

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 730 JR]

BETWEEN

N. G.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Faherty delivered on the 16th day of March, 2017

1. This is a post leave hearing in which the applicant seeks an order of certiorari of the decision of Refugee Appeals Tribunal ("the Tribunal") dated 18th November, 2015 which affirmed the recommendation of the Refugee Applications Commissioner ("the Commissioner") not to declare her a refugee.

Preliminary

2. In her statement of opposition, the respondent objected to the within proceedings on the ground, *inter alia*, that the affidavit grounding the judicial review application was sworn by the applicant's solicitor in circumstances where only the applicant could aver to the facts and events set out in the affidavit. I am satisfied that the respondent's objection, although valid, has been rendered moot by virtue of the affidavit duly sworn by the applicant on 4th November, 2016.

Background

3. The applicant's claim for refugee status arises out of persecution she says she suffered in relation to lands she inherited from her father. She alleges that consequent to her inheritance she was subjected to persecution by her uncles (her father's brothers) who wanted the land. According to the applicant, her father was killed in January 2013, possibly by his brothers. Her mother passed away in March, 2013. The applicant duly sold her land rights to a named individual (LB) in May, 2013. The applicant claims that she received death threats from her uncles in June, 2013 and they subsequently burned her house down, leaving her hospitalised for a week. The applicant made a complaint to the police. However, there were no arrests. Upon leaving hospital, the applicant resided with a friend. In July 2013, she was traced by her uncles, leading to more threats from them. Due to the risk to her from her uncles, her friend arranged for her to leave Malawi. She left on 30th August, 2013. An unsuccessful attempt to travel to this State *via* the Seychelles led to her detention in the Seychelles for five days. Certain medical documents which she had with her were retained by the authorities in the Seychelles. The applicant was then returned to South Africa. Shortly afterwards she travelled to this State *via* Abu Dhabi, arriving on 14th September, 2013. She applied for refugee status at Dublin Airport. Her application was subsequently rejected by the Commissioner. Her appeal to the Tribunal involved an oral hearing which took place on 7th October, 2015. The Tribunal's decision affirmed the Commissioner's recommendation. Her claim was rejected by the Tribunal on grounds of credibility.

The Tribunal's analysis of credibility

4. The Tribunal identified the "core facts" of the applicant's claim, as follows:

- (i) Did the applicant inherit her late father's farm;
- (ii) Did the applicant sell the farm to LB.;
- (iii) Was the applicant subjected to threats on her life from her uncles;
- (iv) Did the applicant's uncles burn her home in June 2013?

All of these matters were duly ruled on adversely to the applicant.

5. Having rejected the "core material aspects" of the applicant's claim, the decision-maker duly found that there was no need to analyse whether the same provided a basis for a finding that the applicant's fear were well founded. Moreover, the decision-maker considered that there was no necessity to consider the other elements of the Convention definition of a refugee.

6. By order of Mac Eochaidh J. dated 21st December, 2015, leave was granted to challenge the decision.

7. Arising from the grounds upon which leave was granted, the issues which arise for determination in these proceedings are:

- (1) Was the Tribunal decision unreasonable or irrational and in breach of Regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") because of what the applicant alleges was the compartmentalised and circular manner in which her credibility was rejected;
- (2) Did the Tribunal act unlawfully in failing to refer to, or apply the mandatory test contained in Regulation 5 (3) of the 2006 Regulations to those parts of the applicant's claim which were not supported by documentary evidence, and in imposing an apparent absolute requirement for documentary proof;
- (3) Did the Tribunal act in breach of the principle of *audi alteram partem* in failing to willingly engage with or afford any weight to the corroborative documentary evidence which the applicant had provided in relation to the current ownership of the farm at the centre of her claim;
- (4) Did the Tribunal act unlawfully, and in breach of Regulation 5(1)(a) of the 2006 Regulations in failing to consider the

credibility of the applicant's claim in the context of available country of origin information, and in particular the corroborative country of origin information which documented both the practice land grabbing from widows and police corruption.

(5) Did the Tribunal act unreasonably in rejecting the authenticity of the police report which the applicant provided on the basis that it only partly corroborated her claim.

The applicant's submissions

8. The applicant's case is that the manner in which her credibility was assessed was unlawful. It is submitted that the structure of the decision, which comprises each individual negative credibility finding resting on all of the previous negative credibility findings, has led to an unfair and unlawful result. Same is not in accordance with Regulation 5(1) of the 2006 Regulations, in particular Regulation 5 (1) (b) which provides that the protection decision maker must assess "the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or maybe subject to persecution or serious harm". Counsel submits that by the time the Tribunal Member comes to whether the applicant has been subjected to persecution, he has effectively already rejected the entire claim, by reason of the first credibility finding that she never inherited the farm, a finding which it is submitted is itself invalid. It is submitted that this is not a case where, as is permissible, there was a valid credibility finding which destroyed the credibility of the entire claim. The Tribunal Member simply found that if there were no inheritance documents available, the inheritance did not occur. This was used to reject all other parts of the claim. The Tribunal Member ignored the fact that the applicant had provided documents from the new owner which corroborated her story.

9. Counsel submits that in finding that the applicant did not inherit the farm, the Tribunal Member's entire emphasis was on the absence of documentation and on the fact that the Tribunal Member had sought documentation from her. There was no mention in the decision maker's analysis of the inheritance issue of the applicant's statement that everything was lost in the house fire.

10. The requirement for absolute documentary proof is not the test that is set out in Regulation 5(1) of the 2006 Regulations. Furthermore, the Tribunal Member did not apply the provisions of Regulation 5(3), as he should have. Rather, instead of so doing, he proceeded from the outset to determine the case on the absence of documentary evidence. This was in direct contradiction of what Regulation 5(3) requires. In this regard, counsel cites *D.E. v. Refugee Appeals Tribunal* [2013] IEHC 304.

11. Additionally, the Tribunal Member unlawfully used his finding that the applicant did not inherit the lands to reject her claim that she sold the lands to LB

12. It is submitted that the decision shows the Tribunal Member's simplistic approach, namely as there are no documents to prove that the applicant inherited the lands, the credibility of this element of her claim must be rejected. As well as the clear failure to apply the test provided for in Regulation 5(3), the approach of the decision-maker is further undermined by the failure to have regard to relevant country of origin information.

13. Contrary to the decision-maker's obligation to do so pursuant to Regulation 5 (1)(a) of the 2006 Regulations. Even a cursory glance at country of origin information in relation to women in Malawi would have shown that the Tribunal Member's expectation of "bills or utilities in the appellant's name" was unrealistic. Counsel submits that the Tribunal Member fell into error by addressing such matters from his own cultural prospective without regard to country of origin information.

14. Counsel further submits that the Tribunal Member continued his compartmentalised and circular approach to the applicant's claim when considering whether she was subjected to threats by her uncles and whether her house was burnt by her uncles in June 2013.

15. Coupled with the decision-maker's over-reliance on the absence of documentation was his failure to properly address the documents which the applicant did produce. Further to the Tribunal's request for documentation, the applicant's legal representative furnished a number of documents pertaining to LB's dealings in respect of the said lands, together with an original letter dated 15th January, 2014 from the Malawian police which documented that the applicant had made a complaint. It is submitted that these documents were not adequately considered and, in the case of the police report, wrongly rejected as not probative or authentic.

The respondents' submissions

16. It is submitted that the decision of the Tribunal accords entirely with the principles set by Cooke J. in *I.R. v. Minister for Justice* [2009] IEHC 353. In compliance with principle 4 of *I.R.*, the Tribunal Member had regard to the full picture as presented. The facts relied on by the decision-maker were correct and were untainted by conjecture. Moreover, the reasons drawn are cogent and bore a legitimate connection to the adverse finding. Four specific matters were identified by the Tribunal Member for consideration as core issues, all of which arose on the account given by the applicant herself. Insofar as there were documents before the decision-maker such as may have required consideration pursuant to principle 9 of *I.R.*, the said documents did not amount to corroborative evidence of the substantive matters which fell for consideration in this case. It is submitted they were secondary documents and were not on par with the type of document which was in issue in *I.R.* itself. In the present case, the Tribunal Member made clear findings and the reasons therefore as given were clear. The reasons given by the decision-maker comply with the test set by Mac Eochaidh J. in *R.O. v. Minister for Justice* [2012] IEHC 573.

17. It is further submitted that a decision-maker in deciding a particular issue is entitled to have regard to findings already made. In this regard, counsel relies on *N.K. v. Refugee Appeals Tribunal* [2005] 4 I.R. 321.

18. While the applicant cites Regulation 5(3) of the 2006 Regulations, it is clear that the benefit of the said Regulation is given only where specific conditions are met. The *dictum* of Mac Eochaidh J. in *D.E.*, upon which the applicant relies, must be taken in that context. It is contended that it is only where there is a favourable assessment of the applicant's general credibility that the absence of documents may not be fatal. In the present case there was no general credibility finding in favour of the applicant when the Tribunal Member commenced his consideration of the absence of documentation. By then, the s. 13 report which put the applicant's credibility in issue was before the Tribunal Member.

19. As regards the complaint about the Tribunal Member's failure to properly address country of origin information, it is contended that it is established jurisprudence "that the mere fact that an applicant gives an account which is consistent with country of origin information does not of itself lead only to the conclusion that the applicant's account is correct, any more than a Tribunal would be absolved from further inquiry into an account which did not seem to be consistent with country of origin information so as to ascertain whether the facts might nonetheless be true is somewhat unusual". (Peart J. in *Imafu v. Minister for Justice* [2005] IEHC 416 quoting Clark J's judgment in the leave application in *Imafu*). Furthermore, *Imafu* is authority for the proposition that where an

applicant is not believed in relation to his or her personal tale, the objective state of affairs in the country of origin will not alter this factor. Counsel cites *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686, where Humphreys J., in addressing the necessity to consider country of origin information, stated at para.39:-

"it is irrational and pointless to require a decision maker to consider something in a narrative form if such consideration does not affect the ultimate decision."

20. It cannot be said that the decision flies in the face of reasonableness or commonsense in the sense outlined in *Keegan v. Stardust* [1986] I.R. 642. In any event, contrary to the applicant's submissions, the country of origin information relied on by the applicant is listed in the decision.

21. It is submitted that the applicant did not respond to the Tribunal's request for documentary proof of the sale of the lands. Insofar as information was furnished, it referred only to an application by LB for an agricultural use on lands. The applicant did not provide any documentation evidencing her inheritance or ownership of her late father's farm, although this was stated to be subject of a lease between her father and the local government in her locality. The decision-maker specifically found that no documentation was supplied corroborating the applicant's father as a leaseholder or corroborating her residence on or inheritance of the land. While the applicant points to country of origin information regarding the difficulties with which women are presented in Malawi in relation to inheriting land, on the applicant's own claim, she in fact inherited the land and she was able to sell it on.

22. The decision-maker makes specific reference to the documentation relating to LB's lease over the farm land. This is the same LB to whom the applicant alleges she gave her title documents at the time of the sale, and with whom she made contact since coming to Ireland for the purposes of obtaining documentation. As far as the sale of the lands is concerned, the Tribunal Member had regard to the applicant's inconsistent testimony and noted that although she had been in correspondence with LB, she had not produced any documentation confirming the existence of a contract or a transaction document. Furthermore the decision-maker noted the applicant did not know the procedure for the sale of the farm.

23. At all stages, the applicant asserted there were documents in existence in relation to her sale of the land. Therefore, the applicant's submissions as to the duty on the Tribunal Member, where there are no documents, must be taken in the context of the applicant's own assertions. She told the Tribunal Member that she gave the title deeds to LB and that only the receipt she got from him was destroyed in the house fire. This was contrary to what she said at the s. 11 interview where it was asserted that everything was burned in the fire. In her Notice of Appeal, the applicant asserted that she did not have documents regarding the sale of the land because she had given them to LB and that she did not retain a copy of such documentation. She again asserts that the receipt for the money she received in the sale was destroyed by a house fire in June, 2013. While the applicant ultimately received documentation from LB, which was furnished to the Tribunal, it related solely to LB's application for an agricultural lease and did not relate to title documents. The documents as presented by the applicant were specifically referenced in the decision. Thus, there is no merit in the contention that the Tribunal Member did not have regard to the documentation which the applicant furnished.

24. It is clear that the Tribunal Member took cognisance of the fact that on the applicant's own evidence she had procured documentation from LB yet she did not procure title documents connected to the farm despite her assertion at all times that he had been provided with these at the time of the sale. It is submitted that in noting that the applicant had been in contact with LB, the Tribunal Member gave cogent reasons for concluding that the applicant had not sold lands to LB. This conclusion was arrived at before the Tribunal Member went on to reiterate that he had already found that she had not inherited the lands.

25. The decision-maker gave equally cogent reasons for his finding that the applicant had not been subjected to threats from her uncles. Specific reference is made to the absence of any threat for her life in the police report despite the applicant's confirmation that she had attended the police on one occasion to complain. The Tribunal Member also considered the absence of any threats in the report as going to the authenticity of the police letter. It is submitted that these conclusions were arrived at independently of the previous findings in relation to the inheritance of the farm and the sale to LB. Likewise, in finding that it was not plausible that her uncles burned down her house in June, 2013, the Tribunal Member based this finding on his rejection of the police report as not probative or authentic. Furthermore, the Tribunal Member had regard to the applicant's own evidence that she had not seen any suspicious activity around her home in the immediate period before the fire and to the fact that there were no witnesses to the event, that no police investigation followed the fire and that the applicant's uncles were never arrested. These findings were based on the applicant's own evidence.

26. It is submitted that the Tribunal Member made his findings as regards the four pillars of the applicant's claim based on the facts as presented by the applicant.

27. While counsel for the applicant relies on the fact that the applicant's address on her questionnaire equates with that of LB, it is submitted that the address given by the applicant on her asylum application and in her ASY1 form does not match the address on the documents which the applicant says she received from the purchaser of the lands. Furthermore, the address for the farm as set out in the questionnaire does not match the two earlier addresses.

28. It is further contended that a perusal of the documentation pertaining to the asylum process shows that there were a number of inconsistencies in the account given by the applicant to when the trouble began for her in Malawi.

Considerations

29. The applicant's claim for refugee status was squarely rejected on grounds of credibility. It is trite law, at this remove, that it is not the function of the court on judicial review to reassess issues of credibility or to substitute its own view for that of the decision-maker. As set out in *I.R.*, the function of the court, where a finding of credibility is attacked, as is the case here, is to ensure that the process by which that conclusion has been reached is "*legally sound*". The principles upon which the court will view how credibility was assessed are well set out at para. 11 of *I.R.*, as follow:-

"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."

30. A principal plank of the applicant's challenge in the within proceedings is that when rejecting the applicant's claims on the basis of lack of documentary proof, the Tribunal Member failed to have regard to Regulation 5(3) of the 2006 Regulations. Effectively, the case is being made that the decision is vitiated by reason of the infringement of the aforesaid statutory provision.

Regulation 5(3) provides:-

"Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met-

(a) the applicant has made a genuine effort to substantiate his or her application;

(b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for protection at the earliest possible time, (except where an applicant demonstrates good reason for not having done so); and

(e) the general credibility of the applicant has been established."

31. It is submitted on behalf of the applicant that the Tribunal's first two findings were arrived at without regard to the above provision. Counsel contends that the applicant had made a genuine effort to substantiate her application, as required by Regulation 5(3) (a). It is further submitted that "all relevant elements" at the applicant's disposal were furnished to the Tribunal and that the applicant had provided a satisfactory explanation regarding any lack of other relevant elements, as required by Regulation 5(3)(b). Counsel thus submits that the applicant's statement were coherent and plausible and did not run counter to either specific or general information relevant to her case, in accordance with Regulation 5(3)(c). Moreover, he asserts that her application complied with the requirements of Regulation 5(3)(d) in that she had applied for protection at the earliest possible time. He argues that by reason of the Tribunal Member's approach, the requirements of Regulation 5(3)(e) of the 2006 Regulations could not be met because the Tribunal Member did not, as he should have done, consider whether the applicant's general credibility had been established.

32. In order to establish whether the approach of the Tribunal Member fell foul of Regulation 5(3) and indeed whether other frailties attach to the first two findings, as alleged by the applicant, it is necessary to set out in detail the relevant findings.

33. The Tribunal's first finding, on the question whether the applicant inherited her father's farm, is as follows:

"The appellant was written to by the Tribunal in advance of the hearing requesting if she had documentation confirming her inherited rights and/or ownership of her late father's farm ... The appellant did not produce documents to this effect and stated at the hearing that her father did not make a will. In addition, the appellant stated in her direct testimony that her father was not the legal owner of the farm but, instead was in possession of rights associated with the land. The appellant confirmed that the land was the subject of a lease between her father and the local government in her locality. No documentation was supplied corroborating her father as a lease holder of the family farm. The appellant did provided documentation stating that [LB] had a lease over the farm land.

The Tribunal also wrote to the appellant requesting if she had documents in the form of utility bills in her name confirming her inheritance of the family farm after her father's death. No documentation was produced by the appellant or via her legal representative proving her residence on the farm or inheritance of the land.

The Tribunal finds it implausible that the appellant inherited her late father's farm. I reached this finding for the following

reasons; the appellant could not provide documentation (after having been afforded an opportunity to do so by the Tribunal) to prove that she had inherited the farm from her father, whether her father had a lease over the farm and any bills or utilities in the appellant's name identifying her as the land owner or occupier of the farm. I am therefore not satisfied on the balance of probabilities of this core aspect of the appellant's claim".

The second core fact of her claim (did the applicant sell the farm to LB) was addressed as follows:

"The Tribunal wrote to the appellant in advance of the hearing requesting all documentation and information in support of her claim. The appellant was queried at her section 11 if she had documentation in support of her claim that she sold her father's farm to [LB]. In her section 11 interview the appellant replied that when the farm was sold to [LB] the title deeds were given to him. In her direct testimony at the hearing she stated that the documents for the transactions were burnt in a fire including a receipt for the sale of the land. This inconsistency was put to the appellant for her comment during the hearing. The appellant also confirmed that she had been in correspondence with [LB] and produced documentation confirming that he had a lease over the farm lands together with a sketch map. No documentation was produced by the appellant (despite this correspondence with [LB]) confirming the existence of a contract between the parties or a transaction document.

The appellant was queried at the hearing as to the procedure in Malawi for the sale of the farm to [LB] the appellant responded that she did not know of the procedure.

The Tribunal does not find it credible that the appellant sold her late father's farm [LB] I reached this finding for the following reasons; the appellant could not provide documentation ... to prove the existence of a contract or transaction with [LB] notwithstanding confirming that she had been in direct contact with him in acquiring the other documentation produced, the appellant was inconsistent at whether all or most of the documents concerning the sale of the farm to [LB] were destroyed in the fire and the appellant could not provide details of the procedure for selling the land when she was queried about it at the hearing. In addition, I have rejected that the appellant inherited the farm sold to [LB] from her late father. I am therefore not satisfied on the balance of probabilities and in considering matters in the round of this core aspect of the appellant's claim".

34. In addition to contending that the decision-maker failed to conduct the credibility assessment in line with Regulation 5(3), counsel submits that, in the particular circumstances of this case, before making a finding on whether the applicant inherited the farm and sold it as she claimed the Tribunal Member should have addressed her evidence that many of her documents were destroyed when her house was set on fire. He submits nowhere in the section of the decision dealing with the inheritance of the farm is there any reference to the applicant's repeated explanation that many of her documents were burnt in the fire in June, 2013. It is submitted that while this explanation is mentioned in the section dealing with whether she sold her land, by this stage the Tribunal Member, in a further piece of circular reasoning, has already relied on the finding that the applicant did not inherit the land. Most remarkably, counsel submits, when the Tribunal Member, at para. 5.4, makes the finding that the applicant did not inherit the farm he makes no reference to the explanation given by the applicant that documents had been burnt in the fire. Counsel refers to question 21 of her questionnaire where the applicant states, in relation to the fire, "I survived though everything got burned". It is submitted that it would have been reasonable to interpret this as stating that everything which was in the house was destroyed as a result of the fire. Accordingly, he argues that it is difficult to see how the Tribunal Member could reasonably make a finding criticizing the absence of inheritance or ownership documents without expressly referring to the explanation tendered by the applicant that they had been destroyed in the fire.

35. As regards the first adverse credibility finding, it is immediately apparent that the rejection of the applicant's claim to have inherited her father's farm was based squarely on the lack of documentary evidence. As stated in the decision, this was against a backdrop where the applicant had been written to to ask if she had documentary proof of her inheritance (including bills in her name). Her response to this request was to provide documents which pertained to LB's dealings with the land after the applicant's alleged sale of the lands to him. They were said by the applicant's legal representative to be "evidence of the sale" and to "show that [LB] has applied to the local authorities for [an] agricultural lease on the land." Thus, it was not a case of the applicant saying that she did not have documentary evidence. She in fact supplied documents, albeit they referred only to LB's interest in the lands and not to the applicant's or her father's. In fairness to the decision-maker, the documents which had been supplied by the applicant were referenced in the finding and while not stated directly, it is patent from the Tribunal's finding that the decision-maker did not find those documents corroborative of the applicant's claim to have inherited the lands. This was not an unreasonable conclusion given that there was nothing in the documents that would aid in establishing whether the applicant had inherited her father's farm. I note that while finding the documents not to be probative, the decision-maker does not otherwise comment on the documents.

36. Counsel for the applicant asserts that before rejecting the applicant's claim to have inherited the lands, the Tribunal Member should have had regard to the fact that the applicant had stated at interview and in her questionnaire that everything had been burnt in the fire. While, as already stated, that was certainly said at one point in her s. 11 interview, it appears, from the summary of the applicant's evidence (which is not challenged as inaccurate), that in the course of the Tribunal hearing she was at pains to point out that only the receipt from LB was destroyed in the fire. I do not see therefore how the case can now be advanced on the applicant's behalf that the decision-maker wrongly failed to acknowledge that her documents were destroyed in the fire, when this was not the thrust of her evidence to the Tribunal. I will however revert to the inconsistency issue later in the judgment in the context of the Tribunal Member's second finding.

37. I now turn to the decision-maker's treatment of the inheritance issue. Counsel for the respondent argued that the Tribunal Member was operating on the basis that the applicant's general credibility had not been established by the time the decision-maker made his finding. In this regard, she relies on the fact that the applicant's claim had been rejected by the Commissioner. As such, she argues that there was no requirement on the Tribunal Member to apply the provisions of Regulation 5(3). I do not agree with the premise of the respondent's argument in circumstances where an appeal before the Tribunal is a *de novo* hearing, albeit that the onus of proof in an appeal to the Tribunal is on the applicant as indicated in s.16A of the Refugee Act, 1996. It seems to me that whether the applicant's general credibility was established was a matter for the Tribunal Member himself to determine on the evidence before him. As stated, the Tribunal Member closed off the inheritance issue by reference to the fact that the applicant was not in a position to provide documentary evidence of her father's lease or of utility bills in her name referable to the farm. In my view, while accepting that he could reasonably reject LB's title documents as not probative of the applicant's inheritance, the Tribunal Member ought to have addressed the question of whether the applicant's account of her inheritance was otherwise credible. There were factors to which the Tribunal Member could have had regard, not least her claim to have given her title deeds to LB and that accordingly she should have been in a position to procure the necessary evidence, or at least make an attempt to do so. However, the decision-maker does not engage in any assessment of her general credibility before concluding that the applicant did not inherit the farm. The claim to have inherited the lands was rejected on the absence of documents, which, to my mind, is not in keeping with the letter or

spirit of Regulation 5(3). I find that, in accordance with the approach of Mac Eochaidh J. in *D.E.*, that the Tribunal Member should have averted his mind to this question before closing off the issue of the inheritance of the lands solely on the absence of documentary evidence. In *D.E.*, Mac Eochaidh J. put the matter as follows:

"13. It is a matter of concern to the court that the rules applicable to the assessment of an asylum claim not based on documentary evidence required by Article 5(3) were not followed in this case. My view is that to discount credibility based on the absence of documents without even mentioning the existence, much less the applicability, of Article 5(3) of the Regulations places a cloud over the relevant finding.

14. It is of note that Regulation 5(3) forgives the absence of documentary evidence in support of an asylum claim where certain conditions are met, including where the general credibility of the applicant is established. This suggests that it is wrong to rely on the absence of documentary evidence to ground a finding as to the general credibility of an applicant. The legislative scheme strongly suggests that general credibility should be determined before the absence of documentary evidence comes to be examined. (My remarks on the impact of Reg. 5(3) are made in passing as the parties did not engage in argument on this point nor did the court invite submissions on the impact of these rules in this case.)"

38. Complaint is also made that the Tribunal Member erred in respect of the first finding in failing to assess the applicant's claim pursuant to Regulation 5(1) (a) of the 2006 Regulations.

39. As the papers show, on 26th June, 2014, the applicant's legal representative furnished country of origin information to the Tribunal, including a US State Department country report on Malawi which reported, *inter alia*, that women in Malawi were disadvantaged with regard to property rights and that there was inefficiency or corruption in Malawi police force. Furthermore, the "Social Institutions and Gender Index Country Profile for Malawi" documented that "dispossession and property grabbing from widows is common" and that women and girls are "relatively powerless on issues of inheritance ... and land rights". It is submitted that the applicant's situation was comparable to the position of widows in Malawi. Furthermore, counsel points to the fact that the Tribunal Member had been provided with an extract from "Concluding Observations of the United Nations Convention on the Elimination of all Forms of Discrimination against Women" which stated:

"The committee is concerned about the precarious situation of women in rural areas, who constitute the majority of women in the State party and are disproportionately affected by the lack of adequate health services, education ownership of land and inheritance, economic opportunities and social benefits. The Committee reiterates its previous concern about rural women's access to justice and the enforcement of their rights under the Convention..."

40. The Tribunal Member was also furnished with an extract from I.R.I.N. which stated, *inter alia*, that "more than 60 percent of land is customary, meaning that it is mostly untitled and administered by local chiefs on behalf of the government, with local communities merely enjoying user rights.

41. The applicant's counsel submits that the Tribunal Member had paid due regard to the "customary" nature of land in the Malawi, he may have concluded differently in relation to seeking documentary evidence of the applicant's inheritance of the farm. Counsel for the respondent argues that contrary to the submissions made on behalf of the applicant, the country of origin information which attached to the s. 13 report, albeit that it refers to pervasive discrimination against women, does not show that women are prevented from owning land. She also contends that the information relied on by the applicant herself also shows that women could inherit land, which the applicant claims to have done. I agree with counsel's submissions on this point. I do not accept that the country of origin information referable to discriminatory practices in Malawi was relevant to the applicant's situation since her evidence was that she did in fact inherit the lands, I consider that there is merit in counsel's submission that the Tribunal Member should have had regard to the manner in which title to land can pass in Malawi, as documented in the country of origin information, before concluding that because she had no documentation, the applicant did not inherit the land. Of course if the Tribunal Member had analysed the applicant's claim to have inherited the farm by reference to her assertion that she had given the title documents to the person said to have purchased the lands, he might not necessarily have been obliged to look at country of origin information at all since the applicant's general credibility might well have been determined by considering that since she had seen fit to contact LB to procure documents said to evidence the sale of the lands, she could just as easily have obtained copies of the title documents she had passed to him. The problem however, as I see it, is that the Tribunal Member does not engage in any general credibility assessment and simply makes the bald assertion that as there are no documents evidencing her inheritance, she did not inherit.

42. Whether the aforesaid frailty, as found by the court to attach to the first core finding is sufficient to vitiate the decision is, to my mind, dependent on the court's assessment of the other challenges that are raised in the within proceedings. As the jurisprudence directs, the court must have regard to the overall impression left on the decision-maker, viewing matters in the round.

43. I turn now to the second adverse finding, namely that the applicant did not sell her lands to LB. As can be seen, the applicant's claim to have sold her farm to this individual was rejected on the ground, *inter alia*, that she could not provide documentary evidence of the sale. Again, counsel for the applicant asserts that Regulation 5(3) was infringed. However, I am not persuaded that the challenge on the Regulation 5(3) ground is sufficiently made out as regards this finding. This was not a case where the applicant was saying that there was no documentation pertaining to the sale of the land. This is clear from the contents of her solicitor's letter to the Tribunal. Furthermore, her testimony to the Tribunal on this issue is recorded as follows: "When the farm was sold to [LB] the title deeds were given to him. She stated in her direct testimony at the hearing that only the 'receipt' of her transaction with [LB] was destroyed in the fire." As previously rehearsed, it is certainly the case that at one point in her s. 11 interview the applicant gave a different version of events when she stated that "everything (associated with the transaction) was destroyed in the fire to her home". The record of the Tribunal hearing shows that this inconsistency was put to her for her comment. I note however that at another point in her s.11 interview, in answer to the question as to whether she had documents pertaining to the farm, the applicant states "The farm was sold and the title deeds were given to the person who bought the farm." Later in the interview, the following exchange takes place.

"Q. And you have no papers to show that you are the official owner of this land?

A. No. I gave all my papers to [LB].

Q. Surely he gave you a receipt for the land sold?

A. It got burnt in the fire."

44. As already referred to, the Tribunal's summary of evidence shows the applicant responded to the claimed inconsistency between what she had said in the earlier part her s. 11 interview and her evidence to the Tribunal by "stating that she had not stated in her direct evidence that all of the documents were burnt in the fire of her home".

45. In his "Credibility" analysis on this issue, the decision-maker states:

"In her section 11 interview the appellant replied that when the farm was sold to [LB] the title deeds were given to him. In her direct testimony at the hearing she stated that the documents for the transaction were burned in a fire including a receipt from the sale of the land. This inconsistency was put to the appellant by her comment during the hearing. ...".

46. I find that this is a somewhat inaccurate analysis of the evidence tendered by the applicant at the hearing. In the Tribunal's summary of her evidence, the inconsistency that was put to her was that she had stated in her direct evidence that only the receipt was burnt in the fire whereas at her s.11 interview she stated that everything associated with the transaction was destroyed in the fire. While there was an inconsistency between what was said at one stage of the s.11 interview with what she said at the hearing to be taken account of by the decision-maker, the inconsistency was not as described by the decision-maker in his analysis. Is this mischaracterisation of her testimony of itself sufficient to impugn the overall finding? I am not satisfied that it is. It is apparent from the decision that the decision-maker also clearly relied on the failure of the applicant to produce any evidence of a contract or transaction with LB in respect of the lands. This reliance was in the context of the applicant's own confirmation that she had been in contact with LB in relation to the matter. It is patent from the Tribunal Member's analysis that a credibility issue arose in circumstances where the applicant could, apparently, procure details from LB concerning his liaison with the relevant authorities to be registered as the leaseholder to the lands, yet she failed to procure from him details of the transaction they had entered into in respect of the lands. One would have expected, at the very least, if not evidence of a contract, then some written acknowledgement from LB that he had transacted with the applicant in relation to the lands, particularly in circumstances where the applicant was liaising with this individual on foot of an enquiry from the Tribunal. This, to my mind, is the reasoning which underlies the Tribunal Member's finding. The Tribunal Member further rationalised his finding that the applicant did not sell the farm in light of her inability to give any detail of the procedure involved in selling the land. I do not find that this was an unreasonable factor for the decision-maker to take account of, particularly when the applicant's own account is that she transacted with LB.

47. Counsel for the applicant submits that the decision-maker failed to have proper regard to the land documents which the applicant furnished in aid of her claim. He asserts that the documents referable to the land were corroborative of the existence of the farm which the applicant had inherited. In particular, counsel points to the fact that LB's application for an agricultural lease had the same address for the lands as that given by the applicant in her questionnaire. It is submitted that these documents were central to the applicant's claim and that the Tribunal Members' failure to engage in any meaningful way with them renders his decision invalid. It is asserted that while the documents are referred to in a tangential way in the decision, their probative value is not assessed. Nor, counsel submits, were they given any weight in any of the credibility findings. Counsel also points to the fact that the Tribunal Member did not state that they were rejected as not authentic. He contends that even if such a finding could be inferred from the decision no reasons are given for such rejection. It is submitted that contrary to the *dictum* of this court in *M.A.I. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 623, the Tribunal Member wrongly rejected the probative value of the documents and failed to set out the weight he attributed to the said information.

48. As to the applicant's submissions in this regard, I note that these documents are specifically referred to in the Tribunal Member's analysis of the inheritance and sale issues and he specifically refers to the fact that the applicant furnished details of LB's application for a lease. However, as is apparent from the decision, the Tribunal Member's emphasis was on the absence of any document from LB which showed his contract or dealings with the applicant for the *sale* of lands, an emphasis which this court does not find to be unreasonable for the reasons already stated. In my view, there was no obligation on the decision-maker to engage in a discursive narrative as to the probative value documents furnished by the applicant, once it is patent from the decision (as I find it is) as to why they were found not to be corroborative of the applicant's claim.

49. The third core issue identified by the Tribunal as material to the applicant's claim, namely the claimed threat to the applicant's life, was dealt with as follows:

"The appellant stated that she was subjected to threats against her life from her uncles in Malawi. She confirmed at the hearing and in her section 11 that she reported these threats made against her in the aftermath of the fire of her home. She admitted that she reported on the threats and fire to the police authorities on one occasion. No reference however to the appellant being threatened was contained in the document produced by her purporting to be a police report to the local police station in Malawi.

The appellant responded to this inconsistency at the hearing by stating that she did not understand the interpreter translating this question in her section 11 interview. She admitted (when put to her) at the hearing she made no complaint during her section 11 interview regarding the quality of the interpreter.

The Tribunal does not find it plausible that the appellant was subjected to threats on her life from her uncles in Malawi. I reach this finding for the following reasons; the appellant stated that she reported the threats against her life to the police yet, no reference is made to them the police report produced, the appellant confirmed that she had attended the police station on one occasion, the document produced by the appellant as a police report is not probative evidence of her being threatened by her uncles and is not accepted as a genuine authentic police report in light of the facts that it omits to record threats on the appellant's life and owing to the appellant's own direct testimony where she confirmed she reported her problems to the police once. In addition, I have rejected that the appellant inherited the farm sold to [LB] from her late father and, that she sold the farm to [LB]. I am therefore not satisfied on the balance of probabilities and in considering matters in the round of this core aspect of the appellant's claim".

50. The fourth core issue as identified by the decision-maker was expressed in the following terms:

"At this juncture I have rejected the other core elements of the appellant's claim. In addition, the Tribunal has rejected the authenticity and therefore the probative value of the appellant's police report ... as a form of corroborating evidence.

The appellant confirmed at the hearing that she did not see any suspicious activity proximate to her home in the immediate period before the fire and stated that there were no witnesses to the fire ... In addition, she confirmed that there was subsequent police investigation into the fire and her uncles were not arrested or charged with the offence of arson or criminal damage of the appellant's home.

The Tribunal does not find it plausible that the appellant's uncles burnt her home in June 2003. I reach this finding for the following reasons; I have rejected the authenticity and probative evidential value of the police report produced by the appellant, the appellant confirmed that she did not see any suspicious activity around her home before the fire and that there were no witnesses to the event, no police investigation followed the fire and the appellant's uncles were never arrested or charged in connection with the fire incident. In addition, I have rejected that the appellant inherited the farm sold to [LB] from her late father and, that she sold the farm to [LB] and that she was threatened by her uncles in Malawi. I am therefore not satisfied on the balance of probabilities and in considering matters in the round of this core aspect of the appellant's claim".

51. The basis on which the aforesaid findings are challenged largely relates to the decision-maker's treatment of the police report. Counsel for the applicant submits that the Tribunal Member's rationale was not a sufficient basis on which to reject the applicant's claim that her life was threatened by her uncles. It is contended that in concluding as he did, the Tribunal Member failed to have regard to or weigh the applicant's explanation for the lack of any mention in the report to the threats from her uncles.

52. The information before the decision-maker on this issue was as follows: when asked, in the course of her s. 11 interview, as to why the police did not continue to help her after the fire if they knew her life was in danger, the applicant's response was that she felt that "there was a relationship between the police and my uncles, they were friends or something". The applicant repeated this assertion in the course of the Tribunal hearing. It is not referred to in the Tribunal Member's analysis of the applicant's credibility. There is therefore merit in the applicant's counsel's submission. Before rejecting the probative value of the police report the Tribunal Member was obliged to have regard to the entirety of the applicant's statements, including her explanation for why there was an absence of any reference to the threat to her life in the police report. That explanation was for the decision-maker to accept or reject, as the case may be, but it was required to be dealt with, including, if necessary, by reference to country of origin information on practices within the Malawian police. I hasten to add that simply because country of origin information might suggest that there was corruption in the Malawian police this may not assist the applicant. The Tribunal Member may well be entirely within reason in discounting her explanation for the absence of any reference in the police report to the claimed threat to her life, without recourse to country information. I simply repeat that her explanation was required to be given due weight. While I note that the decision-maker also rejects the claim on the basis that the applicant only went to the police on one occasion, that cannot save the finding as one has to account for the possibility that if the applicant were to be believed in her claim that the local police did not want to assist her because of an association with her uncles, it could conceivably leave open the potential for the decision-maker to conclude that returning to the police with a further complaint may be a futile exercise.

53. In all the circumstances, I find that the decision-maker could not reasonably have concluded that the police report was not probative or authentic because in reaching his decision it is not apparent to the reader or the court whether the Tribunal Member weighed the applicant's explanation for the absence in the police report to the threat to her life from her uncles. Accordingly, the decision-maker's analysis of the issue was not in accordance with principle 4 of *I.R.*

54. There is one further observation to be made with regard to the Tribunal Member's finding on the police report. Although, the matter was not raised by the applicant's counsel, the court considers that it is not necessarily rational for the Tribunal Member to conclude that the police report was not an *authentic* document because it failed to refer to the alleged threats to the applicant's life. The absence of any recorded threat to her life does not necessarily impugn the authenticity of the document, albeit that the lack of such reference may go to the applicant's credibility. As I have said, in assessing credibility, the decision-maker was obliged to consider any explanation offered by the applicant for the omission. In this case the applicant tendered an explanation, namely her feeling that the police were in league with her uncles, which appears not to have been considered or weighed.

55. At the end of the day, the question for the court is whether the frailties in the Tribunal's findings, as highlighted above, are such as to vitiate the decision. In applying the principles set out in *I.R.*, the court must be careful not to parse the decision and it must have regard to the cumulative impression left on the decision-maker. The cumulative impression left on the Tribunal Member was that the applicant neither inherited nor sold the lands in question; that she was not subjected to threat to her life from her uncles; and her house was not burned down. The basis upon which it was concluded that the applicant did not inherit the lands has been found by the court to be flawed, as has the Tribunal Member's rationale for disbelieving the applicant's claim to be in fear of her uncles. On the other hand, the Tribunal Member's finding on the question of the sale of the lands has not been impugned in these proceedings. However, the court does not find the Tribunal Member's adverse credibility with regard to the sale of the lands sale is sufficiently dispositive of the applicant's general credibility so as to sustain the decision. I find, given that the applicant's claim for protection is based, in part at least, on her claim that she inherited lands in the face of opposition from her uncles, who wanted the lands, that the issue of her inheritance and the claimed threat to her life from her uncles are core aspect of her refugee claim (as indeed recognised by the decision-maker). Thus, in these circumstances, the decision cannot stand in light of the flawed assessment of some of the core issues, as found by the court.

Summary

56. For the reasons set out in this judgment, the challenge to the Tribunal Member's assessment of credibility has been made out. Accordingly, I am satisfied to make an order quashing the decision and to remit the matter for *de novo* consideration before a different member of the first named respondent.