing, the answer to the question referred in each of the cases C-148/13 to C-150/13 is:

> *— Article 4(3)(c) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities founded on questions based only on stereotyped notions concerning homosexuals…*

[87] Thus, an applicant's ignorance of and/or lack of contact with supportive organisations may legitimately be taken into account, provided it is merely one of the factors put into the mix."

23. As noted by all the parties, and as considered by the Tribunal in this case, the UN High Commissioner for Refugees published *Guidelines on International Protection No. 9* [HCR/GIP/12/09 23 October 2012] on claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees.

24. Those Guidelines are extensive and provide considerable guidance to decision-makers. As noted in para. 62 of the Guidelines, ascertaining *"the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation and gender identity, rather than a focus of sexual practices."*

25. The Guidelines set out a series of useful areas of questioning including self-identification, childhood, self-realisation, gender identity, non-conformity, family relationships, romantic and sexual relationships, community relationships and religion. The Guidelines go on to note that that the applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community. Where there is a lack of country of origin information, the decision-maker will have to rely on the applicant's statements alone. Normally an interview should suffice to bring the applicant's story to light. Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.

26. It is particularly relevant, and reflecting the views expressed by the CJEU as cited above in *M.M.*, that stereotypes or assumptions should be avoided, as noted in the Guidelines at para. 49:-

> *"[49] Decision makers should avoid reliance on stereotypes or assumptions, including visible markers or a lack thereof. This can be misleading in establishing an applicant's membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a pre-condition for recognition of the group. In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid persecution.... The "social perception" approach requires neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general public. It is furthermore not necessary that particular members of the group or their common characteristics be publicly known in a society.*

The determination rests simply on whether a group is "cognizable" or "set apart from society" in a more general, abstract sense."

27. As set out above, one of the critical arguments advanced on behalf of the applicant in this case is that the assessment of credibility by the Tribunal was defective because it relied improperly on stereotypes or assumptions. In that regard, it is important to set out the process and reasoning that led to the decision of the Tribunal in some detail.

THE DECISION UNDER REVIEW

28. Prior to the hearing before the Tribunal the applicant was afforded a number of opportunities to explain his position. Importantly, by the time he came to give evidence before the Tribunal it is clear that the applicant, who at all relevant times had legal representation, was aware or ought to have been aware of the issues of concern around his account.

29. The applicant took part in initial interviews and completed a questionnaire (which he completed with legal assistance). On 11 April 2022, the applicant had a substantive interview with the IPO. On 27 June 2022 the applicant was informed by the Minister that an IPO had considered his application for international protection and was recommending that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration. The applicant was informed of his right to appeal.

30. The applicant was provided with the written decision of the IPO, which was dated 18 May 2022. That document set out the essence of the representations made by the applicant and noted the documents that were submitted; these included photographs, reference letters, a medical report and country of origin information. The IPO had accepted that the applicant was a national of Ghana and that he was a divorced 36-year-old man who had three children. The IPO did not accept that the applicant had been attacked because he was in a same-sex relationship, and adverse credibility findings were made on a series of grounds.

31. The applicant, through his solicitors, submitted a Notice of Appeal on 19 July 2022. The grounds of appeal were submitted on 8 August 2022, and asserted that the applicant's account was coherent and plausible and did not run counter to the available country of origin information.

32. The appeal was heard on 20 October 2022. The applicant was present at the hearing accompanied by counsel, and he gave evidence under oath.

33. Following the appeal, by email dated 3 November 2022, the applicant submitted three further supporting documents:

a. First, there was a "*Confirmation Note*" dated 24 October 2022 from a cousin of the applicant in which his cousin confirms that the applicant stayed with him from 8 January 2019 after a mob attacked him because he was gay, and that his cousin had advised him to seek help from an identified pastor.

b. The second document was dated 27 October 2022, and was in the form of a further "*Confirmation Note*" from an identified pastor. In the note, the pastor states that on 27 December 2019 the applicant came to ask for help because a group of men were after him and they wanted to kill him because of his "*gay practice*". The note states that the pastor and his congregation *"assisted him to escape from the mob and subsequently left to Ireland to avoid being killed or further harassment."*

c. Third, there is a letter from a GP dated 19 October 2022 which simply stated that the applicant was on a waiting list for a urology review in an identified hospital.

34. By letter dated 16 November 2022 the applicant was informed by the Tribunal of its decision, affirming the recommendation of the IPO, that he should be refused a declaration as

a refugee and refuse subsidiary protection status. The decision and reasoning of the Tribunal was recorded in a written document dated 11 November 2022, and which runs to 37 pages.

35. The decision records the procedural history of the applicant's interaction with the international protection process and noted the principal credibility findings made against him by the IPO. The Tribunal noted that it was conducting a *de novo* appeal and was not bound by any findings made by the IPO. The Tribunal summarised the grounds of appeal as follows:-

> *"The IPO's credibility findings were speculative and/or reached in breach of fair procedures and that the Appellant was not given a proper opportunity to address them;*
>
> *Insufficient weight was given to the medical report submitted by the Appellant, which is of significant probative value; and*
>
> *The IPO erred in failing to afford the benefit of the doubt to the Appellant."*

36. The Tribunal noted that the applicant's solicitors had been furnished by the Tribunal with copies of various documents that were submitted by the applicant to the IPO. The Tribunal noted that in the course of the hearing the applicant intimated that he may be in a position to submit additional documentation, and the Tribunal granted leave for supplementary documents to be submitted within two weeks. As part of that direction the applicant was asked to indicate when the documents were submitted whether or not it was considered necessary for the hearing to be reconvened; but no such indication was given when the documents were submitted.

37. The Tribunal summarised the account given by the applicant, and I have further summarised the account as follows.

38. The applicant stated that he had been married and had three children but that he divorced in 2017. In 2018 the applicant met a slightly older man "*L*", who was from a neighbouring town. As reported by the Tribunal, the applicant stated that *"after his divorce the appellant had quote lost touch for women… L told him "about gay and how it was going on". L "was doing it for two or three years before that". L explained that "it was okay" and said*

the applicant should try and "could do this". He decided to give it a try. He started to get more into "that one" and to "see what was going on there". In March 2018 he "got in" with L and "moved in" with him. He thought "yes, I am okay with this". He was very happy about everything that they were doing. He felt like he was in the right position. It was perfect. He did not regret it. Since then, he is no longer interested in women. He told the tribunal that "the type I was getting from L, I wasn't getting from women"."

39. The applicant recounted that he often stayed over with L, and the relationship became more serious and was not hidden. However, he did not tell his neighbours or his family. He recounted that when his family heard he was living with a man, the family was disgusted and he felt like an outcast to them. He recounted that he was warned by a friend to be careful but did not take the warning seriously.

40. On 21 December 2018 he met an acquaintance and some others near a bottle shop, and he was hit hard on his forehead with what he now thinks was a bottle. He woke up in a local hospital and he had an injury on his forehead and cuts on his chest and behind his knee. He experienced pain urinating. He was told by a nurse that she had been told by his mother that he had been beaten and had his penis pulled in public. He did not report the incident to the police. He recounted that on 8 January 2019 his mother told him that the people who attacked him were still looking for him and were going to kill him. He went to stay with his cousin in another town and began working as a taxi driver.

41. On 27 December 2019, he was informed by his cousin that people had come to his house looking for the applicant, and created a disturbance. He then left to stay at a rehabilitation and prayer centre run by a pastor. He stated that a mob attended at the church. In February 2020 he flew to Dublin and applied for asylum at the airport using a false passport.

42. In addition to the documentation submitted by the applicant, the Tribunal considered country of origin information submitted by the applicant and additional information considered

by the IPO. Consideration was also given to the UNHCR's *Note on Refugee Claims related to Sexual Orientation*, 21 November 2008.

43. The Tribunal accepted on the balance of probabilities that the applicant was a national of Ghana. The Tribunal prefaced the assessment of the applicant's credibility by noting that allowance had to be made for three matters:

a. First, the Tribunal bore in mind that linguistic difficulties could affect the narrative given by the applicant, particularly by using the words cousin and brother interchangeably.

b. Second, although the GP's letter suggested that his mental health was good, the Tribunal also bore in mind that survivors of trauma frequently present with psychological difficulties that impact on their memory or ability to present a coherent account of past events.

c. Third, while the applicant had resided in Ireland for over two and a half years, the Tribunal bore in mind that it is difficult in a formal setting like an appeal hearing for people to answer questions about matters of intimacy and innate personal feelings, and that it can be even harder for gay people from intolerant countries to talk about their feelings and experiences.

THE ASSESSMENT ON PAST PERSECUTION

44. The Tribunal went on to assess the applicant's account of past persecution, and his claims to have been attacked three times in Ghana between 2017 and 2020. As a general proposition, the Tribunal accepted that the narrative was consistent with and found support in objective, reliable, properly updated country of origin information regarding the treatment of gay people in Ghana.

45. In relation to the first attack, the Tribunal noted that the letter from his GP noted that scarring was observed, and the applicant reported persistent pain and micturition. That report was noted as offering a relatively moderate degree of support for the applicant's claim, however the letter did not suggest that the scars were likely to have resulted from an assault with a bottle or a stick or any other specific weapon. There was no indication of how old the scars were or whether they appeared to have been treated in a hospital setting. There was no insight provided into the likely cause of the urinary issues. Importantly, these concerns had been drawn to the applicant's solicitors' attention before the appeal hearing, and the applicant's solicitors were afforded the opportunity to obtain an updated report. The one-line letter which was submitted from a different GP after the appeal hearing did not advance matters. It simply confirmed that he was awaiting a urology review in a named hospital. It was noted that the applicant solicitors had not sought any adjournment to await the report of the urology review.

46. In addition to that deficit in the medical evidence, there was no documentation to show that the applicant was taken to hospital to be treated, or that his mother paid the hospital bill before his release from hospital. The applicant explained that he was not in touch with his family. However, the Tribunal identified marked discrepancies between the applicant's accounts of the extent to which he had ongoing contact with family members. Those accounts differed at stages, *inter alia*, between his initial presentation, his interview with the IPO and his account to the Tribunal. The submission of a letter from his cousin four days after the hearing undermined his initial contention that his cousin would not help him and was not supporting him. The Tribunal noted that in the course of the international protection process the applicant had been furnished with numerous documents which emphasised the importance of seeking out and submitting all available documentary evidence.

47. There were inconsistencies noted between the account of the assault that the appellant gave in the section 35 interview to the account given in the appeal hearing. The Tribunal was

satisfied that the differences in the accounts that had been given were material and that no satisfactory application explanation was given for the differences. Accordingly, the Tribunal had significant concern in terms of the credibility of the narrative of the first incident.

48. The second incident, which occurred over Christmas 2018 and involved persons attending his cousin's house was noted to have been the subject of consistent accounts. The Tribunal attached very limited weight if any to the "*Confirmation Note*" which was submitted from his cousin after the hearing. The Tribunal noted that the rules of evidence applicable in civil or criminal proceedings were not directly applicable and it was not strictly necessary to prove or authenticate a document. Nevertheless, the onus was on an appellant to show that a document was genuine and reliable, and no real effort had been made to discharge that burden. Hence the Tribunal could not reach any conclusion on the authenticity of a letter or the reliability of its contents.

49. The third incident concerned events at the prayer centre operated by the pastor. Here the Tribunal found that material elements of the applicant's account of what happened at the prayer centre were internally inconsistent in significant ways. In that regard, the Tribunal identified a number of differences between accounts given at the section 15 interview, his International Protection questionnaire, and his subsequent accounts. As noted at section 4.25 of the decision, the Tribunal considered that the evidence given by the applicant at the appeal hearing about the incident *"was so muddled and opaque that the Tribunal Member found herself unable to formulate a single, coherent narrative for the purpose of Part 2…"* The Tribunal was not satisfied with the applicant's attempts to explain the inconsistencies. Similarly, the Tribunal was concerned that no documentary support was provided for this aspect of the applicant's account in advance of the appeal hearing, notwithstanding that this lacuna had been drawn to the applicant's attention before the appeal hearing.

50. After the appeal, the applicant furnished a confirmation note purporting to be from the pastor. Having considered the documentation, the Tribunal was satisfied that the confirmation note had been prepared by the same person who prepared the confirmation note signed by the applicant's cousin. Both documents used the same format and typeface, and the Tribunal was not satisfied that it could assess whether the document and the signature were authentic or whether its contents were reliable. No indication was provided as to how the applicant came into possession of the document, and no fair independent or verifiable evidence had been furnished of the existence of the pastor or his prayer centre. The applicant had submitted that the area where the prayer centre was located was not fully mapped and the centre did not appear in Google maps. The Tribunal member viewed the village on Google maps herself and noted that, in fact, numerous businesses and other locations are mapped in the immediate vicinity, including several churches and chapels.

51. The Tribunal then expressed a decision on the question of past persecution. The Tribunal found that by reason of the accumulation of unexplained problems with his narrative there were significant doubts about the credibility of the applicant and the Tribunal was not in a position to accept that the applicant was persecuted in the past. While it was established that the applicant had scars which might or might not have been sustained during an assault, the "*where, when, why, who*" of any such assault had not been established.

THE ASSESSMENT ON SEXUAL ORIENTATION

52. The Tribunal then turned to the question of sexual orientation. In that regard the Tribunal noted that it did not follow that because the account of past persecution was rejected the Tribunal must also reject the assertion that the applicant was a gay man. The Tribunal noted that it was necessary to engage in a discrete analysis of the credibility of the asserted sexual orientation.

53. The Tribunal considered that it was important but not determinative that the applicant self-identified under oath at the hearing as a gay man. This was described as the first of many things that had to be weighed in the balance. The Tribunal noted that the applicant had been consistent in his assertions about his sexual orientation since the start of the international protection process. The Tribunal also noted that the applicant's accounts of the attitudes shown generally by Ghanian society to LGBTQ people was consistent with country of origin information. Similarly, the Tribunal noted that the country of origin information supported the applicant's contention that he was unwilling to approach the police for protection.

54. Central to the Tribunal's determination on the credibility of the applicant's account of the sexual orientation was what was described as *"a disconnect between the appellant's evidence about the general treatment of gay people in Ghana… and his evidence about how he himself behaved when he entered a gay relationship."* Essentially, the applicant stated that since he commenced his relationship with L in his hometown, he did not attempt to hide the relationship and had no qualms about being openly gay. The country of origin information strongly suggested that this would have been highly unlikely and unusual in Ghana. As noted by the Tribunal at paragraph 4.38, *"of course, he may simply have been naïve or reckless, but is account of how he engaged in a carefree way in an openly gay relationship in the face of widespread intolerance and oppression does strike the Tribunal as being unexpected and unusual."*

55. The Tribunal had difficulties with the applicant's evidence about how he came to realise that he was gay and why he entered into a relationship with L. The Tribunal member noted that many of the questions asked by the Tribunal were formulated in accordance with the DHSS model and that the responses given by the applicant represented *"a fundamental misunderstanding of sexual orientation"*. For instance, the applicant suggested that he had not been attracted to any man or boy at school when he was a young man because nobody in his

village was gay and nobody was interested in being gay. Similarly, his evidence in effect was that he had no curiosity about, inclination towards or attraction to the opposite sex at any time prior to his relationship with L. He gave evidence that he had "*lost touch*" with women after his wife cheated on him, but he gave no indication of any struggle with his identity or feelings.

56. While the Tribunal acknowledged that people realise and come to accept their true sexual orientations in different ways and at different stages of their lives, the applicant's evidence about his life up to that point and the manner in which he transitioned from heterosexuality to homosexuality was *"entirely bereft of any of the thoughts, feelings and emotions that are commonly experienced by SOGI applicants"*.

57. The Tribunal also found that the applicant's evidence about his relationship with L was similarly unusual and unexpected. The applicant made no mention of any physical, romantic or emotional attraction to L. According to his evidence, the applicant was told by L that it was okay to be gay and that the applicant should try it. The applicant, on his evidence, decided to give it a go because he had lost interest in women. Although the Tribunal considered the possibility that the unconventionality of the applicant's account arose from difficulties in recounting intimate experiences in the appeal environment through a different language, the Tribunal formed the strong impression from interacting with him over a period of some hours that the applicant had no personal knowledge or experience of homosexuality. In addition to the matters that were observed by the Tribunal and the inconsistencies and unusual or unexpected elements in his testimony, there was also a concern about his apparent relationship with L. In that regard, no photos or social media contacts or any documentary evidence was proffered. Finally, there was no evidence before the Tribunal that during his time in Ireland the applicant had taken *"even the most tentative steps towards exercising his freedom to live openly as a gay man or even to explore what that life might be like"*.

58. The Tribunal acknowledged that assessing credibility of claims based on sexual orientation is particularly challenging and had regard to the observations of the Court of Appeal in *M.M.*. However, acknowledging the difficulty of the assessment, the Tribunal found it could only apply the tools available to it, which involved weighing the different strands of evidence furnished to it in order to come to a fair conclusion.

59. The Tribunal's conclusion was that there were significant unresolved credibility issues insofar as the applicant's account of past persecution was concerned. However, at the most fundamental level, the applicant seemed to the Tribunal not to understand what it meant to be gay. There was no independent evidence of his relationship with L. His account of their open relationship sat uneasily with what was generally known about Ghana. He gave a weak and unconvincing explanation for not contacting L after he was beaten up. He submitted no evidence whatsoever of any steps to exercise his freedom to live as a gay man in Ireland. Finally, he had not submitted any documentation relating to his age, his background, his identity, his nationality, his travel routes, his identity or travel documents. On that basis, the Tribunal found it difficult to afford the applicant the benefit of the doubt, and came to the conclusion that it should affirm the recommendation of the IPO.

THE FAIR PROCEDURES ARGUMENT

60. Under this heading the applicant's argument was that certain issues ought to have been but were not put to him for his response. In this regard, the applicant argued that when the Tribunal considered the documents that were submitted after the hearing, and formed a preliminary view as to their credibility, the applicant ought to have been afforded a further opportunity to respond to those concerns. It was argued that this did not necessarily require a further hearing, but at least should have involved an opportunity for the applicant to make a further submission. It is important to recall that the treatment of the additional information was

focused primarily on concerns about the authenticity and reliability of the two "*Confirmation Notes*".

61. The respondents accepted that there are certain circumstances where it may be necessary to reconvene a hearing. However, they emphasised the observations of Finlay Geoghegan J. in *Olatunji v. RAT & Anor* [2006] IEHC 113, that the obligation to draw the attention of the applicant to issues that 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."* The respondents argued that these two matters were not matters of substance or significance in the context of the overall consideration.

62. The caselaw is clear that as a matter of fair procedures issues of concern that are significant and substantial should be put to the applicant for a response, even after the formal conclusion of a full hearing. In this case, however, my view is that the two matters and the concerns that arose in relation to them did not warrant providing the applicant with a further opportunity to respond. There are several reasons for that determination.

63. First, the applicant already was aware from the IPO decision that there were significant concerns around the credibility of the accounts that he had given.

64. Second, on 15 September 2022, the Tribunal wrote to the applicant's solicitors setting out a series of matters of concern and expressly inviting him to make efforts to address those matters. The letter, at para. 4, draws attention to the absence of documentation, and notes that in his International Protection questionnaire the applicant had stated that he would ask family members in Ghana to find documents and send them on. The letter also includes the following:

> *"You are reminded that it is his duty to submit as soon as reasonably practicable all the information needed to substantiate his application, including all documentation at his disposal regarding the elements of his claim including age, background, identity, nationality, country of origin, travel routes, and travel documents and reasons for*

applying for protection. Failure to make a genuine effort to substantiate his application may affect his credibility. The Tribunal Member therefore encourages him to urgently redouble his efforts to seek out and submit any documents that might corroborate any aspects of his narrative, including but not limited to…"

65. Thereafter the letter provides a non-inclusive list of matters including his relationship with L, his attendance at hospitals, and the existence and location of the prayer centre where he stayed.

66. Third, despite the ongoing absence of documents, the Tribunal was told by the applicant at the hearing that further documents could be obtained and he was given an opportunity to submit whatever he considered necessary.

67. Fourth, the applicant was expressly advised that if he submitted further documents he could request a further hearing; but he did not request a hearing. Having submitted the documentary evidence that he chose to submit, the applicant could not proceed on the assumption that the documents would simply be accepted on their face. For instance, the applicant was aware that he had suggested that he was likely to find it difficult to obtain assistance from his family. As such, the fact that he could obtain a note from his cousin within a short period of the hearing, was something that raised its own questions.

68. Hence, by the time that the applicant came to submit the additional information, it was clear to him that it was necessary not just to submit documentation – if that was available – but to address any obvious questions about the provenance and reliability of those documents. The applicant was not entitled to assume that any documents simply would be accepted on their face and would not be interrogated in some manner by the Tribunal.

69. Fifth, the Tribunal did not weigh the documents against the applicant's credibility; rather the Tribunal primarily discounted the weight that could be attached to the documents. Insofar as the Tribunal noted that the submission of a document from the applicant's cousin

appeared to contradict the applicant's earlier contentions about his ability to obtain assistance from family members, this manifestly was a matter that that applicant was able to address and ought to have addressed when the documents were submitted. Pragmatically, it seems to me to go too far to suggest that the applicant should have been expressly asked to respond to this issue.

70. Sixth, because the documents were discounted and were found, in reality, neither to assist or detract from the assessment of credibility, and where the findings on credibility were grounded in far more substantial concerns, it seems to me that the additional documents cannot be treated as matter of substance or significance in the sense used in *Olatunji*.

71. Ultimately having considered the process from the applicant's first presentation seeking international protection to the conclusion of the appeal, I am satisfied that the process was fair. It is essential to understand, and I consider that this is clearly explained in the Tribunal decision, that the Tribunal's finding on the "*Confirmation Notes*" was not that they were matters that weighed against the credibility of the applicant. Instead, the point being made was that the Tribunal was concerned about the veracity and reliability of the notes and for that reason they could not be treated as assisting or adding weight to the applicant's claims.

72. The second fair procedures point was made by the applicant was to the effect that the Tribunal treated the "*Google maps*" submission as evidence and erred in placing unreasonable weight on the absence of the pastoral centre on the map.

73. In my view this submission was misplaced. In a similar way to the treatment of the "*Confirmation Notes*", the Tribunal found that the map did not operate to the assistance of the applicant, and effectively it was discounted. This seems reasonable where the map did not establish anything by way of objective evidence regarding the assertions by the applicant about the pastoral centre. The map did not assist in establishing the existence or location of the pastoral centre.

74. Insofar as the Tribunal member observed that the area in fact seemed reasonably well mapped, this simply bolstered the decision that it was not a matter that could be treated as enhancing the credibility of the applicant. The Tribunal was required to consider the evidence in order to determine if it added weight to the applicant's case; the evidence was considered and a reasonable conclusion was reached that the evidence did not add weight to the applicant's case.

75. In all the circumstances, I am not satisfied that the applicant has established that the process before the Tribunal was unfair.

THE STEREOTYPE / CONJECTURE ARGUMENTS AND THE CREDIBILITY ASSESSMENT VIEWED IN THE ROUND

76. As noted above, the case law strongly supports the proposition that a credibility assessment needs to be considered in the round; it is not appropriate to seek to atomise the decision to the extent contended for by the applicant. In addition, where the credibility assessment concerns claims around an applicant's sexuality there is a particular need to avoid conjecture or stereotypes. I have set out in some detail the approach adopted by the Tribunal member. As can be seen, the Tribunal member was very aware of the need to avoid engaging in stereotyped thinking and was conscious of the standards derived from UNHCR guidelines, the CJEU judgments, and the decision of the Court of Appeal in *M.M.*. In addition to seeking to ensure that the overall process was fair and providing opportunities for the applicant to respond to concerns, the Tribunal also sought to explore whether there were reasonable alternative explanations – for instance linguistic or cultural differences – for the applicant's apparent lack of credibility in explaining his situation.

77. I am not satisfied that the Tribunal member fell into error in her treatment of the credibility issues. Contrary to the submissions made on behalf of the applicant this was not a

case where the Tribunal member in any sense sought to criticise the applicant's assertion that he lived openly as a gay man in Ghana. Instead, the Tribunal member found that the applicant's evidence in that regard lacked credibility. Moreover, this was just one element in a series of elements that were found on balance to render the overall credibility of the applicant's narrative unreliable. As set out above, the Tribunal member found that many aspects of the applicant's narrative lacked credibility. These included the narratives around the events that were asserted to constitute past persecution, and the manner in which the applicant in a number of ways described his relationship with L and overall understanding of life as a gay man. Cumulatively, these factors led the Tribunal to a conclusion that it could not accept the credibility of the applicant's assertions.

78. I fully accept that gay men in any culture or country can never be treated as a homogenous group or class, or that their experiences should be expected to conform to some sort of expected norm. However, in this case the Tribunal member was struck forcefully by the fact that the applicant did not appear to have had any intimation of same-sex attraction prior to him meeting L. As acknowledged by the Tribunal member, the fact that the applicant had been married and had children, in and of itself did not mean that he was not gay, particularly in a culture where gay people suffer extensive stigma and prejudice. The point made by the Tribunal was that, to paraphrase, the applicant decided to try being gay when that was suggested by L. His explanation was not accompanied by any evidence of a sense or emerging realisation that the applicant generally was experiencing same-sex attraction.

79. I am not at all satisfied that the Tribunal member erred by making findings based on conjecture or stereotype. The reality was that the Tribunal member was required to make a finding on this fundamental aspect of the applicant's claim. As noted by O'Malley J. in *MAB v. Refugee Applications Commissioner* [2014] IEHC 64, if this aspect of a claim was not accepted, the case was highly unlikely to succeed. The Tribunal had to reach a conclusion on

the credibility of the applicant's narrative and his assertions about his sexuality. The findings made by the Tribunal proceeded from a careful consideration of the facts, and by giving the applicant extensive opportunities to explain his position. In all the circumstances, I am unable to find that there was anything unreasonable or irrational about the approach to the credibility assessment, and I find that the decision of the Tribunal was lawful.

80. As this judgment is being delivered electronically I express the provisional view that the respondents ought to be entitled to their costs. I will list this matter before me at 10.30 am on 21 June 2024 for final orders.