THE COURT OF APPEAL

CIVIL

APPROVED

Court of Appeal Record Number: 2021/58

Murray J.
Donnelly J.
Ní Raifeartaigh J.

Neutral Citation Number [2022] IECA 226

BETWEEN/

M.M.

APPLICANT/
APPELLANT

- AND -

CHIEF INTERNATIONAL PROTECTION OFFICER, THE MINISTER FOR JUSTICE AND THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 14th day of October 2022

Introduction

1. The main issue in this case is one of interpretation of the statutory scheme for the processing of international protection claims by international protection officers ("**IPOs**") pursuant to the International Protection Act 2015 ("**the 2015 Act**"). It arises in the context of the appellant's unsuccessful appeal of a decision of the first respondent that the appellant be refused a refugee or subsidiary protection declaration pursuant to s. 39(3) of the 2015 Act, and that she also be refused permission to remain pursuant to s. 49 of the same Act; see [2021] IEHC 28. The issue of statutory interpretation arising is whether the 2015 Act requires a single IPO to make both (a) decisions concerning the interviewing of an applicant (i.e. whether to interview and who will interview); and (b) the final recommendation/decision subsequent to the interview (in circumstances where the interview is conducted by a panel member appointed pursuant to s. 76(1) of the Act). In the present case, one IPO arranged for the interview to be conducted by a panel member, and a second IPO made the required recommendation. The appellant maintains that the involvement of two separate IPOs in this manner is not permitted by the legislation.

2. Other issues raised in the case are: (1) whether compliance with sub-section (13) of s. 35 must be effected within a particular time-frame; (2) whether the decision on *refoulement* failed to give proper reasons insofar as it contained an (alleged) ambiguity; and (3) whether the decision-maker failed to make a finding of fact on an important factual issue, namely whether the appellant was lesbian in her sexual orientation.

Background

3. The appellant is a national of Zimbabwe who was born in 1993. She arrived into the State on the 16 September 2017 and applied for international protection on the same day. The application process required the completion of a questionnaire. In her application, she stated that she is a Christian and a member of the Ndebele tribe. She also stated that she was married twice, first at the age of 9 and again at the age of 13. She said that the two men to whom she was (successively) married were brothers (her second marriage taking place when her first husband died), and were members of ZANU-PF. She has a son who was born in 2013 and who at the time of the application had remained in Zimbabwe. She said she had experienced emotional abuse, domestic servitude and illegal abortion during her two marriages.

4. At Part 7 of the application, the appellant stated that she fled Zimbabwe because her husband became physically violent to her and made death threats to her due to her lesbian identity, after she was "involuntarily outed" by members of her community. This came about, she said, after her uncle discovered her relationship with a female partner. She stated that she and her female partner fled Zimbabwe and went to South Africa and said that if she were to return to Zimbabwe, she would be endangered.

The procedures employed in respect of the appellant's application

The international protection application

5. Mr. Keiffer Corrigan, an IPO working in the International Protection Office, appointed Mr. Ciarán McCarthy, a panel member, to conduct a personal interview with the appellant, and arranged for the interview to be conducted on the 31 January 2019.

6. Mr. Ciaran McCarthy, a panel member appointed pursuant to s. 76(1) of the 2015 Act, carried out the interview on the 31 January 2019 and created a record of it as required by s. 35(12) of the 2015 Act. He later created an addendum to his draft s. 39 report in order to comply with s. 35(12)(b) of the Act; this was done on the 24 April 2019 and identified the information in sections 1 to 8 of the report which were relevant to the international protection application, and to the permission to remain application, respectively.

7. Ms. Ciara Roche, another IPO working within the International Protection Office, was assigned as the case worker to the file on the 28 February 2019. Obviously, this was on a date after the interview had been conducted with the appellant. Ms. Roche completed a document (the s. 39 report) in which she largely agreed with the views expressed by Mr. McCarthy in his draft s. 39 report and recommendations. She considered the entirety of the applicant's file and the draft report and completed the s.35 report on the 25 April 2019. She made a negative recommendation under s.39(3).

The s. 49 process

8. On the 30 April 2019, Ms. Ruth Byrne, an IPO who was working in the Permission to Remain Unit within the International Protection Office, was assigned to the appellant's case. She conducted an examination of the file and, by a decision dated the 23 May 2019, refused the appellant's application for permission to remain. Ms. Byrne swore an affidavit dated the 20 August 2020 in which she said that before reaching her decision, she took into account the s. 35(12) report, the s. 39 report, and the country of origin information. Ms. Byrne averred that although it was open to an applicant to submit further information in

relation to s.49 to the Minister at any time up to the completion of the s. 39 report, the appellant did not submit any additional information or material after the s. 35 interview.

9. The appellant was notified by letter dated the 20 June 2019 that the IPO had recommended that she should not be given either a refugee declaration or a subsidiary protection declaration. The letter also gave her notice that the Minister had decided pursuant to s. 39(3)(c) of the Act to refuse her permission to remain in the State. The letter enclosed the s. 39 report and a copy of the signed report of the s. 35 interview. The letter said that a recommendation to this effect would be forwarded to the Minister. It told her of her right to appeal to the International Protection Appeals Tribunal (IPAT) pursuant to s. 41(1) of the Act. (The appellant in fact appealed to IPAT "without prejudice" to the present proceedings).

10. Mr. Paraic O'Carroll, Assistant Principal Officer in the International Protection Office, swore an affidavit in which he set out details of the system in operation to process such applications. He averred that applicants for international protection have a legal right, subject to limited rare exceptions, to a personal interview pursuant to s. 35(1) of the 2015 Act. He averred that as the circumstances in which international protection will be granted without an interview are rare, the organising of a personal interview was a "*standard step*" in the processing of an application for international protection and "*not one which requires the exercise of a decision-making function*". As will be seen, the appellant takes issue with this characterisation of the interview process.

11. Mr. O'Carroll described the International Protection Office's Case Processing Unit, which he explained was divided into teams who are assigned individual files. Each team comprises up to 25 panel members who report directly to the Executive Officers and Higher

Executive Officers assigned to that team. Each Executive Officer and Higher Executive Officer on each team is both an IPO and an Officer of the Minister. Each application is assigned an IPO from the same team as its assigned Panel Member, from whom this Panel Member may seek guidance at any time before or after the s. 35 interview. He averred that where an IPO has acquired information about a particular application due to a Panel Member having sought their advice on it before the s. 35 interview, that IPO will be assigned that application where possible.

12. Mr. O'Carroll also described the duties of the Permission to Remain Unit. He averred that its responsibility is to examine Permission to Remain under s. 49 of the 2015 Act in circumstances where a recommendation has been made for the refusal of both a declaration of refugee status and a declaration of subsidiary protection. Cases are assigned to Officer(s) of the Minister in that Unit if a negative recommendation is made under s. 39(3)(c). It is the current practice that those officers who are responsible for the Examination of File under s. 49 will not have had any previous involvement with the claim for international protection in their capacity as IPO.

The statement of grounds

13. In light of the decision of the Supreme Court in *I.X. v. The Chief International Protection Officer & Ors.* [2020] IESC 44, the appellant abandoned some of the grounds originally pleaded on her behalf. The grounds which remained live before the High Court, and in this appeal, were that:-

- The respondents acted in breach of the mandatory duty under statute to interview the appellant pursuant to s. 35(13)(b) of the 2015 Act and thereby

failed to conduct a personal interview with her so as to address anything that would be relevant to the decision under s. 49 of the 2015 Act.

- The decision under s. 49 of the 2015 Act was unlawful by reason of its having been based on a prior unlawful recommendation of the first respondent
- The decision to refuse the appellant permission to reside in the State was unlawful by reason of no proper reason or rationale having been provided for concluding that the State's non-refoulement obligations would not be breached by returning the Applicant to her country of origin.
- The failure of the first respondent to make a decision on a core element of the application (the appellant's sexual orientation) rendered the decision/s invalid.
- The failure of the first respondent to comply with the requirement of s. 35(13) in the preparation of the s. 35 report and/or the failure of the first respondent to include in a separate part of the s. 35 report "anything that would in the opinion of the IPO, be relevant to the Minister's decision under s. 48 or s .49" rendered the s. 49 decision invalid. The last two documents attached to the s. 35 Report in this regard did not have the effect of remedying this defect.
- The impugned recommendation of the first respondent dated the 25 April 2019 was invalid in circumstances where the statutory scheme had not been followed. In particular the statutory scheme contemplates a single identified IPO directing the processing of an application, including, at least, that this IPO causes an interview to take place with a designated panel member and assistance with that panel member.

Relevant provisions of the International Protection Act 2015

14. In *I.X.,* O'Donnell J. (as he then was) succinctly described the overall scheme of the system established by the Act in the following terms:

> "[59.] The 2015 Act effected a radical, and welcome, restructuring of the process for decision-making on applications for asylum, subsidiary protection, and leave to remain and other related issues. The fact that there existed three separate systems for the assessment of claims for asylum subsidiary protection and leave to remain had been criticised as creating confusion and delay and encouraging legal challenges. One object of the legislative scheme introduced by the 2015 Act was, therefore, to provide a single decision-making process with, where appropriate, provision for appeal. In order to achieve this, the Act created the status of IPO, appointed by the Minister, who is required by the statute to be independent, and to make a recommendation on an application for asylum or subsidiary protection and which recommendation may be the subject of an appeal to an independent appeals body, the International Protection Appeals Tribunal ("IPAT"). This reflects the requirements of European law controlling applications for asylum and subsidiary protection. Leave to remain is a matter of domestic law and a matter for the discretion of the Executive, exercised in this case by the Minister, and the Act therefore constitutes the IPO as, also, an officer of the Minister for the purposes of such an application..."

IPOs and Panel Members under the Act

IPOs

15. In Part 1 of the Act, "international protection officer" is defined as

"a person who is authorised under *section 74* to perform the functions conferred on an international protection officer by or under this Act".

16. S. 74 of the Act provides that the Minister "may authorise in writing such and so many persons as he or she considers appropriate to perform the functions conferred on an international protection officer by or under this Act." Subsection 4 provides that an IPO "shall be independent in the performance of his or her functions". S. 75 provides for the position of Chief International Protection Officer.

Panel Members

17. S. 76(1) provides that the Minister "may enter into contracts for services with such and so many persons as he or she considers necessary to *assist* him or her in the performance of his or her functions under this Act…". The use of the word "assist" in this subsection may be noted. These persons are generally referred to as 'panel members' who may be required to carry out personal interviews with applicants, as occurred in the present case.

18. Subsection (2) provides that "the Minister may authorise a person with whom the Minister has entered into a contract for services in accordance with *subsection (1)* to *perform* any of the functions (other than the function consisting of the making of a recommendation to which *subsection (3)* of *section 39* applies) of an international protection officer under this Act". The use of the word "perform" in this subsection may be noted. This subsection was not employed in the present case.

The decision-making process as set out in the Act

19. The primary issue which falls for decision in the present case, namely whether a single IPO must be involved throughout the process, depends upon a close reading of the provisions of the 2015 Act, and in particular the use of the definite article ("the") and indefinite article ("an") with reference to "international protection officer" in different places. I will therefore highlight certain provisions in the below extracts from the legislation, but it may also be helpful to preface this by quoting what was said by O'Donnell J. in the *I.X.* case in this regard, as he succinctly summarised the argument, which is now made in the present case on behalf of the appellant. The point was argued in the *I.X.* case but it was held that it did not fall within the parameters of the case. O'Donnell J summarised the argument, involving a parsing of the provisions of the Act, with particular reference to the words "the" and "an", in the following terms:-

> "[78.] … Thus, s. 34 requires that *an* IPO shall examine each application for international protection. S. 35(1) then provides that, as part of the examination referred to, *the* IPO shall cause the applicant to be interviewed. S. 35(2) has a third formulation and provides that, where necessary, an applicant being interviewed shall be provided "by the Minister or international protection officer" with the services of an interpreter. Thus: s. 34 uses the indefinite article; s. 35(1), the definite article; and s. 35(2) uses neither. S. 35(5) provides that a personal interview shall take place without the presence of family members unless *the* IPO considers it necessary. It is pointed out that s. 35 seems to contemplate an individual IPO since it refers again to *the* IPO at subss. (8), (9), and (13)(a). Again, it is to be noted that s. 39 dealing with the report of the examination of the application tends to refer to *the* IPO at s. 39(1), s. 39(2)(b), s. 39(3), and s. 39(4). Again, subss. (3), (4), and (5) of s. 40 use the definite article, but

this pattern is broken in s. 40(1) which refers to *an* IPO having prepared a report. On the basis of this reading of the relevant part of the Act, it is contended by the appellant that the section specifically contemplates a single IPO having responsibility for the overall application and, critically, being the person under s. 35 who causes the applicant to be interviewed …"

20. Turning now to the provisions of the Act, Part 4 of the 2015 Act provides for the assessment of applications for international protection. S. 28(1) provides that "*an international protection officer* shall, in co-operation with the applicant, assess the relevant elements of the application". The relevant elements to be considered are then enumerated in subsection (3) (including matters such as age, identity documents, background and reasons for seeking international protection). Subsection (4) provides that the assessment must be carried out on an individual basis and that the matters listed at (a)-(f) thereof should be considered. These are, in short form: age, background/family background, identity, nationality(s), previous places of residence, any previous asylum applications, travel routes, relevant identity and travel documents and the reasons for which they are applying for international protection.

21. Part 5 of the 2015 Act provides for the examination of applications at first instance. S. 34 provides:-

An international protection officer shall examine each application for international protection for the purpose of deciding whether to recommend, under *section 39 (2)(b)*, that—

(a) the applicant should be given a refugee declaration,

(b) the applicant should not be given a refugee declaration and should be given a subsidiary protection declaration, or

(c) the applicant should be given neither a refugee declaration nor a subsidiary protection declaration.

22. S. 35 deals with the interviewing of an applicant and provides (in relevant part only):-

35. (1) As part of the examination referred to in *section 34*, *the international protection officer* shall cause the applicant to be interviewed, at such time and place that *the international protection officer* may fix, in relation to the matters referred to in that section.

[…]

(8) A personal interview may be dispensed with where *the international protection officer* is of the opinion that—

(a) based on the available evidence, the applicant is a person in respect of whom a refugee declaration should be given,

(b) where the applicant has not attained the age of 18 years, he or she is of such an age and degree of maturity that an interview would not usefully advance the examination, or

(c) the applicant is unfit or unable to be interviewed owing to circumstances that are enduring and beyond his or her control.

[….]

(12) Following the conclusion of a personal interview, the interviewer shall prepare a report in writing of the interview.

(13) The report prepared under *subsection (12)* shall comprise two parts—

(a) One of which shall include anything that is, in the opinion of *the international protection officer*, relevant to the application, and

(b) The other of which shall include anything that would, in the opinion of *the international protection officer*, be relevant to the Minister's decision under *section 48* or *49*, in the event that the section concerned were to apply to the applicant".

(Emphasis added).

23. It may be noted that s. 35(1) gives effect to an obligation under EU law to conduct a personal interview with an application for international protection; Article 14 of the "Procedures Directive", 2013/32/EU.

24. S. 39 deals with the preparation of a report and provides in relevant part:-

"39. (1) Following the conclusion of an examination of an application for international protection, *the international protection officer* shall cause a written report to be prepared in relation to the matters referred to in *section 34*.

(2) The report under *subsection (1)* shall—

(a) refer to the matters relevant to the application which are—

(i) raised by the applicant in his or her application, preliminary interview or personal interview or at any time before the conclusion of the examination, and

(ii) other matters *the international protection officer* considers appropriate,

(b) set out the recommendation of *the international protection officer* in relation to the application, and

(c) set out any of the findings referred to in *subsection (4)* in relation to the application.

(3) The recommendation of *the international protection officer* in relation to the application shall be based on the examination of the application and shall be that—

(a) the applicant should be given a refugee declaration,

(b) the applicant should not be given a refugee declaration and should be given a subsidiary protection declaration, or

(c) the applicant should be given neither a refugee declaration nor a subsidiary protection declaration."

25. A recommendation under s. 39(3)(c) is sometimes referred to by way of shorthand as a "negative recommendation".

26. S. 40(1) of the Act provides:

Where *an international protection officer* has prepared a report under *section 39*, or caused such a report to be prepared, the Minister shall notify, in writing, the applicant concerned, the applicant's legal representative (if known) and, whenever so requested by him or her, the High Commissioner, of the officer's recommendation referred to in *section 39(2)(b)*.

27. S. 40(5) provides:-

Where *the international protection officer's recommendation* is that referred to in *section 39(3)(c)*, the notification under *subsection (1)* shall be accompanied by—

(a) a statement of the reasons for the recommendation,

(b) a copy of the report under *section 39*, and

(c) a statement of the entitlement of the applicant to appeal to the Tribunal against the recommendation, and of the procedures specified in *Part 6*.

28. S. 49 concerns the Ministerial permission to remain process, which arises if a negative recommendation has been made under s. 39(3)(c), and provides:-

"49. (1) Where a recommendation referred to in *section 39 (3)(c)* is made in respect of an application, the Minister shall consider, in accordance with this section, whether to give the applicant concerned a permission under this section to remain in the State (in this section referred to as a "permission").

(2) For the purposes of his or her consideration under this section, the Minister shall have regard to—

(a) the information (if any) submitted by the applicant under *subsection (6)*, and

(b) any relevant information presented by the applicant in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.

(3) In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to—

(a) the nature of the applicant's connection with the State, if any,

(b) humanitarian considerations,

(c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),

(d) considerations of national security and public order, and

(e) any other considerations of the common good."

29. Subsection 4 of s. 49 provides that having given the matters described in subsections 2 and 3 due consideration, the Minister may grant, or refuse to grant, the applicant a permission. Subsection 5 provides that the applicant or their legal representative will receive notification in writing from the Minister of the decision under subsection 4, along with a statement of the reasons for this decision. Subsection 6 makes it clear that an applicant may at any stage prior to the preparation of a report under s.39(1) submit information that would, in the event that s. 49(1) applies, be relevant to the Minister's decision under s. 49, including information about any change of circumstances. Similarly, s. 49(9) makes it clear that an applicant may submit such information to the Minister after a decision of IPAT upholding a refusal of international protection and before the Minister has conducted a review under s. 49(7). It may be noted that the appellant in the present case did not submit any further information after the interview under s. 35.

30. S. 50 of the Act deals with the issue of *refoulement.* It prohibits r*efoulemen*t in certain eventualities, essentially where that person's life or their freedom is under threat due to their membership of a minority group, or where there is a serious risk that the person would be subjected to the death penalty, torture or other degrading treatment upon their return.

Issue 1: The appointment of a second IPO after the interview had been arranged the first IPO and conducted by a panel member

31. The first ground of appeal is that the trial judge erred in concluding that the IPO who makes the recommendation pursuant to s. 39(3) of the 2015 Act need not be assigned prior to the s. 35 interview, nor need to cause that interview to take place (if he or she decides that an interview is to take place). In broad terms, counsel for the appellant argues that the clear and unambiguous literal interpretation of the 2015 Act is that a single IPO must perform all of the required tasks, and that the independence of the IPO as provided for by s. 74(4) of the 2015 Act is undermined if the interview is arranged by one IPO, but the ultimate decision made by a different IPO, as occurred in this case. I will return to the appellant's submission in further detail after I have set out the trial judge's reasoning and conclusion on this issue.

32. The trial judge defined the first issue to be decided in the following terms: *"Does the IPO who makes the final determination pursuant to s. 39(3) have to be assigned prior to the s. 35 interview?"*, which she dealt with at paragraphs 20-32 of her judgment. She said that what happened in the present case reflected the usual practice, namely that a designated IPO was not assigned until after the s. 35 interview was conducted. She noted that the Act uses the definite article (i.e. *"the"* IPO) in certain relevant sections.

33. The trial judge then directed herself to relevant principles of statutory interpretation, referring to *AWK v. Minister for Justice* and Equality [2020] IESC 10), and the judgment of McKechnie J. in *Meagher v. Minister for Social Protection* [2015] 2 IR 633, and then said:

"[25.] The use of the definitive term *"the IPO"* is not determinative of the legislative intent alone. As acknowledged by the Applicant, and as is clear from an examination of the relevant sections of the Act, this definitive term is not used throughout the Act. Accordingly, giving the definitive term *"the IPO"* its plain and ordinary meaning having regard to the fact that it is not consistently used throughout the Act does not lead to a conclusion that the legislative intent was that a single IPO must be designated prior to the s.35 interview and preside throughout.

[26.] Neither is the plain and ordinary meaning of the words comprised in s.74(4) determinative of the legislative intent. Providing that an IPO shall be independent in the exercise of his or her functions does not require that a particular IPO must be assigned to a case prior to the s.35 interview to thereupon follow it to its conclusion. The arguments made by the Applicant in that regard are separate and distinct to addressing this issue of statutory interpretation.

[27.] The fact that s.35(8) envisages a role for the IPO in determining whether an interview should occur at all; that s.35(5) envisages the IPO determining whether it is necessary for family members to attend the s.35 interview; and, as commented upon by the Supreme Court in *IX v. CIPO*, that an IPO can determine to conduct the interview herself rather than having a panel member carry out the interview, are however significant issues in determining the plain intention of the Oireachtas. As stated by the Supreme Court in *IX v. CIPO* when considering the "import" of s.35 at paragraph 63 of the judgment:-

> "It seems that the Act should be complied with if the IPO himself or herself interviewed the appellant, since in such circumstances there would still be compliance with s. 35(1). However, the section clearly contemplates that in the normal case interviews would be carried out by other persons of sufficient competence. It seems obvious that such persons may include persons with whom the Minister has entered into a contract for services under s. 76(1), although that section is not confined to such circumstances since under s.76(2), such contracts for services may include an authorisation to perform any of the functions of an IPO under the Act other than the recommendations under s. 39(3). Furthermore, s. 35 clearly contemplates a significant degree of co-operation between the IPO charged with making the recommendation under s.39(3) and the person conducting the personal interview. Under s. 35(5), a personal interview shall take place without the presence of family members of the applicant unless the IPO considers it necessary for an appropriate examination. Under s. 35(8), a personal interview may be dispensed with where, in broad terms, the IPO is satisfied that it may be dispensed with and, in particular, s. 35(13) requires that the report to be prepared by the interviewer under s. 35(12) must contain information which, in the opinion of the IPO, is relevant to the application either for asylum or subsidiary protection or a decision on leave to remain."

[28.] Based on that analysis, it is certainly arguable that the 2015 Act requires the assignment of a designated IPO prior to the s. 35 interview being arranged, who will then examine and determine the application. However, the above analysis does not take account of the effect of s. 76(2) of the 2015 Act. Clearly, s. 76(2) envisages that a person who enters into a contract for services with the Second Respondent,

commonly known as a panel member, can be authorised to carry out any function of an IPO except the function of making the final recommendation pursuant to s. 39(3). The plain and ordinary meaning of the language used in s. 76(2) makes this quite clear. That obviously means that in any international application, two people can be involved in the entire process both before and after the s. 35 interview and that every decision required to be made by the IPO could be made by an authorised panel member except for the final recommendation. Accordingly, what appear to be significant decisions which must be made by the IPO examining an application, can in fact be made by a panel member authorised pursuant to s. 76(2). By clear implication, if a panel member can make any decision which the designated IPO can make except for the final recommendation, then another IPO must also be able to do so.

[29.] In light of the clear wording of s. 76(2), s.34(1) does not require that the designated IPO arrange the s. 35 interview. This is merely an administrative action. It does not interfere with the independence of the recommending IPO. Indeed, there are many counter arguments to those made on behalf of the Applicant as to why the designated IPO should not be in a position to choose the panel member to carry out the s. 35 interview. Appointing a panel member independent to the designated IPO could well be argued to be supportive of the independence of the entire process.

[30.] The more significant question, however, is whether there is a necessity to have a designated IPO appointed to an application prior to the s. 35 interview occurring so that the application is processed under a designated IPO even though all decisions bar the final recommendation can be made by an authorised panel member or by another IPO, as I have found. While this may seem like a logical manner of processing

applications, the Act does not specifically require this and, having regard to s. 76(2) of the 2015 Act, it is clear that either an IPO or an authorised panel member can make any decision which they are authorised to make without reference to the IPO who makes the final recommendation. Words would in fact, have to be inputted into s. 76(2) for such a meaning to be found. Accordingly, the plain and ordinary meaning of the 2015 Act when considered as a whole clearly does not require this.

[31.] Accordingly, it seems to me, that the intention of the Oireachtas can be discerned by applying a literal interpretation of the Act and that the plain and ordinary meaning of the 2015 Act, when viewed as a whole, does not require the designated IPO to arrange the s. 35 interview or, more importantly, be designated to a case prior to the arrangement of the s. 35 interview.

[32.] Furthermore, adopting the interpretation submitted on behalf of the Applicant would have the consequence that another IPO could not take over from a designated IPO should the designated IPO become unavailable, for whatever reason, before making the s. 39(3) recommendation. On the Applicant's interpretation, the entire process would have to recommence with another IPO designated and another s. 35 interview required to take place. It would be non-sensical that another s. 35 interview would have to occur exploring matters which already were explored and recorded with the applicant. This simply cannot have been the intention of the legislature."

34. The appellant contends that the trial judge was wrong in her conclusion and again advances the argument on the basis of the wording of the Act and in particular, the use of the definite article "*in large part*" in Part 5 of the Act. Considerable emphasis is placed on

s. 35(1). The appellant submits that the IPO who causes the interview to take place must be the same IPO who makes the recommendation; that it was the intention of the Act that a single, designated IPO would be responsible for the overall process.

35. The appellant is critical of the affidavit of Mr. O'Carroll insofar as it portrays the arrangement to conduct an interview as a standard administrative step, saying that this misunderstands and mischaracterises what is in effect a series of decisions which are integral to the process; namely, a decision to cause an interview to be conducted, a decision to assign this task to a particular panel member, and a decision to require the panel member to furnish a report. She submits that for this to have been done by an IPO other than the designated IPO undermines the independence of the IPO and therefore weakens the protection for the appellant. The appellant seeks in support of this argument to rely on s. 74(4) of the Act, which provides that the IPO shall be independent in the performance of his/her functions.

36. The appellant relies upon the principles of statutory construction articulated by Charleton J. in *J.C. Savage Supermarket Ltd. v. An Bord Pleanála* [2011] IEHC 488, and *D.B. v. Minister for Health and Children* [2003] 3 I.R. 12 and contends that the plain and ordinary meaning of s. 35(1) is that a single IPO must be involved. Counsel also refers to the principle of *expressio unius est exclusio alterius* as well as *Stokes v. Christian Brothers High School Clonmel* [2015] 2 I.R. 509, and contends that if the Oireachtas had intended that matters such as whether the applicant would be interviewed could be carried out by a person other than the designated IPO, it would have said so.

37. The appellant is critical of the trial judge's reliance on s. 76(2) of the Act in arriving at her conclusion. She points out that panel member in the present case was involved under

subsection 1 rather than subsection 2 of s. 76. The appellant emphasises the difference between a panel member *assisting* an IPO pursuant to s. 76(1), and a panel member *carrying out the functions* of an IPO, if so authorised pursuant to s. 76(2). She contends that s. 76(2) cannot be interpreted to support the involvement of two IPOs in the process, as distinct from one IPO and one panel member where the latter situation arises.

38. The appellant also submits that, if she is correct with regard to the statutory interpretation issue, there has been a breach of the required process in her case, and she is not required to show that she was *prejudiced* by what was done, relying *inter alia* on *Commission v. Germany*, Case C-137/14. She also submits that in any event she was prejudiced insofar as the designated IPO had no opportunity to consider whether her case might be dealt with without an interview.

39. At paragraph 79 of *I.X*., O'Donnell J. noted that counsel had submitted in that case that he was not advancing the contention that a specific individual had to be appointed the IPO for a particular case to the extent that, if such an individual was absent, on leave, or retired, no application could be processed. He conceded that in such circumstances it would be possible for another IPO to take the subsequent statutory steps on the basis that it could be said that any second IPO became the IPO for the purposes of the statutory provisions. In the present case, counsel for the appellant said that he was *not* making that concession. He suggested that in such situations, perhaps an applicant could be requested to provide formal consent to the process continuing with a different IPO, which would provide a practical solution to the problem if it arose.

40. The respondents refer to *A.W.K v Minister for Justice* [2020] IESC 10 where McKechnie J. referred to the need to give words their ordinary and natural meaning, which would best reflect the intention of the Oireachtas. They refer to Board of Management of *St. Molaga's National School v. Secretary General of the Department of Education* [2011] 1 I.R. 362, where Denham J. (as she then was) said that there was no need to resort to other canons of construction where the words of a statute were "*clear, unambiguous and not absurd*".

41. The respondents submit that the 2015 Act does not support the interpretation contended for by the appellant. It is pointed out that nowhere is there any reference to a single IPO being "designated" to deal with the totality of the process. It is pointed out that s. 40(1) of the Act uses the indefinite article rather than the definite article, as do parts of s. 28. They submit that the varying use of the definite and indefinite articles do not bear the significance contended for the appellant. They submit that the expression *expressio unius est exclusio alterius* has no application to the present situation.

42. The respondents submit that while s. 74 requires that independence in the performance of the IPO's functions, it does not follow that a single IPO is required throughout the process but rather that each IPO involved in the process must observe the principle of independence.

43. The respondents contend that the trial judge was correct in considering s. 76(2) to be of relevance. They submit that it shows that the Oireachtas clearly contemplated that two separate people may be used in the process, since panel members can be used to perform the functions of an IPO with one exception (the recommendation); and that if this can be done,

then it follows logically that two IPOs can be involved at different stages. They submit that if the appellant's interpretation of Part 5 were correct, s. 76(2) would be rendered nugatory.

44. The respondents also submit that the Court should avoid an interpretation which would be illogical and absurd, citing the categories of absurdity identified by McKechnie J. in *Meagher v. Minister for Social Protection* [2015] 2 I.R. 633. They say that the interpretation contended for by the appellant would cause major practical problems in the operation of the system. An IPO might become unavailable after the commencement of the process by reason of death, illness, maternity leave, career move or other such issue. They contend that it would be absurd if a fresh interview had to be commissioned simply because of the unavailability of the IPO who had caused the interview arrangements to be made. They contend that even if the Court were to conclude that that there was some obscurity or ambiguity in the wording of the Act, s. 5 of the Interpretation Act 2005 should be employed to avoid reaching the result contended for by the appellant. The respondents also refer, *inter alia*, to s. 18 of the Interpretation Act 2005 insofar as it provides that a word importing the singular shall be read as also importing the plural (and vice versa).

Analysis and Decision with regard to the first issue

45. The Supreme Court addressed the overall approach to statutory interpretation relatively recently in *DPP v. A.C..*, [2021] IESC 74, a case concerning the statutory interpretation of provisions concerning the admissibility in a criminal trial of a certificate by a medical practitioner. In the course of his judgment, O'Donnell C.J. said:

> "[3.] I agree that the basic approach to interpretation is the approach that gives primacy to the words used. I prefer to describe this as "the plain meaning approach" rather than a "literal approach", because it may be that the literal meaning may, at its margin, have a connotation of strict or even artificial interpretation, and the two terms are used relatively interchangeably. It is important, however, that this approach does not invite a court to isolate the critical words, in this case, "a certificate purporting to be signed by a registered medical practitioner and relating to an examination of that person", and consider if they have a plain or literal meaning in the abstract. A statute is a form of communication, albeit a formal and very particular one. The function of interpretation, whether officially by a court, by a professional lawyer or by an interested individual, is to understand what is being communicated. It may be that there are writers whose expression is so limpid that each individual sentence could, if placed upon a transparent slide, be understood immediately and without any doubt or hesitation, although I doubt it. But most language carries layers of meaning, which contributes to the richness of literature, and most communication does not occur in disjointed individual phrases. Instead, what is said occurs, and is understood, against a background created by what has gone before, the subject matter of the communication, assumed knowledge and shared assumptions, all of which assist in the understanding by one party of what is being said by another."

46. The Chief Justice then referred to the importance of reading language in its context, quoting from the judgments of McKechnie J. in *DPP v. T.N.* [2020] IESC 26 (Unreported, Supreme Court, McKechnie J., May 28th, 2020) and *Dunnes Stores v. Revenue Commissioners & Ors.* [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., June 4th, 2019). In the latter case, McKechnie J. said, *inter alia*, that "*the focus of all interpretive*

exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail". O'Donnell C.J. described this approach as consistent with the courts' approach over time, citing *Howard v. The Commissioner of Public Works* [1994] 1 I.R. 101 as a strong case in this regard.

47. At paragraph 7 of his judgment, O'Donnell CJ said:

> "If, when viewed in context, having regard to the subject matter and the objective of the legislation, a single, plain meaning is apparent, then effect must be given to it unless it would be so plainly absurd that it could not have been intended."

48. At paragraph 11, he said:

> "An important part of the context is the objective of the provision, if that can be deduced from the provision and the surrounding sections. As Judge Learned Hand said:-
>
> > "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." (*Cabell v. Markham*, (1945) 148 F. 2d 737)

49. Woulfe J. said, at paragraph 44 of his judgment:

> "It is frequently said that in interpreting Acts of the Oireachtas, the Court seeks to ascertain the intention of the Oireachtas: see *Crilly v. T. & J. Farrington Limited* [2001] 3 I.R. 251. *Crilly* also emphasised that what the Courts in this country have also sought to ascertain is the objective intention of the legislature, as expressed in the language under consideration, and *Crilly* re-affirmed the literal approach to the meaning of the words used, as previously approved in cases such as *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101.

50. Bearing the above principles in mind, it seems to me that the following observations may be made in the present case.

51. In the first instance, the use of the definite article ("the") with regard to the phrase "international protection officer" is not consistent throughout the provisions dealing with such officers and their role, which have been set out earlier in this judgment. It is true that the definite article (i.e. "the international protection officer") is frequently used, but it is not an invariable practice, and sometimes the indefinite article is employed, such as in s. 28(1) and s. 40(1). Perhaps more importantly, there does not appear to me to be an obvious pattern with regard to the use of each of them which points to the conclusion that it was the '*will'* of the Oireachtas that only one IPO should be involved throughout the entire process. The appellant placed great emphasis on s. 35(1), but to read this section in isolation from the other provisions would be to make the precise error identified by O'Donnell C.J. in *People (DPP) v A.C.* of interpreting the statute not as a whole but by reference to a single phrase. It therefore does not seem to me that the use of the definite article necessarily points to the

conclusion that the Oireachtas intended that a single IPO would conduct all of the functions described.

52. Secondly, it does not seem to me that the requirement that the IPO must be independent in the performance of his or her functions necessarily leads, in logic, to the conclusion that a single IPO must be involved throughout the process in order that the principle of independence be observed. I mentioned earlier that the appellant took issue with the characterisation of the arranging of an interview as a "*standard step*" in the procedure (as was done by Mr. O'Carroll in his affidavit). However, in my view, to describe the decision to interview as a "*standard step*" merely recognises the reality that the permitted exceptions to this step are few and narrow, and I do not think that anything turns on the characterisation of it as such. An issue of greater substance is the question of whether the splitting of the functions in question (arranging interview, and making report and recommendation, respectively) between different IPOs would undermine the principle of independence in the exercise of those functions. The appellant sought to argue that matters such as deciding whether an applicant would be interviewed and the selection of the interviewer from a panel were important decisions, which might ultimately have an effect on the outcome of the case. But even assuming this to be so, I fail to see how the importance of the functions in question translates into the further and separate conclusion that the functions must all be performed by a single designated IPO. If each IPO performs his or her respective function(s) independently, the principle of independence is observed. I do not accept that the involvement of two IPOs at different stages of the process weakens the protection for an applicant, as the appellant contends. Insofar as the principle of independence has been built into the statutory provisions, it seems to me to be essentially neutral on the separate question

of whether one IPO may arrange an interview, and another IPO carry out the remaining functions (with or without the assistance of a panel member).

53. Thirdly, s. 76(2) is of relevance when seeking to determine the legislative intent. The trial judge said:

> "[28.] … By clear implication, if a panel member can make any decision which the designated IPO can make except for the final recommendation, then another IPO must also be able to do so".

I agree with the trial judge in this regard. Under s. 76(2), the Oireachtas clearly envisaged that two persons might be involved in the process, i.e. a panel member, and an IPO. This in itself is a clear indication that the Oireachtas did not consider the involvement of two separate persons in the process to be inimical to the principle of independence, or objectionable for any other reason. As the trial judge said, there is no reason to think that, if the combination of panel member and IPO was acceptable to the Oireachtas, the involvement of two separate IPOs in the process was not.

54. Fourthly, there is the question of practicality. The volume of international protection applications is significant; a large number of people in the International Protection Office are employed to deal with these applications; and the normal events associated with the employment of a large number of people in an office can arise at any time; illness, career change, maternity/paternity leave, death, and so on. It would be impractical in the extreme if an applicant interview had to be re-conducted, as a matter of statutory requirement, simply because the IPO who had arranged the interview was no longer available, for whatever

personal or professional reason, to carry out the remaining steps in the process. It cannot be lightly assumed that this is the outcome the Oireachtas wished to bring about.

55. Counsel for the appellant argued that a solution would be to write to an appellant seeking his or her consent to the process continuing without having to re-do the interview, but this seems to me to sidestep the relevance of the point as an aid to the statutory interpretation in the first place. In my opinion, it seems very unlikely that the statutory intention was to devise a system which was highly vulnerable to practical problems of this obvious kind; and certainly not without language making it very clear that this was intended. It also seems to me to be very unlikely to be the legislative intent when one considers the context and purpose of the legislation as a whole, which was to streamline a number of different types of protection application, as described by the Chief Justice in *I.X*.

56. Having regard to the above, it seems to me that, when viewed in context, and having regard to the subject matter and the objective of the legislation, the words in Part 5 of the 2015 Act are not ambiguous; they do not impose a statutory requirement that a single IPO must both make the decisions concerning the applicant interview as well take all the steps subsequent to an interview which are carried out by a panel member.

57. Given the conclusion that I have reached in this regard, it is not necessary to deal with the arguments as to the effect of any breach of the system and/or the question of prejudice to the appellant.

58. Accordingly, I would uphold the conclusion of the trial judge with regard to the first issue.

Issue 2: The addition of an addendum in order to comply with s.35(12)(b) of the Act

59. Ground 2 in the Notice of Appeal contends that the trial judge erred in concluding that ss. 35(12) and (13) of the 2015 Act were complied with by reference to her own judgment in *H.K. v. Minister for Justice* [2021] IEHC 40. Ground 3 asserts the invalidity of the s. 49(4) decision by reason of a prior invalid s. 39(3) recommendation. Both relate to the same issue; the late addition of an addendum in order to comply with s.35(13)(b), which the appellant asserts renders the s. 39(3) recommendation invalid, with a knock-on effect on the s. 49(4) decision.

60. It will be recalled that s. 35(12) of the 2015 Act requires the interviewer to prepare a report in writing of the interview conducted with the applicant "following the conclusion of the interview", while s.35(13) requires that the report under subsection 12 shall comprise two parts: (a) one which includes anything that is relevant to the application (for international protection); and (b) the other of which includes anything that is relevant to the Minister's decision under ss. 48 or 49 (in the event that the section concerned were to apply to the applicant).

61. The trial judge defined the second issue in the following terms: *"Was section 35(12) and (13) of the Act of 2015 complied with?"* and dealt with it at paragraphs 33 and 34 of her judgment. She said that she had already determined this issue in a prior judgment in *H.K. v. Minister for Justice*), where she had held that an addendum can be made at a later stage to the s. 35 report to reflect the necessary requirements of s. 35(13)(a) and (b). She said that the decision of Barrett J. in the *I.X.* case was (implicitly) to similar effect. She said this

conclusion also disposed of the issue relating to the validity of the s. 49(4) decision (i.e. ground vii).

62. The appellant refers to the terms of s. 35(12) and (13) and submits that they do not permit of the creation or addition of an addendum some months after the preparation of the report, as occurred in the present case. This was a clear attempt, it is submitted, to cure the defect identified by the High Court (Barrett J.) in the *I.X.* case. The appellant accepts that it can be done (and must necessarily be done) *after* an assessment of the written interview, but disputes that it can be done "*at almost the latest possible stage and 'with an eye' on [the] recent developments in the caselaw*".

63. The respondents submit that there is no temporal requirement in the Act itself and the appellant is seeking to imply words such as "*immediately*" or "*soon thereafter*" into the provisions. The respondents also submit that there is nothing objectionable about the decision-makers keeping themselves apprised of the courts' jurisprudence and seeking to stay within statutory limits in light of court decisions.

64. I would uphold the decision of the trial judge on this issue. No temporal requirement appears within the 2015 Act itself; all that is required is that parts (a) and (b) of the report are prepared "*following the conclusion of the interview*". Provided the relevant addenda, as they have come to be called by lawyers, are done in advance of the next steps (i.e. the relevant decisions being taken), there is no possible procedural injustice to an applicant which arises from the creation of an addendum which is designed to comply with the statutory provisions in question.

Issue 3: Refoulement

65. The third issue addressed by the trial judge was the appellant's complaint that the decision-maker had failed to give reasons, in the s. 49(4) decision, to support the view that that the State's *refoulement* obligations would not be breached if the appellant were returned to her country of origin. The appellant had relied upon *K.A. (Ghana) v. Minister for Justice and Equality* [2018] IEHC 511 in which the High Court (Humphreys J.) held that there was an ambiguity in the reasoning of the decision-maker such that proper reasons had not been furnished. Ground 4 in the Notice of Appeal complains of the trial judge's treatment of this issue.

66. The trial judge distinguished *K.A. (Ghana)* on the basis that *K.A.* involved a review decision (pursuant to s. 49(7) of the Act) which was ambiguous as to whether the conclusion as to the absence of risk stemmed from (a) a disbelief of the applicant's account; or (b) from information concerning the country of origin itself. She said that the case before her was not a review decision, and there had been no revisiting of the findings that had been made at first instance in the course of the intentional protection application.

67. The appellant submits that the decision is flawed for precisely the same reason as that identified in the *K.A.* case, namely by reason of the uncertainty as to the reason for refusal. She submits that the crucial sentence in the report found by the High Court to be ambiguous in *K.A.*, is near identical to the following sentence contained in the report in the present case: "*The Country of origin information does not indicate that the prohibition of refoulment applies if the applicant is returned to Zimbabwe*".

68. The respondents rely upon the decision in *M.N. (Malawi) v. Minister for Justice* [2019] IEHC 489, where Humphreys J. said that his decision in K.A. was "*fundamentally distinct*" because in *K.A.*, the applicant had made submissions under s. 49(9), unlike the case before him. The respondents point out that the decision-maker in the present case specifically stated that for the purposes of "*this consideration*" (i.e. the s. 49 decision), the appellant was "*considered to be a failed asylum seeker*" and that her claims in relation to international protection "*are not revisited in this report*".

69. In her s. 49 report, Ms. Ruth Byrne recited the provisions of s. 50, noted what the appellant had said on her questionnaire concerning *refoulement* (*inter alia* that her life was in danger because of homophobia in her country of origin), and that the s. 39 report had concluded that the appellant was not at risk of torture, inhuman or degrading treatment or punishment in her country of origin. She then went on to observe that the appellant's application for international protection had been rejected at first instance and that she should therefore be considered "*a failed asylum seeker*" and her claims in respect of international protection should not be "*revisited in this report*". She referred to a 2017 report from the United States Department of State concerning Zimbabwe, quoting therefrom. She referred to the fact that the appellant's family members continued to live in that country. She then said:

> "I have considered all the facts of this case together with the relevant country of origin information in respect of Zimbabwe. The prohibition of *refoulement* was also considered in the context of the International Protection determination. The prohibition on *refoulement* has also been considered in the context of this report. The country of

origin information does not indicate that the prohibition of *refoulement* applies if the applicant is returned to Zimbabwe.

Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the applicant to Zimbabwe is not contrary to Section 50 of the International Protection Act 2015, in this instance, for the reasons set out above".

70. I agree with the trial judge's conclusion that this case is different in a material respect from *K.A.* because the decision which the appellant challenges for lack of reasons is a decision which itself does not make findings of fact but instead adopts as its starting position the prior views reached in the application for international protection and proceeds to consider the *refoulement* issue on the basis of those facts. The appellant in the present case did not submit any further information which required to be considered by the Minister. In *K.A.* (which was expressly distinguished by the High Court in *M.N.*), the ambiguity arose in a decision which was itself a review decision taking place after further information and material had been submitted to the Minister pursuant to s. 49(9), which therefore needed to precisely identify the reasons for the decision in an unambiguous manner, i.e. as to whether the conclusion had been reached on the basis of the country of origin information or a disbelief of the applicant's narrative.

71. I would accordingly uphold the trial judge's finding on the third issue concerning *refoulement*.

Issue 4: Alleged failure to make a finding on a core issue of fact

72. The fourth issue was whether the first respondent had failed to determine a core element of the applicant's claim, namely whether she was of lesbian sexual orientation. The trial judge held that while the decision of the IPO did not explicitly state that it did not accept this claim, it was implicit from its reasoning that it did not do so. This issue is covered by Ground 5 in the Notice of Appeal.

73. The appellant maintains that even if the full account she gave of events arising from her lesbian relationship with another woman was deemed not credible, the mere fact of being lesbian in her sexual orientation *simpliciter* would have been sufficient grounds for granting protection; and that no finding was made on that core issue.

74. She relies on *M.A.B v. Refugee Applications Commissioner* [2014] IEHC 64, a decision of the High Court (O'Malley J.) in which a negative recommendation was quashed *inter alia* because there had been no finding as to whether the applicant was a member of a particular Sudanese tribe. As O'Malley J. explained in her judgment, the failure to state whether or not it was accepted that the applicant was a member of the Zaghawa tribe gave rise to difficulties for the following reason:-.

> "[48.] … This was indeed a core part of the applicant's claim- if it was not believed, then it would appear that he had no case at all. If it was believed, that did not necessarily determine the issue of his status but it would provide a significant substratum of accepted fact."

75. The appellant disputes the trial judge's view that a finding that the appellant was not a lesbian was implicit in the s. 39 report. She also criticises the trial judge insofar as she commented on the appellant's lack of knowledge of the names of any gay or lesbian groups and that she had failed to engage with any such groups in Zimbabwe or Ireland. She maintains that such reasoning involves impermissible stereotyping about sexual orientation, a form of reasoning which, she contends is prohibited, having regard to the *A, B and C* case, Joined Cases C-148/13, C-149-13, and C-150-13. She also maintains that the same decision mandates that unambiguous findings of fact should be made in such matters, with a clear explanation of whether and why each material fact has been rejected as not credible.

76. The respondents submit that the decision in *M.A.B.* is distinguishable from the present case. They maintain that the trial judge was correct in her conclusion on this issue, because the s. 39 report clearly stated that the only facts accepted were that the appellant was a 25-year-old single Christian woman from Bulawayo who was a member of the Ndebele tribe. The respondents submit that the relevant principles relating to credibility assessment were identified by Cooke J. in *I.R. v. Minister for Justice & Anor.* [2009] IEHC 353, which was followed and described as a 'seminal decision' in *A.O. v Refugee Appeals Tribunal* [2017] IECA 51. They also refer to the comments of Humphreys J in *I.E. v Minister for Justice & Anor.* [2016] IEHC 85 as to credibility assessments.

77. A distinction may be drawn between two aspects of the appellant's complaints in this regard. The first is whether the decision-maker actually reached a conclusion, and communicated that conclusion, in respect of the appellant's sexual orientation *simpliciter* (as distinct from her narrative of her relationship with another woman having been discovered and their having been subjected to adverse consequences as a result). The second is as to the

method by which the decision-maker reached this conclusion (if one was indeed reached), and whether it involved (as the appellant contends) impermissible reliance upon stereotyping. Strictly speaking, the second question arises only if the Court finds that the decision-maker actually reached a conclusion on the issue identified.

78. At page 5 of her report, Ms. Roche defined the factual issues as four-fold in the following terms: *"(i) the applicant's personal circumstances; (ii) the applicant entered into two arranged marriages as a child; (iii) the applicant entered into a lesbian relationship in Zimbabwe; and (iv) the applicant was caught engaging in lesbian acts, was threatened and forced to leave Zimbabwe as a result*". It is notable that despite her having constructed a useful list of questions to be addressed, she did not list the appellant's sexual orientation *per se* as one of the relevant questions. This may have been a function of the manner in which the applicant's case was presented to the respondent but, objectively viewed, her point was that she was of lesbian sexual orientation, and the third and fourth points as identified by Ms. Roche were evidence of that and of the persecution she would in consequence suffer if returned to Zimbabwe.

79. It is true that the appellant put forward a particular narrative of events which included specific allegations that her husband became physically violent with threats to kill her and her (female) partner because of their sexual identity, and that her hut was torched with fire by homophobic residents of her community. However, in a separate part of her application form, she also had said:

> "If returned will put my life in danger (sic) there is no guarantee of safety in that country. Homophobic is countryside with no reputable organasations (sic) which can

> guarantee me protection and the instigators of my case. They know my personal information and links which makes me trailable and traceable in the modern society and unbearable to live a free and progressive life without challenges".

80. In my view, the inclusion of that paragraph in the application amounted to a general request that the decision-maker take into account that the appellant was of a lesbian sexual orientation and that her physical safety would be jeopardised by returning her to her country of origin. Although there was of course a close connection between her narrative of specific events and this claim, there was nonetheless what might be described as a stand-alone or underlying claim that the appellant would be persecuted, if returned to her country of origin, by reason of her sexual orientation *simpliciter*. This required to be addressed by Ms. Roche.

81. More particularly, in order to properly address this claim, Ms. Roche would have needed (a) to decide whether or not she accepted that the appellant was of a lesbian sexual orientation; and (b) if she accepted that the appellant was of such orientation, to decide whether or not she was likely to be subjected to persecution for this reason if she were returned to her country of origin. Issue (a) would have needed to be addressed by reference to the evidence put forward by the appellant about her own personal circumstances, while issue (b) would have to be addressed in light of country of origin information more generally *together with* the evidence put forward by the appellant. It may well be that by rejecting the specific instances advanced by the applicant to support her claim as to her orientation the decision-maker was concluding that because these were not credible, then neither was the underlying assertion that the applicant was lesbian. However, that was not stated. Given the centrality of her sexual orientation to the applicant's application, the failure to

specifically state that – and why – the applicant's claim that she was lesbian was not accepted, was more than a mere formality.

82. It is agreed on all sides that Ms. Roche made no explicit finding on the appellant's sexual orientation. Unlike the trial judge, I do not accept that the decision-maker *implicitly* reached a conclusion that the appellant was not of lesbian sexual orientation. I am influenced, in the first instance, by the fact that this question was not included in Ms. Roche's otherwise excellent four-fold classification of the issues to be addressed. Secondly, the respondent relies upon the passage in Ms. Roche's report which says that the only aspects of the appellant's claim which were accepted as credible were that she was "*a 25-year-old Christian single woman from Bulawayo who is of Ndebele ethnicity*" for the proposition that this was, by exclusion, a finding that she was not of a lesbian sexual orientation. However, the relevant passage is, in my view, ambiguous in this regard. It is possible to read it as the respondent suggests; but it is also possible to read it as meaning that the narrative of events was not accepted, but that the decision-maker was not concluding anything one way or another on the appellant's sexual orientation as such. Thirdly, and importantly, Ms. Roche did not say that it was unnecessary to consider whether the appellant's personal safety would be at risk, if she were returned to Zimbabwe, by reason of her sexual orientation *simpliciter*, whereas this would have been a relevant point to make if she was implicitly finding that the appellant was not lesbian in her sexual orientation. Fourthly, it was important that there be a clear and unambiguous finding in respect of a matter as important as the appellant's sexual orientation, and her personal safety in her country in light of that orientation, when it was at the very heart of her application. It would not be satisfactory for the appellant to be returned to her country of origin without there having been a clear finding on a matter of such importance.

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

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

85. The court went on to say that the methods used by the competent authorities to assess the evidence submitted in support of those applications must be consistent with the provisions of Directive 2004/83 and 2005/85 and with the fundamental rights guaranteed by the Charter. (Directive 2005/85 has now been recast as Directive 2013/32 – the "procedures'

directive previously referred to in this judgment). The court also made clear that the assessment of facts must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant, including factors such as background, gender and age, in order for it to be determined whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

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

> [60.] As regards, in the first place, assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant for asylum.
>
> [61.] In that respect, it should be recalled that Article 4(3)(c) of Directive 2004/83 requires the competent authorities to carry out an assessment that takes account of the individual position and personal circumstances of the applicant and that Article 13(3)(a) of Directive 2005/85 requires those authorities to conduct the interview in a manner that takes account of the personal and general circumstances surrounding the application.
>
> [62.] While *questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment*, the assessment

of applications for the grant of refugee status on the basis *solely* of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.

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

[…]

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

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

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

88. In view of the guidance provided by the court in the *A,B and C* case, and in view of the central role of the appellant's sexual orientation in her application for international protection, I am of the view that the decision-maker erred in failing to pose and answer the questions: (a) Is the applicant of lesbian sexual orientation?, and (b) If so, is she at risk of persecution or risk to her personal safety if returned to her country of origin? These questions fell to be determined on the basis of the specific evidence submitted by the appellant as well as country of origin information. However, they required clear articulation as issues to be determined, and answer, and this did not occur.

89. Accordingly, on this point alone, I would quash the decision and remit the matter so that consideration may be given to, and explicit findings made, with regard to questions (a) and (b) identified above.

90. It also follows that the s. 49(3) of the Minister falls also for reconsideration in light of what emerges from this prior exercise.

91. I should perhaps clarify that there is nothing to prevent such reconsideration from taking into account the narrative of events provided by the appellant and how she dealt with questions during her interview in reaching a conclusion on her sexual orientation. A reconsideration of her case on the single issue identified above may or may not yield a different outcome. The credibility of the narrative provided by the appellant is clearly

relevant to an assessment of the underlying question of her sexual orientation; the point is that the question of whether her narrative of specific events is credible is a distinct issue from whether she is lesbian in orientation, and this issue (and whether it poses risks to her personal safety) should be addressed in its own right. The distinction may appear to be a fine one, but we consider it to be important. It is possible, in principle, that a person might exaggerate or falsify a factual narrative in order to support a claim of a particular sexual orientation, while nonetheless actually having that orientation in reality. The point is that conclusions should be reached and clearly articulated in respect of whether she is accepted to be of lesbian sexual orientation and if so, whether this would pose a risk to her personal safety if she were returned to her country of origin.

92. Finally, and insofar as it is necessary to do so, I would reject the appellant's ground of appeal relating to the decision of the trial judge not to allow the cross-examination of deponent Mr. O'Carroll (i.e. Ground 6). The appellant did not make oral or written submissions in relation to this ground of appeal as such, but instead relies on the contents of the motion to cross-examine and grounding affidavit. This ground of appeal is also generic in nature. In my view, the appellant has failed to establish any conflict of fact, or other relevant matter, such that it would have been necessary for the proper disposal of the case to cross-examine Mr. O'Carroll.

93. For the above reasons, I would allow the appeal on the single ground identified above and remit it for reconsideration of that issue.

94. This judgment is being delivered electronically and both Murray J. and Donnelly J. have indicated their agreement with it.

95. As the appellant has been successful in this appeal, my provisional view is that the appellant is entitled to the costs of the appeal. Should the respondents contend for a different order, the respondents should contact the Registrar within 14 days of the delivery of this judgment to arrange a brief hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, the respondents may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the proposed terms will be made.