THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 358 J.R.]

BETWEEN

E.Q.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 27th June 2018

Introduction

1. The applicant seeks judicial review of a decision of the Refugee Appeals Tribunal, now the International Protection Appeals Tribunal ('the IPAT'), dated 25 April 2016 and made under s. 16(2)(a) of the Refugee Act 1996, as amended ('the Refugee Act'), affirming a recommendation of the Refugee Applications Commissioner ('the commissioner') that the applicant should not be declared to be a refugee ('the IPAT decision').

2. On the 30th May 2016, Mac Eochaidh J gave the applicant leave to apply for certain reliefs, including an Order of *certiorari* quashing the IPAT decision, on a single ground.

3. That ground is that, in reaching that decision, the IPAT failed to take into account, either properly or at all, certain relevant material comprising: first, the contents of a letter that the applicant wrote to IPAT on 21 March 2016; and second, certain country of origin information ('COI') that the applicant submitted to it. In their statement of opposition, dated 9 December 2016, the respondents join issue on that ground, pleading that the IPAT considered all of the material that had been submitted to it.

4. At the time when leave was granted, the International Protection Appeals Tribunal was known as the Refugee Appeals Tribunal. When s. 71(5) of the International Protection Act 2015 ('the Act of 2015') came into force on the 31st December 2016, the former was substituted for the latter in these proceedings by operation of law.

Background

5. The applicant is an Ethiopian national who applied for asylum in the United Kingdom on 4 July 2013. On 16 August 2013, the United Kingdom requested, pursuant to Article 17 of Council Regulation (EC) No. 343/2003 ('the Dublin II Regulation'), that Ireland take charge of the applicant. It seems the applicant had entered the United Kingdom from Ireland, where he had been a student. Ireland acceded to that request on 19 September 2013 and the applicant was transferred back to Ireland on 13 February 2014.

6. The applicant formally applied for refugee status in the State on the following day, 14 February 2014. His claim was that he had a well-founded fear of persecution by reason of his political opinion if returned to Ethiopia. The applicant was interviewed on 28 June 2014, pursuant to s. 11(2) of the Refugee Act.

7. In a report made pursuant to s. 13(1) of the Refugee Act on 28 July 2004, the commissioner recommended that the applicant should not be declared to be a refugee. That report was furnished to the applicant under cover of a letter from the commissioner's office, dated 25 August 2014. The applicant purported to exhibit the report to his grounding affidavit in these proceedings but did not do so – it was subsequently exhibited to an affidavit sworn on behalf of the respondents.

8. The applicant appealed against that recommendation by notice of appeal, dated 11 September 2014. That appeal was heard by the IPAT on 18 January 2016. As already noted, the IPAT decision, dated 25 April 2016, affirmed the recommendation of the commissioner.

9. Although that is the decision directly under challenge in these proceedings, the applicant failed to exhibit it to the affidavit that he swore to ground his application for leave to seek judicial review. While I think it fair to say that, in the general run of judicial review proceedings, the omission from the applicant's papers of the central document in the case would be considered astonishing, if not unprecedented, this is not the first time it has happened in the immigration and asylum field. The explanation may be found in the approach to these cases widely adopted on behalf of applicants, whereby the impugned decision is tucked away as one of the last exhibits to the grounding affidavit, intended to be referred to, almost as an afterthought, only once the asserted merits of the applicant's substantive claim – already ventilated both at first instance and before the tribunal - have been again rehearsed in detail and at length.

10. It should not have to be endlessly reiterated that this court is engaged in a review of the decision-making process and not in hearing an appeal de novo on the merits of the underlying claim; see, most recently, the decision of the Supreme Court in *E.D. (a minor) v Refugee Appeals Tribunal* [2017] 1 I.R. 325 (Clarke J, at 338-9 and Charleton J, at 352).

11. It would be a cardinal error to allow sympathy for the applicant's personal circumstances to taint what should be a detached and objective assessment of the fairness and lawfulness of the decision-making process, just as it would be to allow any antipathy towards the applicant to do so. And yet, in case after case in this list, counsel for the applicant insists on recapitulating in detail and at length the asserted merits of the applicant's underlying claim and, very often, counsel for the Minister, who has if anything less excuse, responds by addressing at considerable length the asserted inconsistencies, evasions, omissions, errors, untruths or other shortcomings that tend to undermine it. This nearly ritual, preliminary excursus in the greater proportion of these cases makes the conduct of litigation in this list take much longer than it should, overstretching scarce court resources and causing delay to other litigants. I hasten to add that, while I have used this judgment as the occasion for these remarks, they are not intended in any way

as a criticism of counsel in this case, whose presentation of oral argument cannot be faulted.

12. The applicant's solicitor swore an affidavit on 2 June 2016, some days after leave to seek judicial review had been obtained on 30 May 2016, belatedly exhibiting the decision under challenge. In that affidavit, the applicant's solicitor averred that the failure to exhibit the decision to the applicant's grounding affidavit had been the result of unspecified 'human error', and that the court had been given sight of the decision for the purposes of the application for leave *ex parte*, together with an undertaking to exhibit it to an affidavit 'as soon as practicable' afterwards.

The applicant's claim for refugee status

13. The applicant claims that he has a well-founded fear of persecution on grounds of political opinion because of his membership of a political organisation that is banned in Ethiopia. In brief summary, the applicant relies on the following narrative. At the time of the 2005 national election, he was an activist on behalf of what was then the main opposition party in Ethiopia, the *Coalition for Unity and Democracy*. He was not politically active again for some years afterwards until, in 2009, he became involved with a social justice movement named *Solidarity Movement for a New Ethiopia* ('SMNE') and, in 2010, he joined an opposition political organisation named *Ginbot 7*.

14. The applicant came to Ireland to study in 2009 and remained here as a student until September 2012, when he returned to Ethiopia (albeit only briefly, as it turned out).

15. The core of the applicant's claim is this. Between 2009 and 2012, he was a 'social media activist', sharing information on social networking sites. In 2012, he started a small news and entertainment website and mobile application, which was later suspended with the result that he no longer has access to the contents of it. Since then, he has maintained a blog on a particular microblogging and social networking website and has also posted material on another popular social networking website. In the same year, the Ethiopian government authorities labelled him as a member of Ginbot 7 and identified him as a reporter for a particular television channel broadcasting news and current affairs programmes to Ethiopia. In December 2012, a government agent came to his workplace in Ethiopia, threatening him that his life would be in danger if he continued his activities. He received an anonymous telephone call to the same effect, later in the same month. In February 2013, another government agent came to his place of work and demanded that he cooperate by providing information on the activities of Ginbot 7. This was followed by repeated, anonymous, threatening phone calls.

16. The applicant left Ethiopia and travelled back to Ireland for his graduation ceremony in March 2013. While here, he was told by his family that a government agent was looking for him and that is was not safe for him to return to Ethiopia. In June 2013, the applicant travelled to the UK, where he applied for refugee status. He was transferred back to Ireland in accordance with the terms of the Dublin II Regulation in February 2014. The applicant fears that he will be arrested and detained if he returns to Ethiopia, and that he may also be subjected to torture and ill-treatment.

The decision under challenge

17. The IPAT decision runs to 11 pages. The applicant's claim failed because, for various stated reasons, the tribunal did not consider his account of being targeted by agents of the Ethiopian government credible and was not satisfied on the evidence presented that he had established any future or prospective risk of persecution. Those aspects of the IPAT decision material to the single ground upon which the applicant has been given leave to challenge its validity are, in summary, the following.

18. The tribunal identified, as the gravamen of the applicant's case, that he posted or re-posted statements on the internet critical of the Ethiopian government, which had exposed him to a well-founded fear of persecution in that country by reason of his political opinion (para. 5.2). But the only such material that the applicant could provide to the tribunal, through his legal representatives, on the day of the hearing of his appeal was material posted or created by him in Ireland, rather than in Ethiopia (para. 5.3).

19. The tribunal sought to establish, with the assistance of the Commissioner, whether the applicant was identifiable or traceable as the operator of the relevant website or as the person who posted that material (para. 5.4). As part of that exercise, the tribunal asked the Commissioner (at the hearing of the appeal and, later, in a letter dated 26 January 2016) to make inquiries concerning when and where the material furnished to the tribunal had first been posted (para. 5.4). The Commissioner could not access the popular social media website used by the applicant and could only confirm that the microblogging website that he used was based in New York in the United States of America (para. 5.5).

20. The tribunal concluded that its request to the Commissioner was, in any event, moot, as the material provided on the day of the hearing by the applicant's legal representatives was, by the applicant's own admission, material posted in Ireland (para. 5.5). The tribunal drew the inference that the computer on which those postings had been made would have had an Irish internet protocol ('IP') address and observed that it was unlikely to be one directly or exclusively linked to the applicant, since he had acknowledged in his evidence to the tribunal that he had little access to computers in Ireland (para. 5.6).

21. At para. 5.7 of its decision, the tribunal set out its conclusion on the point:

> 'I think I can accept that the particular internet postings, printouts of which were copied to me may have been made by the [a]pplicant. I also accept the COI submitted to the effect that the Ethiopian government harshly suppresses dissent and persecutes known dissidents and members of Ginbot 7. However, I do not accept it as more probable than not, or even as a real prospect, that making, re-posting or forwarding of those matters could somehow serve to expose him to persecution in his country of origin. In this regard 'publishing' on Facebook, for example, can consist of as little as clicking 'like' on content created by a third party.'

The permitted ground of challenge

22. The single ground upon which the applicant has been granted leave to challenge the IPAT decision is the following:

> 'In making the said decision, [the IPAT] failed to take into account adequately or at all relevant material: first, a letter submitted by the applicant of 21st March 2016, setting out the dates and locations (in both Ireland and Ethiopia) at which the applicant had posted online material critical of the Ethiopian [g]overnment, via his own personal [social network] page, and a micro-blogging site, and enclosing supporting documents; and second, country of origin information submitted setting out the specific risks of persecution by the Ethiopian [g]overnment of those who use such tools of social media as blogs and Facebook to voice their criticism of the government. This evidence and information was material to the conclusion arrived at by [the IPAT] to the extent that [it] did "not accept it as more probable than not, or even as a real prospect, that the making, re-posting or forwarding of those matters could somehow serve to expose him to

> persecution in his country of origin" and found that "the only such statements copied to this [t]ribunal were all made or republished in Ireland" [para. 5.15] and that "there was nothing to suggest that this applicant could somehow be traced back to any anti-governmental postings or statements" [para. 5.22].'

i. the applicant's letter of 21 March 2014

23. At the hearing of the applicant's appeal on 18 January 2014, the tribunal requested that he submit, within a further week, one example of a political posting that he had published while in Ethiopia and one of a political posting that he had published while in Ireland between March and June 2013.

24. The applicant's solicitors responded by letter of the same date, setting out the applicant's instructions to them as follows. He had been unable to access the material he published on his own website between September 2012 and March 2013, while he was in Ethiopia, because his website domain was 'suspended' at the end of that period and the material published during it became inaccessible to him. The applicant had been able to find an article that he posted on his own social network page on 8 March 2012, while he was a student in Ireland, and another that he had posted on his micro-blog page on 20 May 2013, while he was in Ireland before he travelled to the UK.

25. The article posted on the applicant's social network page was a copy of one written by a correspondent for a 'diaspora-based' Ethiopian current affairs website, and published by that website on the same date. The article posted on the applicant's micro-blog page was one that had been written by an American academic and lawyer and which had been published on an Ethiopian news and opinions website the previous day. Copies of those posts and of each of the original articles from which they were copied were enclosed with the solicitors' letter.

26. On 26 January 2016, the tribunal wrote to the Commissioner's office, enclosing a copy of the material that the applicant's solicitors had provided immediately after the hearing and requesting, pursuant to the terms of s. 16(6) of the Refugee Act, that the Commissioner made further inquiries into 'where and when the online postings attached were first posted on the internet i.e. [in] what country and when?'

27. The Commissioner's office wrote in reply on 26 February 2016, providing some information about the relevant articles and websites in line with that already summarised, but none about when or where the applicant made either of the two posts at issue.

28. On 14 March 2016, the tribunal wrote letters in identical terms to the applicant and his solicitors, enclosing, 'for your information', the exchange of correspondence between the tribunal and the Commissioner's office just described and inviting each to '[p]lease furnish your response (if any), to the Refugee Appeals Tribunal by the 22nd March, 2016.'

29. The applicant replied personally to the tribunal by letter dated 21 March 2016, stating that he was writing in response to its letter requesting him 'to provide further evidence' on the two posts concerned. In that letter, he acknowledged that he made both of those posts while in Ireland. However, he went on to refer to, and provide copies of, two further posts on his social network page that he claimed to have made while in Ethiopia on 4 November 2012 and 25 January 2013. One of those posts is in one of the languages indigenous to Ethiopia. It was provided without a translation, although the applicant asserted in his letter that it is about 'illicit financial outflows from Ethiopia.' The other is a copy of an article written by someone else, alleging pervasive corruption within the ruling party in Ethiopia.

30. The sequence of events just described is summarised in the IPAT decision (at paras. 3.8 to 3.11). The decision states that the correspondence between the tribunal and the Commissioner's office had been copied to the applicant and his solicitors to allow the applicant an opportunity to respond to it by way of comment, should he so wish. The applicant had not been invited to respond by furnishing further evidence. The decision continues (at para. 3.11):

> 'As I had made clear in the course of the hearing in January, and as a special indulgence to the [a]pplicant, I had given him one extra week after the hearing to adduce further documents. With laudable promptness, his legal team adduced those documents within hours. It is now far too late (being essentially two months later) for the applicant to seek to adduce further documents. Despite all of that, I have perused same but they add nothing probative to his case.
>
> All of the documentation has been fully considered.'

31. The applicant's social media network posts appear to have been made under a username that comprises in sequence the first three letters of his first name, the initial of his last name, and a common first name that is different from his own. It is very difficult to see how that could possibly identify him. The post from his micro-blog page that the applicant has disclosed does not seem to be associated with any username or information of any sort capable of identifying him. Nor, as far as I can see, could the applicant provide the tribunal with evidence to suggest, much less establish, that either website displayed any personal profile information that would permit the applicant to be identified as the person responsible for those posts or that blog. It was against that background that the tribunal was anxious to be apprised of any other plausible basis upon which the applicant could be traced or identified as the person responsible for them.

32. While the two additional social media network posts that the applicant disclosed for the first time two months after the hearing of his appeal appear to have been made under his username from locations in Ethiopia during the period when he was present in that country, they contain nothing further that would contribute to the identification of him as the person who made them, beyond some - apparently very general - location information. Certainly, if the applicant had any case to make that he was, or is, identifiable as the social media network user concerned by reference to the fact of those posts or of others like them while he was present in Ethiopia, he did not make it then (and has not done so, even now).

ii. the country of origin information

33. On 27 June 2014, the day before the applicant's interview with an authorised officer of the commissioner under s. 11 (2) of the Refugee Act, the applicant's solicitors wrote to the commissioner's office, enclosing various documents and eight different COI reports in support of the applicant's claim. Among those COI reports was one published in March 2014 by the non-governmental organisation Human Rights Watch, entitled '"*They Know Everything We Do*" *Telecom and Internet Surveillance in Ethiopia*' ('the Human Rights Watch report').

34. The portions of that report upon which the applicant relies for the purpose of these proceedings are the following. First, at page 2:

> 'Websites of opposition parties, independent media sites, blogs and several international media outlets are routinely blocked by government censors. Radio and television stations are routinely jammed. Bloggers and Facebook users face harassment and the threat of arrest should they refuse to tone down their online writings. The message is simple: self censor to limit criticism of the government or you will be censored and subject to arrest.'

35. And, at pages 68-9 (with the portions of the text that were omitted from the applicant's written legal submissions reinserted and indicated by square brackets):

> '*Pressure to Censor: Threats to Bloggers and Facebook Users*
>
> [Human Rights Watch did not find any cases in which individuals were targeted because of what they accessed online, but there are numerous instances where individuals were targeted for what they posted online through blogs or Facebook.
>
> While blogging is very much in its infancy, the blogging community is increasing in size and critical writings appear with more frequency.] With the growth in blogging over time in Ethiopia, many bloggers have been under pressure from the government to censor their writings. Since 2009, many blogs in Ethiopia (see Appendix 1) have been blocked and many bloggers stopped writing after their blogs were blocked.
>
> Many others have experienced pressure to censor their postings on Facebook and other public forums. Sometimes this takes the form of threatening messages on Facebook from unknown people who do not identify themselves, while other times security personnel visit or phone the individual and threaten or pressure them to stop posting certain photos or articles, particularly on Facebook. This suggests ongoing monitoring of Facebook users. [Such monitoring could occur through a number of methods, from simply observing public Facebook activity to creating fake accounts or befriending targets, compromising account passwords, or intercepting unencrypted Facebook traffic.
>
> Adjusting privacy settings on Facebook would provide some level of protection from harassment, but awareness in Ethiopia about these settings is quite low. Facebook is also one of the few mediums where Ethiopians express themselves quite openly. Anecdotally, it does not appear to be used to organize meetings and gatherings the way that it has been used in other countries. One user said: "I think there is a perception (in Ethiopia) that Facebook is anonymous. Because Facebook use is relatively new in Ethiopia, government officials have not seen the role it can play in spreading ideas that otherwise cannot be spread. They are more concerned with the formation of social movements that Facebook was used for in Egypt and elsewhere. In Ethiopia Facebook is not used for that."]
>
> Nonetheless, more and more people are having problems because of what they publicly post on Facebook. One person described being harassed because of having posted an OLF flag on their Facebook account:
>
> > "My problems started in August 2012. Before 2012 I had been suspected of being OLF. When the prime minister (Miles Zenawi) died I was ordered to collect money in his memory though I complained about having to do it. Security Services said they saw the OLF flag on my Facebook page. They chat with people on Facebook. If someone uses it in rural areas, security follows those Facebook users. 'We see what you are posting on Facebook'."
>
> [Other individuals told Human Rights Watch of being forced to change their Facebook postings because they posted materials about banned organizations, religious issues, were critical of the late Prime Minister Meles Zenawi, or posted material from blocked websites.]
>
> Another individual described the pressure he was under to censor his blogs that satirized politics and current events. Three plainclothes security officers came to his compound in Oromia in early 2012 and threatened him for what he wrote on Facebook. His blog has also been blocked on at least six different occasions. He stopped blogging altogether for several months. He has resumed blogging but is now "very careful about what I say."
>
> As Facebook and blogging becomes more popular in Ethiopia, Facebook users and bloggers are coming under increased pressure. [Human Rights Watch is not aware of users of other online services being under pressure to censor their content.]'

36. The applicant never sought to make the argument that he was unaware of how social media operates or of what the significance of user privacy settings on social media networks might be. The specific nature of the course of study that the applicant pursued in Ireland would almost certainly have precluded him from doing so plausibly.

Analysis

i. the single ground on which leave was granted

37. In its decision, the tribunal stated that all of the documentation furnished by the applicant had been considered (para. 3.11). The tribunal recorded (at para. 3.6) that, in support of his claim, the applicant had submitted numerous COI reports on Ethiopia, dating for the most part from 2014. Those reports included the Human Rights Watch report just referenced. As already noted, the tribunal specifically addressed the applicant's letter of 21 March 2016 and the further documents enclosed with it (at paras. 3.9 to 3.11).

38. In *G.K. v Minister for Justice* [2002] 2 I.R. 418, the Supreme Court pointed out (*per* Hardiman J) (at 426-7):

> 'A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.'

39. In *T.G. v Refugee Appeals Tribunal* [2007] IEHC 377, Birmingham J addressed the issue of what does, and what does not, amount to inferential evidence that, contrary to its express statement, a decision making authority has not considered representations made to it:

> '[Feeney J] in *Banzuzi v Minister for Justice* [[2007] IEHC 2], is firm in his view that there is no obligation on a decision maker to refer to every aspect of evidence or to identify all the documents within its written decision – a proposition which subsequently received endorsement of Ms Justice Dunne [in *A.W.S. v Refugee Appeals Tribunal & Ors* [2007] IEHC 276].

> For my part, I respectfully agree with the remarks of [Hardiman J], [Feeney J] and [Dunne J].'

40. The applicant acknowledges these statements of principle but points to the portion of the judgment in *T.G.* immediately following, in which Birmingham J rejected the applicant's submission that, despite a clear statement in the decision that the COI had been considered, an inference should be drawn that a particular COI report had been ignored or overlooked, before continuing:

> 'However, that is not the end of the matter. I have already indicated my complete agreement with the comments of [Feeney J] and [Dunne J] that there is no obligation to refer to every item of evidence or every document. However, that is not to say that there cannot be documents or evidence that require specific mention.
>
> I am of the view that unusually there are factors present such that fair procedures require specific reference to the [relevant COI report] and an indication of the analysis that would lead to it being discarded. As I have already stated on more than one occasion, the document was submitted to the tribunal as a specific response to [another COI report]. If the tribunal member was proposing to allow the [other COI report] to direct his decision, as it had the decision at first instance, fair procedures required that there should be some indication why the [relevant COI report] was not seen as relevant. It need hardly be said that there were a number of factors present which would have fully justified the tribunal member viewing the [other COI report] as the more reliable….
>
> I have reached the conclusion which I have that in the very particular circumstances of this case fair procedures require more and that more specific and transparent analysis of the country of origin reports is required. Proper consideration required that the consideration and analysis on this point be transparent. This was a case which required not only the document be considered but that it be seen to be considered.'

41. I can find no unusual factors present in this case comparable to those identified by Birmingham J in *T.G.* There is no suggestion in the IPAT decision that the tribunal chose to prefer the contents of a conflicting report over those of the Human Rights Watch report, as none was identified. Nor can I find anything in the IPAT decision that is directly inconsistent with the contents of the relevant extract from The Human Rights Watch report. The applicant's claim in this case did not founder because the IPAT decision rejected the relevant contents of that report – the decision expressly accepted that the Ethiopian government harshly suppresses dissent and persecutes known dissidents and members of Ginbot 7. The applicant's claim ran aground because the applicant failed to persuade the tribunal of the credibility of his testimony that he had been personally targeted as a blogger by the Ethiopian government and because he failed to satisfy the tribunal on the evidence presented that he could be identified or traced as the person behind the username under which he had posted copies of various articles critical of the Ethiopian government on certain social media platforms, whether those posts originated in Ireland or Ethiopia.

42. For those reasons, it seems to me that the circumstances of this case are more closely analogous to those in the case of *F.O. v Minister for Justice & Ors* [2008] IEHC 213, which Birmingham J distinguished from *T.G.* on the basis that it was 'not one in which the documentation submitted was so directly on point and so critical, in the circumstances, as to call for a specific assessment.' For the reasons set out in the preceding paragraph, I find that to be the position in this case also.

43. The applicant prays in aid the decision of the United Kingdom Supreme Court in *RT (Zimbabwe) & Ors v Secretary of State for the Home Department* [2012] UKSC 38, [2013] 1 A.C. 152 and, in particular, the passage from the judgment of Lord Dyson JSC (at 168) confirming that what is known in that jurisdiction as '*the HJ (Iran) principle*', deriving from the judgment of that court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 and establishing that it is no answer to a claim for asylum to assert that an applicant could conceal his sexual identity to avoid persecution on that basis, applies equally to the assertion that an applicant could conceal his or her political beliefs to the same end.

44. For my part, I would have no hesitation in adopting the judgments in that case as a correct statement of the law, particularly the trenchant concurring opinion of Lord Kerr JSC (at 180-1). However, the issue in this case was not whether the applicant could be expected to conceal his political beliefs to avoid persecution if he returned to Ethiopia; it was whether his claim of past persecution and asserted risk of future persecution on that basis was credible. And while the tribunal in this case was under an obligation to give careful consideration to the COI already described concerning threats to bloggers and Facebook users in Ethiopia, that information was not comparable to what was described in the country guidance on Zimbabwe that informed the asylum decisions that were at issue in *RT*, as described by Lord Dyson JSC (at 165-6).

45. The applicant points to the statement at paragraph 5.11 of the IPAT decision that, while it acknowledged that 'one must assess an asylum-seeker's credibility in the context of relevant information about his country of origin', citing the judgment of Finlay Geoghegan J in *A.M.T. v Refugee Appeals Tribunal* [2004] 2 IR 607, it considered 'the crucial *factum probandum'* in the case before it to be that that the applicant could be traced or identified from his alleged internet postings. The applicant argues that this suggests that the tribunal wrongly considered that it was not necessary to engage in a consideration of COI. In my view, the tribunal quite clearly stated the opposite *i.e.* that it was necessary to consider relevant COI, though not exclusively or in a vacuum.

46. The applicant submits that the tribunal erred in concluding that he had failed to establish that he was traceable or identifiable as the blogger or Facebook user concerned because the extracts from the Human Rights Watch report already cited 'went directly to addressing the issue.' I do not agree. The relevant extracts much more obviously suggest that other Facebook users in Ethiopia have permitted themselves to be identified by failing to use available privacy settings to ensure their anonymity, than that, in the words of the applicant's submission, 'the Ethiopian government does have the capacity to trace persons who publish critical material on Facebook or other blogging websites.'

47. In argument before me, counsel for the applicant referred to a separate section of the Human Rights Watch report that deals with powerful surveillance technologies that the Ethiopian government may have acquired to invade the privacy of individuals outside the country, involving what is known as 'spyware' or 'malware' attached to an apparently innocuous file or e-mail. Before the tribunal, the applicant had relied upon an alleged statement (wrongly described as an affidavit) from a person associated with Ginbot 7 in the UK, who claims to have been the subject of such remote surveillance and to have been in communication with the applicant at the material time, thereby creating a risk that the applicant may have been identified by the Ethiopian government as a member of Ginbot 7. However, the tribunal considered all of the relevant material as part of its overall consideration of the credibility of the applicant's claim and was left unpersuaded by it. This court cannot usurp the tribunal's function in that regard.

ii. the attempt to pursue other grounds of challenge without leave

48. In the statement of grounds upon which the applicant sought leave to apply for judicial review of the IPAT decision, three separate grounds of challenge were identified. Having heard the application for leave, Mac Eochaidh J refused the applicant leave to

raise two of them. One of those two was the following:

> 'In making its decision of 25th April 2016 recommending that the applicant not be declared to be a refugee, the first respondent erred in law in his analysis of the concept of refugee *sur place* and the application of this concept to the applicant's case….'

49. The applicant did not appeal against that refusal.

50. Instead, the applicant attempts to argue that there were certain implied qualifications or limitations in the decision of MacEochaidh J at the leave stage and that '[i]t is now for this Honourable Court to determine [the issue of whether the tribunal erred in its analysis of the concept of refugee *sur place* or in its application of that concept to the evidence before it] on a substantive level.'

51. L.*R. and L.T. v Minister for Justice* [2002] 1 I.R. 260 was a case involving an application to amend a statement of grounds in judicial review proceedings by the reinstatement in it of certain grounds that it had originally contained but which were not included in the order of the Court granting leave. In his judgment in the High Court, McKechnie J stated (at 267):

> 'By not granting leave on these other grounds one must conclude that the application, made on behalf of the applicants was therefore refused by the High Court Judge who granted the leave order. This being the situation, it seems to me that in the same proceedings and on identical grounds, another judge of the High Court does not have jurisdiction to effectively overrule an earlier order of the same court. Such authority or power does not in my view exist. The only court which could, but was not invited to do so, would be the Supreme Court. It is not now I feel possible for this court to reinsert or reinstate grounds which previously a judge of this court refused to grant leave on.'

52. In *Lelimo v Minister for Justice* [2004] 2 IR 178, Laffoy J followed the decision of McKechnie J in *L.R. and L.T.*, having quoted with approval (at 185) the following passage from Collins and O'Reilly, *Civil Proceedings and the State*, 2nd edn, (Dublin, 2004) at para. 5.79 (pp. 144-5):

> 'As regards applications to reintroduce grounds that were either expressly or impliedly refused at the leave stage, there is some authority for the proposition that r. 23(2) [of Order 84 of the Rules of the Superior Courts] permits the High Court to allow an applicant to amend his statement by adding a ground that had been rejected at the application for leave. But the better view must surely be that a refusal to grant leave binds every other judge of the High Court, who is therefore deprived of jurisdiction to act in such a manner as to effectively set that refusal aside. The appropriate remedy available to a dissatisfied applicant is by way of an appeal to the Supreme Court against that part of the High Court order refusing to grant leave.'

53. Applying those principles, I am satisfied that I have no jurisdiction to consider either of the grounds upon which the applicant sought, but was not granted, leave to seek judicial review.

Conclusion

54. For the reasons I have given, the application for judicial review is refused.