THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 145 J.R.]

BETWEEN

N.N.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 15th February 2017

Introduction

1. By order made on the 14th March 2016, Mac Eochaidh J granted leave to the applicant to apply by way of judicial review for an order of *certiorari* quashing the decision made on the 13th October 2015 by the International Protection Appeals Tribunal ('the IPAT') (then called the Refugee Appeals Tribunal), pursuant to s. 16, sub-s. 2 of the Refugee Act 1996, as amended ('the 1996 Act'), to affirm the recommendation of the Refugee Applications Commissioner that the applicant should not be declared to be a refugee.

International Protection Appeals Tribunal

2. As these proceedings were originally constituted, the second named respondent was the Refugee Appeals Tribunal. However, the International Protection Act 2015 (Commencement) (No. 3) Order 2016 appointed the 31st December 2016 as the day on which those parts of the the International Protection Act 2015 ('the 2015 Act') not already in force came into operation.

3. Section 71, sub-s. (1) of the 2015 Act provides:

> 'With effect from the establishment day, the administration and business in connection with the performance of any functions of the former Tribunal under the Act of 1996, the Regulations of 2006, the Regulations of 2013 and the Dublin System Regulations are transferred, to the Tribunal.'

4. As s. 2 of the 2015 Act makes clear, 'the Tribunal' means the International Protection Appeals Tribunal established by s. 61 of that Act.

5. Section 71, sub-s. (5) states:

> 'Where the former Tribunal is a party to legal proceedings pending immediately before the establishment day which relate to functions which, on and after that date, are functions of the Tribunal, the Tribunal shall, insofar as the proceedings relate to those functions, be substituted in the proceedings for the former Tribunal and the proceedings shall not abate by reason of the substitution.'

6. Accordingly, the International Protection Appeals Tribunal has been substituted for the Refugee Appeals Tribunal in these proceedings with effect from the 31st December 2015 by operation of law.

Application to extend time

7. The order of the 14th March 2016 recites on its face that the applicant is given leave to seek an order of *certiorari* on the grounds set forth at paragraph (e) of his statement of grounds, dated the 7th March 2016. That statement of grounds has not been produced to the court. Instead, the applicant purports to rely on the grounds set forth at paragraph (e) of an 'amended' statement of grounds dated the 24th March 2016. The applicant submits that, although the Order states the contrary, the application for leave was in fact made based on the amended statement of grounds, dated some ten days later.

8. Counsel for the applicant submitted at the commencement of the hearing that, although the Order does not say so, during the application for leave *ex parte* on the 14th March 2016, the applicant sought and was granted an extension of time to seek judicial review of the tribunal decision of the 13th October 2015. Ground 6 at paragraph (e) of the amended statement of grounds, dated the 24th March 2016, states: 'An extension of time to be granted for the reasons set out in the [a]pplicant's grounding affidavit.'

9. Counsel for the applicant acknowledged that no application was made to speak to the terms of the Order of the 14th March 2016, whether under O. 28, r. 11 of the Rules of the Superior Courts. as amended ('the RSC') or otherwise, at any time since that Order was made and perfected. Nor was any application made to the Court to direct the production of a transcript, whether under O. 123, r. 5 of the RSC or otherwise. Nevertheless, Counsel for the applicant - who, in fairness to him, had not been in the case at the time of the application for leave - was clear that his instructions were that an extension of time to bring the application had been granted by Mac Eochaidh J when the application for leave *ex parte* was made and hence, the Court should ignore the plain terms of the Order in favour of accepting that submission.

10. The respondents' statement of opposition is dated the 5th August 2016. An affidavit of verification concerning it was sworn on the 2nd September 2016. It is largely a traverse of the grounds for relief set forth by the applicant, together with a denial that the applicant is entitled to the order of *certiorari* he seeks. However, it does contain a preliminary objection that the applicant is not entitled to bring these proceedings in circumstances where application for leave was made outside the time permitted, and no adequate basis for an extension of time has been set out.

11. At paragraph 7 of the grounding affidavit that he swore on the 6th March 2016, the applicant has provided the following explanation for his delay in seeking leave to apply for judicial review:

> 'I received a letter from the Refugee Legal Services dated the 22nd of October 2015 asking me to consider going to a private solicitor within 28 days and telling me that they did not believe there were grounds for bringing Judicial Review proceedings in the High Court. I did not understand what they meant by this and I telephoned the Refugee Legal Services on receipt of this letter to request an appointment to see my Solicitor. I was told to wait for my three options letter. I rang my former Solicitors approximately 3 to 4 times to ask what my options were and to ask to see my Solicitor each time I was told to wait until I got the next letter from the Department of Justice and then they would arrange to meet with me. I have not received any further correspondence from the Department of Justice or my former Solicitors. I also say that I am of limited means and receive 19 euros per week and did not think I could afford to go to another Solicitor. I got my current Solicitors number from a friend of mine around the 10th February 2016 and I then called him to ask for an appointment. He arranged to meet me on the 21st day of February 2016 and I am advised he wrote to my former Solicitors to request my file. I am advise (sic) he received the files around the 22nd day of February 2016 and he sent my papers to Counsel who drafted the within proceedings. I say my Solicitor called me yesterday to arrange to meet me today.'

12. The applicant's original written legal submissions, dated the 4th January 2017 and electronically filed the following day, contained the assertion that an extension of time had been sought and granted when the application for leave *ex parte* was made to Mac Eochaidh J on the 14th March 2016. The respondents' written legal submissions, dated the 10th January 2017 and filed two days later, address, among other matters, the preliminary objection clearly flagged in their statement of opposition that the applicant's proceedings are out of time. The applicant then delivered, on the eve of the hearing and without the leave of the court, 'additional [written legal] submissions' in support of an application for an extension of time within which to seek judicial review. From that occurrence, the respondents and the court were left to infer that the applicant was putting forth, as an alternative to his submission that an extension of time had already been granted by Mac Eochaidh J, the argument that the court should now grant an extension of time.

13. The respondents objected to the filing of those 'additional submissions' but conceded, very properly, that, since the legal principals and jurisprudence with which they deal are well-known, no prejudice would be caused by allowing them to be relied upon. For that reason, I ruled that the applicant could rely on those submissions.

14. In the unusual circumstances that had arisen, and very much as an exceptional measure, the Court consulted the digital audio recording of the application for leave *ex parte* made to Mac Eochaidh J by Senior Counsel on behalf of the applicant on the 14th March last year. Having done so, I informed Counsel that while the recording discloses that reference was made to the 're-jigging' of the grounds upon which relief was sought (by the deletion of one ground that was considered by Senior Counsel for the applicant to be 'somewhat generic'), I could find no reference to, or mention of, any application for an extension of time to bring the present application, much less any ruling by Mac Eochaidh J granting one.

15. I pause here to remark that it is deeply unsatisfactory that an assertion should be made on behalf of any party to litigation that a previous order of the court contains an error (whether of inclusion or omission), in circumstances where that party has taken no steps, whether under O. 28, r. 11 of the RSC ('the slip rule') or otherwise, to have that purported error corrected and has adduced no evidence whatsoever in support of the contention that an error has been made, beyond the bald assertion of Counsel that that is so. It seems to me that the appropriate course for the court to adopt in such circumstances is to deprecate any attempt to go behind the express terms of the order.

16. In this case, however, I took the unusual step of consulting the digital audio recording of the application for leave instead, both out of an abundance of caution and because I am conscious of what is at stake for the applicant. That should not be taken as a precedent. In view of the status of the applicant's solicitor as an officer of the court and of the applicant's Counsel as a member of the Bar, it is gravely troubling to consider how easily the court could have been misled. When I invited the parties to make whatever submissions they considered appropriate in light of that clarification, the Counsel who had previously been instructed on behalf of the applicant appeared in court on the following day to apologise in person for what, he informed the court and I have no reason to doubt, was a genuine error on his part. In the circumstances, I did not take that aspect of the matter any further.

17. The respondents next submitted that I should determine the issue of whether it is appropriate to grant an extension of time as a necessary preliminary to any consideration of the substantive application. Section 5, sub-s 2 of the Illegal Immigrants (Trafficking) Act 2000, as substituted by s. 34 of the Employment Permits (Amendment) Act 2014 provides in respect of the judicial review of various types of decision, including a decision of the tribunal under s. 16 of the 1996 Act, that:

> 'An application for leave to apply for judicial review … shall be made within the period of 28 days commencing on the date on which the person was notified of the decision...unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision...is invalid or ought to be quashed.'

18. The respondents' contention was that the Court should first embark upon a narrow consideration of whether the reasons given by the applicant for his delay in applying for leave are good and sufficient and, if not so satisfied by reference solely to what is set out on affidavit on that point, should dismiss the proceedings without ever going on to consider whether, despite the inadequacy of the reasons given, the broader interests of justice might warrant permitting the application to proceed. In support of that argument, the respondents cited the ex tempore decision of Finlay Geoghegan J in *Jolly v Minister for Justice, Equality and Law Reform* [2004] IEHC 36. That case involved an application for leave to seek judicial review of a decision refusing refugee status that was brought outside the 14-day time limit then applicable. The respondents relied upon the following passage from the report of the judgment:

> 'This court may only consider extending the time where what might be considered to be good and sufficient reasons are set out on affidavit either by the applicant or by some other person swearing an affidavit or making a declaration on his behalf.'

19. Thus, the respondents submitted, the law is that the court must consider only whether the reasons for extending time set out on affidavit on behalf of an applicant are good and sufficient. If not, the court's enquiry must go no further and the application must be refused.

20. In my view, that submission invites the court to read far too much into the terms of a single sentence in an ex tempore judgment and to do so out of context. In the preceding sentence in Jolly, Finlay Geoghegan J had pointed out that, nowhere in the declaration and affidavit grounding the application for leave in that case had any reference been made to the delay in bringing it, much less had any reason been provided to the court for extending time. A 'no reasons' case is very different from a 'not good enough, or insufficient, reasons' one. And, as Counsel for the applicant pointed out, Finlay Geoghegan J did go on to consider the merits of the

application in Jolly.

21. Moreover, to give so sweeping an interpretation to that single sentence in an ex tempore decision would be to place that judgment in obvious conflict with several other cases on the point, most notably the decision of the Supreme Court in *G.K. v Minister for Justice* [2002] 2 I.R. 418, which, I regret to say, was not cited in argument. In G.K., the Supreme Court was dealing with an appeal by the State against an order extending time for bringing an application for leave to seek judicial review of two decisions; one a refusal of refugee status and the other a deportation order. Hence, the Supreme Court was required to interpret the words 'unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made' in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. In giving judgment for the Court, Hardiman J, (Denham CJ and Geoghegan J concurring), stated (at 422-3):

> 'In other circumstances where the court is called upon to extend a period of time limited for the taking of any step, or considers an application to strike out proceedings in the exercise of inherent jurisdiction, the merits of the substantive case are considered relevant. In relation to extensions of time to appeal to this court from the High Court, the well known case of *Eire Continental Trading Co. Ltd. v. Clonmel Foods Ltd*. [1955] I.R. 170 lays down three preconditions for the exercise of the discretion of the court to extend time, the third of which relates to the existence of an arguable case on appeal. This requirement was discussed and reaffirmed in this court in *Dalton v. Minister for Finance* [1989] I.R. 269. The case related to the extension of time for appeal to this court, pursuant to an unqualified power contained in O. 58, r. 3(4) of the Rules of the Superior Courts, 1986.
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> Specifically, the rule contains no requirement for "good and sufficient reason."
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> The merits of the underlying case also appear relevant in considering an application to stay proceedings, usually on grounds of delay, in the exercise of the inherent jurisdiction of the court. An example of this is *Guerin v. Guerin* [1992] 2 I.R. 287, where such an application was refused inter alia on the basis that even if the delay were inexcusable, the plaintiff had a very strong, indeed almost unanswerable case on the merits of the substantive action so that "an obvious and substantial injustice" would be done to him if deprived of his opportunity to litigate his claim. By parity of reasoning, the fact that a case was apparently unarguable must also be relevant.
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> I believe that the use of the phrase "good and sufficient reason for extending the period" still more clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in particular circumstances. The statute does not say that that the time may be extended if there were "good and sufficient reasons for the failure to make the application within the period of fourteen days". A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits. The phrase actually used "good and sufficient reason for extending the period" does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case."

22. Although the decision of the Supreme Court in *G.K.* was not opened to the court, I was not persuaded by the respondent's argument that the merits of the case are irrelevant to the question of whether there is good and sufficient reason for extending time to bring these proceedings. Thus, I decided that it would be appropriate to consider the extension of time issue in conjunction with the substantive application for judicial review, since the merits of the case were going to have to be considered either way and the proceedings were already at the trial stage. I took the view that a telescoped hearing of both issues together was a more effective use of court time, since it eliminated the potential for a two-stage process.

Background

23. The applicant formally applied for refugee status on the 24th June 2013. He completed a questionnaire about that application a little over a week later. He was interviewed approximately three weeks after that. In a report dated the 23rd August 2013, the Office of the Refugee Applications Commissioner ('ORAC') recommended that the applicant should not be declared to be a refugee.

24. Through the Refugee Legal Service, as his legal representative, the applicant appealed that decision to the second respondent (or its predecessor in title) by notice of appeal, dated the 16th October 2013.

25. In summary, the applicant claims as follows. He is a national of the Democratic Republic of Congo. He has a well-founded fear of persecution if returned to that country on the ground of his membership of a particular social group, specifically his family, and of his political opinion, specifically his membership of, and involvement with, the UDPS political party there. The applicant's family home was attacked three times in 2008 by masked men demanding money. The applicant believes those men were soldiers. On the first and second occasions, he and his family were beaten; on the third, the applicant's mother gave the men a small amount of money and they went away. The applicant's family complained to the local chief or mayor rather than the police because that is the custom. They did not receive any assistance. They moved to another part of the country. The appellant was attacked there in 2011 by members of the PPRD political party who threw stones at him. Separately, the applicant's family were again attacked in their home by armed men. The applicant's brother was shot dead in front of the applicant and, while he did not directly witness it because he was making good his own escape, the applicant believes that his mother and sister were raped and then kidnapped. The applicant believes that the attacks on his family home were instigated by his father's second wife because she was jealous of the applicant's mother, his father's first wife, and her family. This belief is based on the applicant's surmise that the masked men were soldiers and his assertion that his father's second wife was in a relationship with a soldier. The only identification that the applicant could produce is an electoral identity card. There is no direct corroboration for any of the applicant's claims.

26. In its decision of the 13th October 2015, the second respondent concluded that the applicant's claim of a fear of persecution was not credible. On one view, that finding of lack of credibility is really a finding of lack of convention nexus, since the principal parts of the applicant's account which the second respondent found lacking in credibility were his belief that the attacks he described were motivated as he suggests, rather than random criminal acts. However, that aspect of the second respondent's decision has not been challenged. The applicant's claim failed because, in the eyes of the second respondent, he was unable to establish a well-founded fear of persecution.

The grounds of challenge

i. the burden of proof

27. In setting out the basis upon which an order of *certiorari* is sought, Counsel for the applicant submitted that, when this case was being called on in the list to fix dates on the 19th December last, the Court directed that the present hearing should not extend to ground 1 at paragraph (e) of the applicant's amended statement of grounds, as it was then the subject of a pending 'test' case.

28. That 'test' case was *O.N. v The Refugee Appeals Tribunal* [2017] IEHC 13. O'Regan J gave judgment in it on the 17th January 2017. The issue was whether the standard of proof to establish the factual circumstances which may constitute evidence in support of a claim for refugee status is the ordinary civil standard, namely the balance of probabilities (often expressed as a 51% likelihood or greater), subject, where appropriate, to the application of the benefit of the doubt, or that applicable to the assessment of risk of future persecution, namely a reasonable degree of likelihood or real possibility.

29. The affected ground in these proceedings, ground 1, asserts that the second respondent applied the incorrect standard of proof as follows:

> 'In applying the standard of the balance of probabilities the second named respondent applied the incorrect standard of proof – both in relation to past events and in relation to the likelihood of future persecution. In relation to past events the correct approach is that set out in *Karanakaran v Secretary of State for the Home Department* [2003] 3 AER 449; see especially the dicta of Brooke LJ at 469 and Sedley LJ at 479. In relation to future persecution the correct standard is that of a reasonable degree of likelihood that the Applicant will be persecuted for a Convention reason. The application of the incorrect standard was particularly egregious when the Applicant's legal adviser had specifically raised the question of the correct standard of proof in the (sic) Ground 3 and 11 of the Notice of Appeal where she cited the case of *A(F) v Minister for Justice, Equality and Law* (sic) (High Court, Ó Caoimh J., 21st December 2011).'

30. It ought not to be a difficult thing for a party who is legally represented to distinguish between a statement of grounds and a submission. It would have been much more helpful if the ground just quoted had set out the standard of proof (if any) contended for by the applicant, in asserting that the wrong standard had been applied, leaving over for argument the citation of authority in support of that proposition, rather than simply citing authority without explanation and inviting, or requiring, the other party and the Court to work out for themselves precisely what the standard of proof (if any) contended for is. As its name suggests, and as O. 84, r. 20 and Form No. 13 in Appendix T of the RSC confirm, a statement of grounds should include a precise statement of each ground for seeking relief, giving particulars where appropriate, and should identify in respect of each ground the facts or matters relied upon as supporting that ground. Any material – whether legislation, case law or secondary sources – that is to be relied upon in support of any such ground should be separately identified in written or oral submissions.

31. What alternative standard of proof is the applicant contending for in relation to past or present events? What is the 'correct approach' in that regard, evidenced by the dicta of Brooke and Sedley LJJ for the English Court of Appeal in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449? It seems to me that the answer to that question is by no means simple, which may explain why the applicant did not attempt to provide it. While the ultimate issue in that appeal was one of internal relocation as an alternative to refugee status, the Court of Appeal first considered at some length the way a decision-maker should consider whether there is a 'serious possibility of persecution for a convention reason' if an asylum seeker is returned. Brooke LJ concluded (at p. 469 of the report), that the correct approach was that adopted by the majority of the Immigration Appeal Tribunal in *Kaja v Secretary of State for the Home Department* [1995] Imm AR 1. Describing that approach, Brooke LJ explained (at pp. 459-460):

> 'It is important to understand clearly the true effect of the majority decision in *Kaja's* case. They did not decide, as it is suggested in one headnote ([1995] Imm AR 1 at 1) that:
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> '…the lower standard of proof set out in [*R v Secretary of State for the Home Department ex p Sivakumaran* [1988] AC 958] applied both to the assessment of accounts of past events and the likelihood of persecution in the future.'
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> What they decided was that when assessing future risk decision-makers may have to take into account a whole bundle of disparate pieces of evidence: (1) evidence they are certain about; (2) evidence they think is probably true; (3) evidence to which they are willing to attach some credence, even if they could not go so far as to say it is probably true; (4) evidence to which they are not willing to attach any credence at all.
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> The effect of *Kaja's* case is that the decision-maker is not bound to exclude category (3) evidence as he/she would be if deciding issues that arise in civil litigation.'

32. Brooke LJ had dealt with the lower standard of proof set out in *Sivakumaran* earlier in his judgment in the following terms (at p. 457):

> 'The English cases show that the courts have recognised that different techniques are required in asylum cases when a decision-maker has to make judgments about future outcomes. The law in this respect is now authoritatively settled in this country by the decision of the House of Lords in [*Sivakumaran*]. In that case it was held that when deciding whether an applicant's fear of persecution was well-founded it was sufficient for a decision-maker to be satisfied that there was a reasonable degree of likelihood that the applicant would be persecuted for a convention reason if returned to his own country (see [1998] 1 All ER 193 at 197-198, 202, [1988] AC 958 at 994, 1000 per Lord Keith of Kinkel, per Lord Goff of Chieveley). Support was afforded by an earlier of the House of Lords in *Fernandez v Government of Singapore* [1971] 2 All ER 691, [1971] 1 WLR 987, an appeal concerned with the proper interpretation of s 4(1)(c) of the Fugitive Offenders Act 1967 ('if it appears … that [the appellant] might, if returned, be … detained or restricted in his personal liberty by reason of his … political opinions'). Lord Diplock ([1971] 2 All ER 291 at 597, [1971] 1 WLR 987 at 994) held that, bearing in mind the relative gravity of the consequences of the court's expectation being falsified, it was appropriate to adopt a lesser degree of likelihood that that inherent in the expression 'more likely than not'. He saw no significant difference between such as expressions as 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' as means of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justified the court in giving effect to the provisions of s 4(1)(c).'

33. It is worth interposing here to note that, in *MA (Somalia) v Secretary of State* [2011] 2 All E.R. 65 at 70, the U.K. Supreme Court (per Lord Dyson SCJ) has expressed the view that there is no practical difference between the 'reasonable likelihood' standard applied to risk of future persecution in *Sivakumaran* and the 'substantial grounds' standard for believing a person faces a 'real risk' of torture or inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights; *Vilvarajah v UK* (1991) 14 EHRR 248 (para 103).

34. In his concurring judgment in *Karanakaran*, Sedley LJ stated (at pp. 679-670 of the report):

> 'I would put my own view, in summary, as follows. The question whether an applicant for asylum is within the protection of the convention is not a head-to-head litigation issue. Testing a claim ordinarily involves no choice between two

conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant's case. It is conducted initially by a departmental officer and then, if challenged, by one or more tribunals which, though empowered by statute and bound to observe the principles of justice, are not courts of law. Their role is best regarded as an extension of the initial decision-making process; see Simon Brown LJ in *R v Secretary of State for the Home Dept*, *ex p Ravichandran* [1996] Imm AR 97 at 112. Such decision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of the applicant and include in-country reports, expert testimony and – sometimes – specialised knowledge of their own (which must of course be disclosed). No probabilistic cut-off operates here; everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the convention issues. Finally, and importantly, the convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues, they are not themselves conclusions. How far this process truly differs from civil or criminal litigation need not detain us now.

…

While, for reasons considered earlier, it may well be necessary to approach the convention questions themselves in a discrete order, how they are approached and regarded should henceforward not be regarded as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the convention's criteria of eligibility for asylum.'

35. Having considered the judgments in *Karanakaran* and, in particular, the passages that I have just quoted from them, it does not seem to me correct to suggest, as the applicant appears to, that Brooke and Sedley LJJ were laying out a specific standard of proof to be adopted to the ascertainment of past or present events, whether one the same as or distinct from that to be applied to an assessment of prospective risk i.e. a reasonable likelihood of future persecution. Rather, the English Court of Appeal was eschewing the application of any probabilistic test to past and present events, whether a 'more probable or not' or a 'reasonably likely' one, in favour of the application of a unitary evaluative test to the ultimate question of whether there is a reasonable likelihood of future persecution. As Sedley LJ put it (at 476): 'It is one thing to apply the civil standard of proof which artificially elevates factual probabilities to forensic certainties; it is another to treat past facts which probably did not happen as equally certain.'

36. In adopting that approach, the English Court of Appeal cited with approval, and quoted at length from, several decisions of the High Court of Australia and of the Federal Court there. Those cases reflect a conviction that a too close analogy between administrative decision-making and the conduct and determination of civil litigation is misplaced; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282. Brooke LJ drew specific attention to the Federal Court decision in *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719, in which Sackville J. distilled the following six principles from the decided cases (at paras 60-67):

'(1) There may be circumstances in which a decision-maker must take into account the possibility that alleged past events occurred even though it finds that these events probably did not occur. The reason for this is that the ultimate question is whether the applicant has a real susbstantial basis for his fear of future persecution. The decision-maker must not foreclose reasonable speculation about the chances of the future hypothetical event occurring.

(2) Although the civil standard of proof is not irrelevant to the fact-finding process, the decision-maker cannot simply apply that standard to all fact-finding. It frequently has to make its assessment on the basis of fragmented, incomplete and confused information. It has to assess the plausibility of accounts given by people who may be understandably bewildered, frightened and, perhaps, desperate, and who often do not understand either the process or the language spoken by the decision-maker/investigator. Even applicants with a genuine fear of persecution may not present as models of consistency or transparent veracity.

(3) In this context, when the decision-maker is uncertain as to whether an alleged event occurred, or finds that although the probabilities are against it, the event may have occurred, it may be necessary to take into account the possibility that the event took place in deciding the ultimate question (for which see (1) above). Similarly, if the non-occurrence of an event is important to the applicant's case, the possibility that the event did not occur may need to be considered by the decision-maker even though it considers that the disputed event probably did occur.

(4) Although the 'What if I am wrong?' terminology has gained currency, it is more accurate to see this requirement as simply an aspect of the obligation to apply correctly the principles for determining whether an applicant has a 'well-founded fear of being persecuted' for a convention reason.

(5) There is no reason in principle to support a general rule that a decision-maker must express findings as to whether alleged past events actually occurred in a manner that makes explicit its degree of conviction or confidence that its findings were correct. (In [*Minister for Immigration and Multicultural Affairs v Guo* (1977) 144 ALR 567], for instance, the High Court considered that it was enough that the tribunal appeared to have no doubt that the probability of error was insignificant).

(6) If a fair reading of the decision-maker's reasons as a whole shows that it 'had no real doubt' that claimed events did not occur, then there is no warrant for holding that it should have considered the possibility that its findings were wrong.'

37. The reasoning of the High Court of Australia and of the English Court of Appeal is persuasive but does it represent the law in this jurisdiction? The recently provided answer to that question is no.

38. In *O.N.*, already cited, O'Regan J identified certain principles of law relevant to the identification of the appropriate standard of proof to be applied to 'fact finding and/or the acceptance of the history of events as disclosed by an individual applicant' (at §62). Among them are the following:

(a) There is no approach which is universally accepted either within the EU or internationally.

(b) No approach is mandated under either the 1951 Convention and 1967 Protocol Relating to the Status of Refugees ('the Geneva Convention') or Council Directive 2004/83/EC ('the qualification Directive'). At least one United Nations High

Commissioner for Refugees ('UNHCR') document has noted that the balance of probabilities 'is used in proving facts in an asylum claim in many common law countries', without apparent criticism.

(c) There is no legislation in this jurisdiction prescribing a particular approach, whether under the Refugee Act 1996, as amended ('the 1996 Act'), the European Communities (Eligibility for Protection) Regulations 2006, as amended, or the European Union (Subsidiary Protection) Regulations 2013.

(d) There is no authority on the point in this jurisdiction. In *A(F) v Minister for Justice, Equality and Law Reform* [2001] IEHC 271, Ó Caoimh J found that the 'reasonable likelihood' standard applied by the decision maker in that case to the risk of future persecution was the correct one, noting that it accorded with the test applied by the House of Lords in *Sivakumaran*, and finding no essential difference between it and the 'real possibility' standard identified by Stevens J in the U.S. Supreme Court in *I.N.S. v Cardoza-Fonseca* 480 US 421 (1987) at 440, or the 'real chance' standard applied by the High Court of Australia in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. That decision appears to have been subsequently and, no doubt, inadvertently overlooked in several cases. In *D.H. v Refugee Applications Commissioner* [2004] IEHC 95, Herbert J left over to an appropriate case the issue of the standard of proof applicable to an assessment of risk of future persecution, having noted that the *Sivakumaran* 'reasonable likelihood' standard had been applied by the relevant decision-maker in that case, though suggesting, obiter, that the 'balance of probabilities' standard might more properly have been applied. Subsequent cases such as *RKS v Refugee Appeals Tribunal* [2004] IEHC 436 (a contested leave application on the existence of arguable grounds) and *M.A.M.A. v Refugee Appeals Tribunal* [2011] IEHC 147, did not follow that suggestion, approving instead the 'reasonable likelihood' standard identified in *Karanakaran* (i.e. the standard established in *Sivakumaran*) as the appropriate one to apply in assessing the risk of future persecution, although without reference to A(F). None of these cases addresses the standard of proof in accordance with which past or present events must be established.

(e) In *MA (Somalia) v Secretary of State*, already cited, the U.K. Supreme Court (per Lord Dyson SCJ) observed (at 71) that, prior to the House of Lords decision in *Sivakumaran*, 'the general view in extradition and asylum cases was that past and existing facts should be determined according to the civil standard of proof (i.e. on the balance of probabilities)', referring to *R v Immigration Appeal Tribunal*, *ex p Jonah* [1985] Imm AR 7 (Nolan J) as an example, before suggesting that this approach to the ascertainment of past facts "may also be seen as consistent with the requirement for 'substantial grounds' or 'serious reasons'." Noting that the argument before the Supreme Court in that case had proceeded on the basis of the position in common that 'real possibility' was the correct test to apply to past and present facts in Geneva Convention cases, Lord Dyson SCJ indicated that the Supreme Court was expressing no view on the issue before concluding (at 72): 'We think it would be desirable for the point to be decided authoritatively by this court on another occasion.'

(f) In the earlier U.K. Supreme Court decision in *H (Iran) v Home Secretary* [2011] 1 AC 596, the question at issue was the test to be applied when considering whether a gay person who is claiming refugee status has a well-founded fear of persecution in the country of his or her nationality based on membership of that particular social group. In that narrow and specific context, Lord Hope DPSC observed (at 628) that the decisions in Australia, New Zealand, South Africa, the United States and Canada to which the Court had been referred did not reveal a consistent line of authority indicating a universally accepted approach, before identifying (at 630-1) a four-stage test to be applied to that question, which O'Regan J felt anticipated, in material part, the description of the refugee status determination process later provided by the Court of Justice of the European Union (see below). In addressing the broader issue of the test for refugee status generally, Lord Walker JSC reiterated (at 649): 'Where life or liberty may be threatened, the balance of probabilities is not an appropriate test.'

(g) Canada imposes a burden on refugee status applicants to prove the facts on which they rely to the civil standard of proof *i.e.* the balance of probabilities. That is apparent from two decisions of the Federal Court of Canada; *Adjei v Minister of Employment and Immigration* [1989] 2 FC 680 and, more particularly, *Alam v The Minister of Citizenship and Immigration* (2005) FC 4. In the latter case, O'Reilly J stated (at §8):

> 'The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context. Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a risk of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance", "more than a mere possibility" or 'good grounds for believing" that they will face persecution.'

(h) In Case C-277/11, *M.M. v Minister for Justice, Equality and Law Reform*, the Court of Justice of the European Union referred to the 'assessment of facts and circumstances' relevant to an application for international protection, which is the subject of Article 4 of the qualification Directive (at §62), before going on to state (at §64):

> 'In actual fact, that 'assessment' takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.'

O'Regan J goes on to note that, in Case C-429/15, *Danqua v Minister for Justice and Equality*, the Court of Justice observed (at § 29) that, in the absence of EU rules concerning the requirements attaching to the submission and examination of an application for subsidiary protection applicable in Ireland, it is for the domestic legal system of this State to determine those requirements, provided that they are no less favourable than those governing similar domestic situations (principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred under the EU legal order (principle of effectiveness).

39. O'Regan J then concluded (at §63):

> 'In light of the foregoing principles and having regard to the fact that the balance of probabilities is the civil standard of proof in this jurisdiction, I am satisfied that the principle of equivalence and the principle of effectiveness are both safeguarded by the application of the standard – being the balance of probabilities – coupled with, where appropriate, the benefit of the doubt. Until such time as this State might introduce more favourable standards as contemplated by Article 3 of [Council Directive 2004/83/EC], this is the appropriate standard to apply, i.e. the balance of probabilities, coupled with, where appropriate, the benefit of the doubt.'

40. For my part, it does not seem to me to follow ineluctably that the civil standard of proof generally should be the default standard for establishing relevant past and present facts in refugee status applications. Nor is it clear to me that the decision of the Court of Justice of the EU in *M.M.* mandates that conclusion or precludes the application of the alternative approach identified by the England and Wales Court of Appeal in *Karanakaran*. I see no basis for concern that the latter approach could, or would, infringe the principle of equivalence or that of effectiveness, as a matter of EU law. Nor is it obvious to me that the approach adopted in Canada is preferable to that adopted in England, Wales and Australia. But the question is not a straightforward one and there is no obvious right answer. For that reason, I accept that, on the well-established principles recognised by Parke J in *Irish Trust Bank Ltd. v Central Bank of Ireland* [1976] 1 I.L.R.M. and reformulated by Clarke J *in Re Worldport Ireland Ltd* [2005] IEHC 189, I should not depart from the decision of O'Regan J.

41. It follows that the applicant cannot succeed on the first ground, in asserting that the second respondent erred in applying the 'balance of probabilities' standard of proof to past or present events. In alleging as part of the same ground that the second respondent wrongly (indeed, 'egregiously') applied the balance of probabilities standard to the ultimate 'likelihood of future persecution' test, the applicant has not identified anything in the second respondent's decision to support that contention.

42. Faced with the decision in *O.N.*, Counsel for the applicant instead put forward the alternative argument that the second respondent had failed to apply the benefit of the doubt properly when assessing the evidence, although that argument had not been pleaded in the applicant's statement of grounds, whether in the alternative or at all. Even if the argument had been properly raised, it could not succeed on the facts of the present case. The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, published in 1979 and reissued in 2011, which is the source of the acknowledgment by O'Regan J that the balance of probabilities standard is subject, where appropriate, to the benefit of the doubt, states (at para 204):

> 'The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statement must be coherent and plausible, and must not run counter to generally known facts.'

In *V.Z. v Minister for Justice* [2002] 2 I.R. 135 (at 145), the Supreme Court (per McGuinness J, Keane CJ Denham, Murphy and Murray JJ concurring) noted the use by the High Court in the decision then under appeal of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status ('the UN Handbook') as an aid to the interpretation of the Geneva Convention (at 145). The Supreme Court endorsed that approach as correct (at 148). In this case, the second respondent was not satisfied as to the applicant's general credibility. Accordingly, the necessary condition precedent to the application of the benefit of the doubt was not present.

ii. 'disregard' of notice of appeal and country of origin information

43. At the suggestion of Counsel for the applicant, the second and third grounds upon which the applicant seeks an order of *certiorari* can conveniently be taken together. They are essentially as follows: first, that the second respondent disregarded the notice of appeal filed on the applicant's behalf by the Refugee Legal Service; and second, that the second respondent disregarded certain country of origin information furnished by the applicant.

44. Section 16, sub-s. 16 of the 1996 Act states, in material part, that, before deciding an appeal under that section, the tribunal shall consider the relevant notice of appeal. The Supreme Court considered the purpose and function of that document in *M.A.R.A. (Nigeria) v The Minister for Justice and Equality* [2015] 1 I.R. 561. Giving judgment for the Court (Denham CJ, Hardiman, Clarke and Dunne JJ concurring), Charleton J addressed the purpose and function of that document, and of a s. 16 appeal, at considerable length (at 575-577). From that analysis, several points of relevance to the present application are worthy of note.

45. First, in essence, a s. 16 appeal is an active process. Second, the function of the [tribunal] is to examine afresh such aspects of the decision of the Refugee Applications Commissioner as are appealed. Third, initiation of an appeal under subs. 3 [of s. 16 of the 1996 Act] is by a notice in writing, which must specify the grounds of appeal. Fourth, whatever information has been brought to the attention of the Refugee Applications Commissioner, or that has come to his or her notice during the investigation of the application for refugee status should be furnished on the appeal. Fifth, subs. 16 makes it clear that, in deciding an appeal, regard is to be had to evidence, to representations, to documents and to argument. Sixth, the issue on appeal is not simply whether any error was made at first instance, since the person appealing has the right to attend and present their case in person or through a legal representative, or other individual of their choosing, under subs. 11 (c). Seventh, on appeal there is a complete opportunity to present any new facts or arguments; to reargue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full. Eighth, the appeal is a full and thorough inquiry into the relevant documents and observations previously furnished to the Refugee Applications Commissioner and the hearing of oral evidence and the reception of documentary evidence and submissions in respect of every point on which an appeal has been lodged. Ninth, insofar as it may be thought necessary by the tribunal, in some cases, to resolve appeals as to the essential point only, or to conclude that a particular issue decides the appeal, while leaving unresolved some other question raised in the notice of appeal, this does not result in any disadvantage to an applicant.

46. While the applicant would no doubt lay emphasis on the eighth point, it seems to me that it is the ninth one that effectively disposes of these two grounds of challenge to the second respondent's decision.

47. There is no suggestion that the second respondent expressly disregarded the grounds raised in the applicant's notice of appeal, in general, or the two grounds in that notice that dealt with country of origin information, in particular. Instead, this Court is asked to draw that conclusion from the absence of any direct reference to them in the second respondent's decision.

48. But the second named respondent's decision resolves the appeal on the essential point of the applicant's credibility. There is now a considerable body of case-law that stands as authority for the proposition that , because asylum claims require a number of essential elements to be established, it is unnecessary to require a decision-maker to decide on every such element where an adverse finding has been made in respect of one, save in exceptional circumstances of no relevance here; *R.A. v Refugee Appeals Tribunal* (No. 1) [2015] IEHC 686 (at §§ 34-5); *E.K.K. v Minister for Justice and Equality* [2016] IEHC 38 (at §52).

49. In *I.E. v Minister for Justice and Equality* [2016] IEHC 85, the court had to consider a similarly bare submission that not all the matters set out in the notice of appeal there had been considered by the tribunal. Humphreys J. concluded (at §40) that the onus is on the applicant to show that the decision-maker failed to consider matters which by statute it was required to have regard to, citing the judgment of Hardiman J in *G.K. v Minister for Justice* [2002] 2 I.R. 418 (at 426-427).

50. While it is true that no express reference is made to the country of origin information upon which the applicant sought to rely, that information concerning the level of endemic financial corruption throughout the government and state security forces in the country concerned, and the high incidence of reported domestic violence there, is plainly of only the most peripheral relevance, if any, to the applicant's assertion that the State concerned cannot or will not protect him as a member of his mother's family from persecution by his husband's second wife or as a member of the UDPS political party from persecution by members of the PPRD political party.

51. The written submissions delivered on behalf of the applicant go on to suggest that the 'country of origin information, in question, inter alia, includes the decision of the High Court in *SSL v Minister for Justice* [2013] IEHC 421 wherein McDermott J referred to the breakdown of the rule of law and the collapse of civil society in Kinshasa.' That case was indeed invoked in broadly those terms in the applicant's notice of appeal but there are several problems with that submission.

52. First, it is not the judgment in *SSL* (or in any other case) that constitutes country of origin information; it is the country of origin information referred to in the judgment concerned. Second, in that case, the relevant information was what McDermott J referred to (at §16) as 'a depressing series of reports from the U.S. Department of State, the U.N. Organisation Mission in the Democratic Republic of Congo (MONUC), Amnesty International, Human Rights Watch and the U.K. Home Office.' That was not the relevant material before the second respondent here. Third, in that case, McDermott J based his conclusion that the decision to refuse subsidiary protection was irrational on a consideration, in large part, of aspects of those materials that dealt with events in 2007 and 2008, which, he was satisfied, established a real risk of serious harm from which the state concerned could not provide protection. That was not the specific issue facing the second respondent here.

53. In the Court of Appeal decision in *SJL v Refugee Appeals Tribunal* [2016] IECA 47, Ryan P expressed the view (at §54) that an applicant has a high threshold to meet in making the case that the tribunal did not consider all of the relevant material before it simply because it is not all addressed in the written determination. In my view, the applicant has fallen far short of that threshold in this case.

54. The situation here is of a very different kind than that which arose in each of the various authorities upon which the applicant sought to rely in advancing this ground. Here the applicant refers to grounds of appeal not specifically addressed in the decision challenged and country of origin information not specifically referred to in it, without endeavouring to explain in any detail how any of those grounds or of that information could undermine or affect the adverse credibility finding on which the decision was based. *K.F.D. (Togo) v. Refugee Appeals Tribunal* [2015] IEHC 788 was a 'papers only' appeal in which an adverse first instance decision on credibility was challenged on specific grounds in a notice of appeal but where Stewart J found the respondent had not engaged with those grounds in specifically upholding that lack of credibility finding. In *O.P.E. v Refugee Appeals Tribunal* [2015] IEHC 748, Stewart J dealt with a very different issue, namely the failure of the tribunal in that case to deal with a separate strand of the applicant's claim to have a well-founded fear of persecution and its failure to properly consider the discrete issue of the applicant's credibility in respect of that aspect of her claim. *T.N. v Minister for Justice* [2007] 4 I.R. 553 was a clear-cut case in which Finlay Geoghegan J found that only 10 of the 29 foreign language documents specifically relied upon by the applicant in support of his claim were translated and, thus, considered by the decision-maker, in obvious and fundamental breach of the requirements of s. 16, sub-s. 16(e) of the 1996 Act.

iii. Credibility incorrectly assessed

55. As Counsel for the applicant indicated that the fifth ground is no longer being pursued, the fourth ground is the final one relied upon in seeking an order of *certiorari*. In essence, that ground asserts that the second respondent erred in basing its decision on credibility on 'non-core' issues surrounding the applicant's claim. The applicant points to the findings at paragraphs 5.6 and 5.7 of the challenged decision. Those paragraphs deal, respectively, with the period spent in the last location where the applicant resided before leaving the Democratic Republic of Congo and the circumstances of the applicant's journey from that country to the State. The second respondent found that the applicant lacked credibility in his account of each of those matters, though it did conclude, in respect of the second, that its 'negative credibility finding' in that regard was 'not central to the [applicant's] claim.'

56. The applicant relies on the decision of Cooke J in *I.R. v Minister for Justice, Equality and Law Reform* [2009] IEHC 353; in particular, on the principles identified there (at §11) as a guide to the manner in which evidence going to credibility ought to be treated and the review of conclusions on credibility carried out; and, specifically, on the fifth and sixth of those principles, whereby:

> '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 an 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 to an account given.'

57. In view of the obligation on Counsel not to mislead the Court or permit the Court to mislead itself, it is surprising that in advancing the argument just described in both written and in oral submissions solely by reference to the authority just cited, Counsel for the applicant did not apprise the court of the decision of Humphreys J. in *I.E. v Minister for Justice and Equality*, already cited, if only for the purpose of seeking to persuade the court not to follow it. That decision was delivered almost a year ago and it would be worrying to imagine that practitioners are unaware of it. Fortunately, Counsel for the respondent was not.

58. In *I.E.*, having posed the question 'can the tribunal reject credibility based on matters other than the 'core' claim of persecution?', Humphreys J. considered the issue at some length, before addressing the judgment of Cooke J. in I.R. The matters to which Humphreys J. had regard in doing so include the following. First, s. 11B of the 1996 Act expressly requires a decision-maker to have regard to various matters including whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State. Second, the earlier decision of Edwards J. in *K.M. v Refugee Appeals Tribunal* [2007] IEHC 300, upholding a finding of lack of credibility based on inconsistencies in relation to details of travel to the State (in reliance, in part, upon the statutory obligation upon the decision-maker to consider that aspect of the matter under s. 11B of the 1996 Act), must be preferred to the later one of Eagar J. in *M.O.S.H. (Pakistan) v Refugee Appeals Tribunal* [2015] IEHC 209, not least because the decision in the former case does not appear to have been opened to the Court in the latter one. Third, as a matter of logic and first principles, the credibility of an individual on peripheral matters capable of independent verification can, and frequently does, undermine that

individual's credibility on core matters that are difficult or impossible to independently verify. Fourth, when considering the preceding point in particular, the sixth principle articulated by Cooke J. is open to some refinement to the extent that it elides two distinct concepts; the question of whether a credibility issue is a major or minor one, on the one hand, and the question of whether that credibility issue relates to the core facts of the refugee status claim or facts incidental to it, on the other. I respectfully agree with the analysis of Humphreys J. on this issue and applying that analysis to the facts of the present case, I must reject the applicant's contention that the second respondent erred in basing its decision on credibility on facts and circumstances outside the 'core' of the applicant's claim.

59. I should add that, even if I were not inclined to follow the approach of Humphreys J. in *I.E.*, it would still be necessary to acknowledge that the second respondent did, in fact, expressly find that several key assertions concerning the 'core' facts of the applicant's claim of persecution had not been established on the balance of probabilities. Specifically, those assertions were that the attacks on the applicant's family were orchestrated by his father's second wife and that the applicant was involved in the UDPS political party. It is in that context that the second respondent's overall conclusion on 'fear of persecution' is framed in the following terms (at §5.6):

> 'When looked at holistically, the appellant's stated fear of being a target of his father's second wife and his stated fear due to his membership of the UDPS is simply not believed by the Tribunal. His claim of fear of persecution is not considered credible, on the balance of probabilities, for the reasons given.'

60. As I have already indicated, the second respondent's rejection of the applicant's credibility on the 'core' aspects of his claim for protection appears to be predicated on an acceptance that the attacks described took place, coupled with a rejection of his assertion - which the second respondent appears to accept may be mistaken rather than deliberately untruthful - that those attacks amount to persecution based on his membership of a particular social group (his family) or expression of a political opinion (his affiliation with the UDPS political party), as opposed to being random criminal acts. As I have already observed, it seems to me that such a finding would more obviously fall within the rubric of 'failure to establish a convention nexus', but nothing seems to turn on the point, since the applicant has not sought to challenge the second respondent's decision on that basis.

61. For the reasons I have given, I reject this ground also.

Extension of time

62. Having determined that the applicant's claim fails on its merits, it might be considered superfluous to return at this juncture to the question of whether time should be extended to permit him to bring such a claim. Nonetheless, I propose to do so, lest I am mistaken in the principal conclusion I have reached.

63. The decision of the second respondent that the applicant has sought to challenge was made on the 13th October 2015. Section 5, sub-s (2) of the Illegal Immigrants (Trafficking) Act 2000, as amended, requires an application for leave to challenge such a decision to be made within 28 days of the date on which the applicant was notified of it. The applicant sought leave, including an extension of time for that purpose, on the 14th March 2016, more than three months outside the 28-day permitted period.

64. The Court is required, first, to consider whether there is good and sufficient reason for extending the period within which the application may be made and, second, to be satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. Of course, the applicant fails the second part of the test. But does he fail the first part as well?

65. The applicant's reasons for his delay in seeking leave to apply for judicial review have already been set out above. He avers that he did not understand the letter he received from the Refugee Legal Service, dated the 22nd October 2015, which he says advised him that there were no grounds for judicial review but suggested he consider going to a private solicitor within 28 days. The applicant has not exhibited that letter. He avers that he did not understand what those statements meant, without explaining what his difficulty was. He further avers that he telephoned the Refugee Legal Service on receipt of that letter to request an appointment to see a solicitor but 'was told to wait for his three options letter' from the Department of Justice and Equality and, despite ringing a further '3 to 4 times' to ask what his options were, repeatedly received the same advice from the same source. The applicant makes no attempt to corroborate those assertions, which imply a criticism of the Refugee Legal Service for repeatedly giving the applicant inaccurate or misleading advice on the telephone. Indeed, while extemporising in the course of submissions on the theme that the good and sufficient reason for the applicant's failure to seek leave within the time allowed was the failure of the Refugee Legal Service to give him complete or accurate advice, Counsel for the applicant submitted that the failure of that body to raise the substantive arguments upon which the applicant was seeking to rely (and which I have since held to be entirely without merit) corroborates the applicant's criticisms of it in that regard. It is important to note that these criticisms have been made without affording the Refugee Legal Service an opportunity to comment upon, much less be heard in response to, them. For that reason in particular, it is difficult to give them much weight.

66. The applicant does give a slightly more compelling reason for his failure to move within time when he avers that he was, and is, of limited means, receiving €19 per week, and did not think he could afford to go to another solicitor until he got his current solicitor's number from a friend of his around the 10th February 2016. He does not explain why he was unable to obtain that information between October 2015 and February 2016, however.

67. The principal authority on which the applicant relies in submitting that the evidence presented represents good and sufficient reason for extending time is the decision of the Supreme Court in *C.S. v Minister for Justice* [2005] 1 I.R. 343. In that case, the applicants were approximately two weeks outside the 14-day time limit then applicable to such applications when they successfully brought their application for an extension of time. The respondents appealed. The evidence was that the primary applicant had telephoned the Refugee Legal Service on the day she received notification by post of a decision to make a deportation order against her. Having been informed that it could not assist her any further, she telephoned someone else whom she understood to be a solicitor on the same day. There followed some confusion about the status of that person and the location of the papers that the applicant had furnished to him. Having instructed another solicitor, it took some further time to resolve that confusion, with the result that an extension of time had to be sought approximately two weeks outside the time permitted. In affirming the decision to extend time by dismissing the appeal, McGuinness J. (Murray C.J., Hardiman, Geoghegan and Fennelly JJ concurring) emphasised (at 366) that the delay was short and, in the words of the Supreme Court in The Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360, the first applicant showed 'reasonable diligence' in seeking access to the court.

68. The respondents submit, and I accept, that the circumstances of the present case are closer to those considered by Irvine J in *J.A. v Refugee Applications Commissioner* [2009] 2 I.R. 231. It is true that the period of delay in that case was a substantial one; approximately two and a half years in relation to one decision and approximately fifteen months in relation to the other. Nonetheless, quite distinct from the issue of the period of delay, Irvine J observed (at 244):

'There is ample authority to suggest that an extension of time should not be granted merely to allow new lawyers to take a different view as to the legality of some decision already considered by their predecessors. In this regard the decision of Finlay Geoghegan J. in *Muresan v Minister for Justice* [2004] 2 I.L.R.M. 364 is of significance. At p. 373 she stated as follows:-

> "It is inevitable that different counsel will take a different view of the same case. It appears to me that if the courts were to permit an extension of the time provided for under s. 5(2) of the Act of 2000 simply upon the grounds that a new counsel had come into a case and had taken a view that a differing and additional claim on new and distinct grounds should be made that this would defeat the legislative intent as expressed in s. 5(2) of the Act of 2000. It may be that on certain facts the clear oversight or errors by lawyers acting for an applicant may amount to good and sufficient reason for extending the period under s. 5(2). There was no such clear error in this case."

[34] Applying this sentiment to the facts of the present case I conclude that it would not be good law to permit an extension of time which is effectively based upon a fresh legal view of decisions which were considered by the applicant's previous legal advisors. To do so would lead to an open ended right to maintain judicial review proceedings.'

69. Applying the foregoing principles to the facts of the present case, I conclude that the applicant has not demonstrated 'reasonable diligence' in seeking to access the court and that the challenge which he now wishes to maintain is one which is based upon a new approach by his lawyers to a decision previously considered by his former legal representatives. For those reasons, I find that there is no good or sufficient reason to extend time.

Conclusion
70. For the foregoing reasons:

(a) I refuse the application for an extension of time;

(b) Insofar as may be necessary or appropriate, I refuse the application on its merits; and

(c) I order that the proceedings be dismissed.