THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 372

[Record No. 2022/669 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED), AND IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN:

M.H.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 28th day of June, 2023

INTRODUCTION

1. This is an application for an order of *certiorari* of a decision of the International Protection Appeal Tribunal (hereinafter "the Tribunal") affirming the first instance decision that the Applicant be refused refugee status and subsidiary protection status. The proceedings raise separate issues in relation to, firstly, the proper application of Article 15(c) of the Qualification Directive (2004/83/EC) [hereinafter "the Qualification Directive"] and s. 2 of the International Protection Act, 2015 [hereinafter "the 2015 Act"] and, secondly, the proper treatment of documents submitted in support of a claim as part of an assessment of general credibility.

BACKGROUND

2. The Applicant is a Pakistani national who identifies as Kashmiri from the Pakistani occupied Azad Kashmir region. Azad Kashmir is located in the western part of the geographical Kashmir region. It is separated from the Jammu & Kashmir political region, which is occupied by India, by a border known as the Line of Control. The Applicant claims that he lived near the Line of Control, as did his forefathers.

3. The Applicant was born on the 6th of June, 1986. He married in 2005 however, his wife died in 2014. He is the father of 4 children, aged from 8 to 16 years. They remain in Azad Kashmir and the Applicant finds it difficult to obtain information as to their wellbeing. The Applicant is of Gojar ethnicity, the majority ethnic group of Azad Kashmir, and is a Muslim. The Applicant claims to be a member of a long-standing nationalist family advocating for a free and independent Kashmir. He claims that his grandfather was killed by Indian forces in 1993 and that his father was killed by Pakistani forces in 2003. He claims his family were activists with the political group Jammu Kashmir Liberation Front (hereinafter "JKLF"). The Applicant says he formally joined JKLF in 2007.

4. Faced with ongoing threats from government forces, the Applicant procured a student visa to the UK and lived there from February, 2012 until 2015. He returned home on 3 occasions during this period for significant family events. The Applicant's student visa for the UK expired on the 9th of May, 2015. On the following day, 10th of May, 2015, he was detected seeking to board a ferry for Belfast. He was detained as an overstayer and imprisoned. He then claimed asylum in the UK on a false basis and this was refused. He was released from detention on the 12th of July, 2015.

5. The Applicant arrived in Ireland on the 16th of July, 2015 and applied for refugee status on the 17th of July, 2015. His application was refused by ORAC (Office of the Refugee Applications Commissioner) and he appealed to the Refugee Appeals Tribunal by Notice of Appeal dated the 23rd of November, 2016. It bears note that in the report prepared pursuant to s. 13 of the Refugee Act, 1996 (as amended) the documents submitted (which at that stage included a reference letter purporting to be from the JKLF, registration papers with the JKLF Kotli and a JKLF membership card) were assessed and the authenticity of the documents were called into question based on their contents and appearance and in view of the Applicant's lack of knowledge of the history of the JKLF.

6. Following the commencement of the 2015 Act, the Applicant completed a fresh questionnaire, whereby he also sought subsidiary protection and permission to remain, on the 13th of July, 2018. On this occasion, it is clear from the s. 39 report that the documentation originally relied upon had been supplemented by a Court document, a death certificate and a newspaper article but again issue was taken with the authenticity of the documentation in view

of the contents of the documents and their appearance. The IPO (International Protection Office) report of the 8th of May, 2019 recommended refusal of the subsidiary protection application. This was notified to the Applicant by letter dated the 18th of June, 2019.

7. The Applicant appealed this decision to the Tribunal by letter dated the 3rd of July, 2019. By letter dated the 29th of August, 2019, the Applicant's solicitor submitted Grounds of Appeal which the Applicant himself had composed, together with supportive country reports and documentation including, most notably, a letter dated the 16th of July, 2019 from JKLF. Further submissions and country reports were submitted to the Tribunal by the Applicant's solicitor by letter dated the 2nd of September, 2019. The oral hearing before the Tribunal took place on the 17th of September, 2019. Following the hearing, by letter dated the 21st of November, 2019, his solicitor submitted further country of origin information relating to the ongoing deterioration of conditions in Kashmir.

8. In a decision dated the 27th of January, 2020, the Tribunal rejected the appeals. That decision was challenged in judicial review proceedings bearing the Record Number [2020/185 JR]. These proceedings were compromised and the appeals were remitted for fresh determination by a different Tribunal member. Further documents were submitted to the Tribunal by letters dated the 10th of January, 2022. The oral hearing on remittal was held before the Tribunal on the 12th of January, 2022.

9. On the 17th of January, 2022, a redacted Tribunal decision wherein subsidiary status was granted to a person in light of the level of violence occurring in the Line of Control area of Kashmir was also submitted to the Tribunal. The redacted decision quoted extensively from recent country reports including: an EASO report entitled "*Situation in Pakistan-administered Kashmir*" dated the 6th of October, 2020; an Internal Displacement Monitoring Centre (IDMC) report entitled "*Pakistan: Displacement associated with conflict and violence 2020*"; a Freedom House report entitled "*Freedom in the World 2020 – Pakistani Kashmir*" dated the 4th of March, 2020 and an EASO report entitled *"Pakistan: Security Situation"* dated 2020.

10. In a decision dated the 24th of May, 2022, the Tribunal rejected the appeals. This decision was notified to the Applicant by letter dated the 26th of May, 2022, and received by the Applicant on or about Monday, the 30th of May, 2022. This is the decision impugned in the within proceedings.

ISSUES

11. The following issues arise on the Applicant's case as pleaded and argued before me:

1. Did the Tribunal fail to apply Article 15(c) of the Qualification Directive and s. 2 of the 2015 Act in refusing to recommend international protection?
2. Was there a structural failure in the treatment of documents by the Tribunal in making findings on credibility first and rejecting the documents on the basis of general credibility findings and without assessing the documents themselves?

IMPUGNED DECISION

12. The impugned decision is detailed and runs to some fifty-one pages. While I refer hereinafter more specifically to the treatment of documents and the treatment of Article 15(c) considerations being the issues raised in the proceedings, fairness requires that I record that the report is replete with careful consideration of the Applicant's oral evidence. This evidence was found to be inconsistent in both material (e.g. the number of attempted arrests he had endured and where he actually lived in Kashmir) and minor respects (e.g. dates, the number of people arrested at the same time, work history). Credibility findings linked to inconsistencies in the Applicant's oral evidence have not been challenged. Similarly, reliance on the Applicant's admission that he was untruthful in respect of his claim insofar as he claimed to have returned four times to Pakistan (when he later accepted that he in fact returned three times) and that he had been untruthful to gain immigration advantage to support an adverse credibility finding are not challenged. In fact, adverse credibility findings were justified by reference to nine separate factors of the Applicant's claim, none of which have been challenged.

13. At paragraph 2.2 of the Decision, the Tribunal sets out a detailed list of documents relied upon in support of the claim. At paragraph 2.6, the Tribunal states that all documentation on the Tribunal member's file has been considered before proceeding to give an outline of the Applicant's evidence during oral hearing. A summary of the Applicant's evidence is recorded and it is noted that the Applicant is seeking protection because of what happened to his father and what happened after he joined the JKLF.

14. The Applicant told the Tribunal that he lived in Datote, near the Line of Control, 12 to 15 km on one side and 8 to 9 kms on the other side. A death certificate submitted in respect of his father's death was referred to and at paragraph 2.9 the Tribunal records:

> *"The reason the death certificate said 2015 rather than 2003 was because it was a mistake. The Appellant had a new letter issued from the local union council office, with an attestation."*

15. At paragraph 2.17 the Tribunal further refers to the documentation submitted from the JKLF as follows:

> *"In respect of the documentation submitted, the Applicant received that from the JKLF after contacting them. The Appellant joined in 2007; the reason the card said 2012 was because he had to ask the office to issue him a card and the issue with the date was cleared in the letter from them."*

16. At paragraph 2.19 the Tribunal makes further reference to documents submitted stating:

> *"If he returns to Datote, Kashmir, he fears how the authorities are treating the people of Kashmir and the JKLF. In 2015, they killed the Appellant's cousin. The FIR said only that he was killed by unknown people. He was killed on his way from the JKLF office in Rawalpindi."*

17. In its decision the Tribunal accepted that the Applicant is a national of Pakistan and it was stated that there was no reason to doubt that he is Muslim and originally from Datote, Kashmir or that he is the father of four and that his wife has passed away. The Tribunal then proceeded to assess each of four component parts of the Applicant's claim. At paragraph 4.3.4 it is stated:

> *"In respect of the documentation submitted by the Appellant ostensibly from Pakistan, its credibility can only be assessed by reference to its contents and the details provided therein and by reference to the credibility of the Appellant. The assessment of the reliability of the document, as with any document submitted by the Appellant, is irredeemably bound up in the determination of the Appellant's credibility. If the*

Appellant is not otherwise credible, the documentation submitted by him is not reliable. In this regard, the Tribunal has regard to the decision in Ahmed v. Home Secretary [2002] UKIAT 00439, as approved in this jurisdiction by the High Court in I.L. v. International Protection Appeals Tribunal [2019] IEHC 443 and O.A. (Nigeria) v. International Protection Appeals Tribunal [2020] IEHC 100."

18. At paragraph 4.3.5 – 4.3.6 the Tribunal refers further to the decision of Humphreys J *in O.A. Nigeria v IPAT* [2020] IEHC 100 saying:

"4.3.5 ...The Tribunal has regard to the assessment of Humphreys J., where he considered the decision in RA v Refugee Appeals Tribunal [2017] IECA 297 and stated at para. 12 page 3 and 4 "[it] It certainly can be said that it is extremely unlikely in practice that an exercise of the type speculatively mentioned in R.A., that is, making a definite decision on documents before assessing an applicant's credibility overall, could meaningfully be undertaken…The general rule is that an assessment of the reliability of documents cannot be separated from an assessment of the credibility of the applicant; and if there are exceptions to that, then they are more theoretical than real for virtually all practical purposes.

4.3.6 As such the reliability of document depends on the assessment of the credibility of the Appellant. The matters are intrinsically linked in this case…"

19. Referring to the alleged bombing of the Applicant's home by the Indian army in 1993, the Tribunal noted that documentation had been submitted but observed without further reference to this documentation (at paragraph 4.3.21):

"for the reasons outlined above, accepting that documentation depends on accepting the applicants general credibility, where the documentation cannot be independently verified. While COI does show issues and also shows intermittent ongoing conflict over a number of decades such that the applicant's claim cannot be said to run counter to COI, that does not mean the claim is credible or the documentation is reliable."

20. The Tribunal continued (at para. 4.3.22):

"As such, in light of the issues identified, and where the claim is not objectively supported by reliable, independent evidence, the best that be said at this stage is that this aspect of the claim is uncertain. It is dependent on the potential application of the benefit of the doubt. If the Appellant's general credibility is established, uncertain elements of his claim can be given the benefit of the doubt. If it is not established, uncertain elements of the claim cannot be accepted. This shall be assessed below, assessing credibility in the round."

21. When assessing the Applicant's claim that his father was tortured and killed by Pakistani security forces because of his involvement with the JKLF, the Tribunal referred again to documents submitted but did not set out the details of these documents stating at (paragraph 4.3.31):

"The Appellant has also submitted documentation in this regard. However, for the reasons outlined above, accepting that documentation depends on accepting the Appellant's general credibility, where the documentation cannot be independently verified. While COI does show issues between the authorities and Kashmiri separatists, and also shows an intermittent ongoing conflict over a number of decades such that the Appellant's claim cannot be said to run counter to COI, that does not mean the claim is credible or the documentation is reliable."

22. In assessing the Applicant's claimed membership of the JKLF, the Tribunal referred (paragraph 4.3.25) to the membership cards submitted noting:

"In respect of the dates on the membership cards he stated that "according to the records of the party, they made new cards and sent them to me".

23. Further reference is made to the cards and correspondence from the JKLF at paragraph 4.3.28 where the Tribunal states:

"In his s.35 interview, he also noted that he joined the JKLF "in September 2007 after completing my graduation" and that his duty was "to promote the Kashmir cause". When issues with the date of the JK letter to him, he stated "I did not look at it but it

should be a date, but the documents have the date". He also noted that "from private organisations they can issue cards like this". In respect of the dates, with the documents being issued on a date when he was allegedly not in Pakistan, he stated "it is obvious at the time, I requested them to have these documents afterwards, it's the date they were issuing me the card not the old date."

24. The Tribunal returns to these documents (at paragraph 4.3.31) in general terms stating:

"The documentation submitted cannot be independently verified and can only be assessed when assessing credibility in the round.. ……. Further, as noted in the section 13 and section 39 reports, there are issues with the lamination of his membership card; this could be seen to give rise to doubts as to authenticity. These are, however, relatively minor issues and may not necessarily harm his credibility."

25. When assessing the Applicant's claim that his family had continued to be targeted in Pakistan, the Tribunal refers to the date on his cousin's death certificate at paragraph 4.3.49 of the decision noting that the Applicant's s.11 interview occurred after his cousin's death but no mention of any issues with his cousin was made during the interview. The Tribunal further records the Applicant's reliance on FIR in relation to his cousin's death stating (paragraph 4.3.53):

"…the FIR said only that he was killed by unknown people".

26. The Tribunal records some credibility concerns arising from the failure to mention his cousin's death earlier but adds (at paragraph 4.3.54):

"There was no mention of any issues with his cousin prior to the completion of the IP questionnaire. As noted above, the documentation submitted cannot be independently verified."

27. Between paragraphs 4.3.73 and 4.3.81 the Tribunal identifies nine separate bases for reaching an adverse credibility finding without any reference to the documents submitted before finally stating at paragraph 4.3.82 that:

"…The Tribunal also cannot accept as credible or reliable any of he documentation submitted by the Appellant that is ostensibly from Pakistan, where it cannot be independently verified."

28. While the Tribunal goes on to refer to the poor-quality lamination of the JKLF membership card as one of a whole series of other potential issues with the Applicant's account (paragraph 4.3.83), no weight appears to have been attached to this in the conclusions arrived at as to the Applicant's general credibility. At paragraph 4.3.86, the Tribunal states:

"….The documentation submitted could not be verified and as with all the documentation allegedly from Pakistan submitted in this claim, was dependent on the Appellant's general credibility. Where that has not been accepted, that documentation cannot be accepted, and uncertain elements of the claim cannot be accepted."

29. The Tribunal's decision sets out the COI considered in the context of a risk of persecution in Kashmir quoting at paragraphs 5.2.6 to 5.2.9 of the decision from the EASO Situation Report of October, 2021. A similar analysis is conducted in respect of the risk of *"serious harm"* at part 8 of the decision. While the report addresses Article 15(a) and 15 (b) considerations, the focus of challenge in these proceedings is on the Article 15(c) considerations which commence at paragraph 8.2.9 of the Decision. At paragraph 8.2.10 the Tribunal quotes again from the October 2021 EASO report as follows:

"The territory of Kashmir is a disputed area divided between India, Pakistan and China but claimed in its entirety by Pakistan and India. The Pakistan-India relationship has been historically tense for decades. The Line of Control (LoC) is approximately a 724 km long border separating India-administered Kashmir from Pakistan-administered Kashmir, managed by their respective armies on each side. It is known as one of the most heavily militarised borders in the world. India accuses Pakistan of supporting militant groups like JeM, LeT and Hizb-ul-Mujahideen (HM) and of having their operational bases in the Pakistan and Indian-administered Kashmir region. HM is a militant group operating in Azad Jammu and Kashmir. It is led by Syed Salahuddin who is based in Pakistan. HM has conducted numerous attacks in India-administered Kashmir. Also, JeM has attacked high profile Indian targets, including the Indian

parliament in New Delhi and the legislative assembly in Indian-administered Kashmir. In February 2019, the group claimed the Pulwama attack, killing some 40 Indian soldiers. A month after the Pulwama attack, in February 2019, Pakistan started 'a crackdown' on groups it claims are linked to banned organisations. According to the Jamestown Foundation, the wave of attacks in August 2018 in Giligit-Baltistan showed that the area was vulnerable to militant attacks. The article suggested further resurgence of the TTP in the Giligit-Baltistan region. The wave of attacks in August 2018 demonstrated the group's possibility to recruit people as well as its ability and willingness to conduct a variety of attacks.

…

In February 2021, it was reported that India has committed 3 097 cease-fire violations in 2020, which killed 28 and injured 257 civilians. Pakistan reportedly committed 5 133 violations. On 25 February 2021, Pakistan and India reaffirmed their commitment to the 2003 ceasefire agreement alongside the LoC. In the beginning of May 2021 both nations accused each other of violating the ceasefire agreement after an exchange of fire in the Ramgarh sector. At the end of June 20921, India stated that two explosive-laden Unmanned Aerial Vehicles (UAV) crashed into the Indian-controlled territory of Kashmir."

30. The Tribunal says at 8.11 to 8.13, *inter alia*, in relation to this COI (from October, 2021):

"8.2.11These figures have to be seen in the light of the overall population of Kashmir, of more than 4 million people. They also show that the attacks are targeted towards Indian forces. The Appellant in this regard relied upon an IPAT decision of January 2021 in respect of violence in Kashmir. That decision must be set against the level of violence at that stage versus the level of violence as of the date of hearing and report in this case. However, the EASO report shows that there was a recommitment to cease fire in May 2021. While the COI shows some accusations of the ceasefire agreement being breached, it does not show a deterioration of the situation after May 2021.

8.2.12 In light of the number of deaths and casualties shown in Kashmir, it is not accepted that the level of violence rises to that of an internal or international armed conflict in Datote, Kashmir, Pakistan.

8.2.13 While he is relatively close to the Line of Control, the COI does not show that the level of proximity is such as to give rise to a real risk of suffering serious harm. While there has been some exchange of fire, the COI does not suggest that proximity alone is sufficient to give rise to increased risk compared to the rest of Kashmir generally. While obviously there would be an increased risk of light arms fire closer to the Line of Control, the applicant's home in this case is a number of kilometres from the Line of Control."

31. It is concluded that it is not accepted that there is a real risk of the Applicant suffering serious harm under Article 15(c) if returned to Datote, Hsamir, Pakistan as a failed asylum seeker.

DOCUMENTATION SUBMITTED

32. In view of the centrality of the approach taken to the consideration of documentation in these judicial review proceedings, it is appropriate to identify that the documentation in question includes:

I. Birth Registration Certificates in respect of family members showing birth in Datote (for cousin's father, Applicant's mother, the Applicant himself, the Applicant's cousin);
II. Cousin's death certificate showing date of death as December, 2015;
III. Applicant's card showing membership of JKLF dating to September, 2012;
IV. Card recording membership of JKLF dating to September, 2007;
V. Letter from JKLF dated 16th of July, 2019;
VI. Letter from the Union Council Datote dating to January, 2022 confirming that the Applicant's father died in June, 2003 but that records were flood damaged and so a procedure was followed to issue a death certificate in 2019. This document appears to give a mobile telephone number;

VII. A Certificate dated the 30th of March, 1993 purporting to be from the Office of the Sub-Divisional Magistrate Fatehpur Thekyala District Kotli confirming that the family home had been destroyed by the Indian Army with bombs on the 20th of February, 1993; and that a named individual (the Applicant's grandfather) had been killed and a named child grievously injured;

VIII. Death Certificate of Applicant's grandfather;

IX. Death certificate of Applicant's father;

X. Newspaper report from Jang Rawalpindi daily newspaper dating to February, 1993 reporting on the bomb blast at the Applicant's grandfather's house and describing him as a social and political worker;

XI. A FIR in respect of the Applicant's cousin's death (this referenced in the Decision and in the papers but has not been identified by me as included in the exhibits).

33. Both the letter from the JKLF and the newspaper article warrant special mention as documents the contents of which are not addressed in the decision despite being ostensibly relevant and important. The letter from the JKLF confirms significant details in relation to the Applicant's involvement with the party as well as his father and grandfather's involvement, his father's kidnap and torture in custody and the Applicant's own difficulties arising from his involvement with the JKLF. There are several things to note about this letter. It is type-written. It is on headed paper. It purports to be signed by the President of the JKLF who gives a phone number and a "*yahoo*" email address. The letter bears an official stamp from the named District President. The letter gives addresses and telephone numbers for the Head Office, the Central Info. Office (CIO), the Gilgit Office, the Diplomatic Chapter (England) and the Europe Zone (Belgium). While telephone numbers and email addresses are given for the US Branch and the UK zone, no addresses are given. Furthermore, the newspaper article from the Jang Rawalpindi daily newspaper is dated and is in a format typical of a newspaper presentation. The possibility of investigating the authenticity of the documents is not addressed in the Tribunal decision beyond a general statement that the authenticity of documents submitted cannot be verified.

AVAILABLE COUNTRY OF ORIGIN INFORMATION (COI)

34. Extensive COI was available to the Tribunal. Most notably, exhibited in the papers before me were:

i) *"EASO Pakistan: Security Situation, October 2021,*

ii) *FIDH (International Federation for Human Rights), dated 27th September 2021;*

iii) *EASO Situation in Pakistan administered Kashmir, dated 6th October 2020*

iv) *EASO Pakistan Security Situation, dated October 2021*

35. In summary, as clear from the COI, the territory of Kashmir is a disputed area divided between India, Pakistan and China but claimed in its entirety by Pakistan and India. The Pakistan-India relationship has been historically tense for decades. The Line of Control, close to which the Applicant claims to have lived, is approximately a 724 km long border separating India administered Kashmir from Pakistan-administered Kashmir, managed by their respective armies on each side. According to the EASO report from October, 2021 relied upon by the Tribunal, the Line of Control is known as one of the most heavily militarised borders in the world. Various cease-fires have been agreed between the armies on both sides of the de facto border, most recently in 2003.

36. It was reported that India has committed 3,097 cease-fire violations in 2020, which killed 28 and injured 257 civilians. Pakistan reportedly committed 5,133 violations. However, on 25 February 2021, Pakistan and India reaffirmed their commitment to the 2003 ceasefire agreement alongside the Line of Control. Despite this, in the beginning of May, 2021, both nations accused each other of violating the ceasefire agreement after an exchange of fire in the Ramgarh sector. At the end of June 2021, India stated that two explosive-laden Unmanned Aerial Vehicles (UAV) crashed into the Indian controlled territory of Kashmir. Nonetheless, compared with the previous year, COI supports a conclusion that the re-commitment to the 2003 cease-fire led to a significantly reduced level of risk for the civilian population living close to the Line of Control. According to the EASO report which was before the Tribunal, in the first and second quarter of 2021, CRSS counted no casualties in the area.

DISCUSSION AND DECISION

37. I propose to address each of the issues identified on behalf of the Applicant and their component parts in turn.

Did the Tribunal fail to apply Article 15(c) of the Qualification Directive and s. 2 of the 2015 Act in refusing to recommend international protection?

38. The Applicant raises a number of issues in relation to the application of Article 15(c) of the Qualification Directive. At the outset, it is proper to record that the Qualification Directive with which I am concerned in these proceedings has been recast through the provisions Directive 2011/95/EU. Ireland has yet to "*opt in*" to the recast Directive. I am conscious that this means that greater vigilance is required when considering the decisions of the CJEU in this area to ensure that the principles developed have full application in the State due to the State's opt out from the Recast Directive 2011/95/EU. From a comparison of the provisions which arise for consideration in these proceedings, however, there does not appear to be any material difference between those provisions of the Qualification Directive (which apply in the State) under consideration in this case and the later Recast Directive.

39. The Qualification Directive defines a person eligible for subsidiary protection at Article 2(e) as follows:

> *"Article 2(e) 'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;"*

40. Article 15 of the Qualification Directive provides at Chapter V under the heading "*Qualification for Subsidiary Protection*" as follows:

> *"Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c)*

serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

41. Section 2 (entitled "*Interpretation*") of the 2015 Act says (reflecting the Qualification Directive), *inter alia*:

"person eligible for subsidiary protection" means a person—

(a) who is not a national of a Member State of the European Union,

(b) who does not qualify as a refugee,

(c) in respect of whom substantial grounds have been shown for believing that he or she, if returned to his or her country of origin, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country, and

(d) who is not excluded under section 12 from being eligible for subsidiary protection;"

42. Section 2 of the 2015 Act goes on to say (reflecting Article 15 of the Qualification Directive using identical wording), *inter alia*:

""serious harm" means—

(a) death penalty or execution,

(b) torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict;"

43. The Applicant makes the case that his situation came within the third limb (limb (c)) of serious harm. The elements which need to be established for Article 15(c) of the Qualification Directive or the equivalent provision in the 2015 Act to apply include:

- International or internal armed conflict;

- Civilian;
- Indiscriminate violence;
- Serious and individual threat;
- To life or person;
- Nexus (by reason of indiscriminate threat).

44. As the application of Article 15(c) of the Qualification Directive is significantly dependant on the general situation in the country of origin, assessing objective and up-to-date COI is a crucial element of the protection decision making process. The Applicant raises several issues regarding the application of Article 15(c) in this case. Notably, the Applicant points to inconsistencies with an earlier decision of the Tribunal where Article 15(c) was relied upon in recommending the grant of protection. Furthermore, it is contended that the fact that the cease-fire has not held in the past should have weighed more heavily in considering the future risk of harm. It is also contended that the Tribunal erred in having regard to the level of risk vis a vis the population of Kashmir as a whole instead of the area around the Line of Control and improperly applied a threshold of casualties divorced from geographical area.

Previous Decision of the Tribunal – Consistency in Decision Making

45. On behalf of the Applicant reliance is placed upon a redacted previous decision of the Tribunal of the 21st of January 2021 where it had been found in relation to another applicant who lived near the Line of Control that:

> *"the indiscriminate violence to which he may be exposed does reach such a high level that substantial grounds have been shown for believing that the Appellant, if returned to his country of origin, would, solely on account of his presence on the territory of that country, face a real risk of facing serious and individual threat to his life or person. As such the Tribunal finds that the Appellant is at risk of serious harm under this subsection."*

46. It was accepted in submissions before me that there is no doctrine of *stare decisis* binding the Tribunal but it was argued that inadequate regard was had to the January 2021 decision and the need for consistency in decision making in the decision in this case. Reliance

was placed in this regard on the judgment of the Supreme Court in *P.P.A. v Refugee Appeals Tribunal* [2007] 4 IR 94. In *P.P.A.* Geoghegan J. said (at paras. 24-25):

> *"24 ...It is of the nature of refugee cases that the problem for the appellant back in his or her country of origin which is leading him or her to seek refugee status is of a kind generic to that country or the conditions in that country. Thus, as in these appeals, it may be a problem of gross or official discrimination against homosexuals or it may be a problem of enforced female circumcision or it may be a problem of some concrete form of discrimination against a particular tribe. Where there are such problems, it is blindingly obvious, in my view, that fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this of a similar category. Yet, if relevant previous decisions are not available to an appellant, he or she has no way of knowing whether there is such consistency. It is not that a member of a tribunal is actually bound by a previous decision, but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary. In Manzeke v. Secretary of State for the Home Department [1997] Imm. A.R. 524, Lord Woolf M.R. succinctly summed up the usefulness of previous relevant decision when he said the following: "It will be beneficial to the general administration of asylum appeals for special adjudicators to have the benefit of the views of a tribunal in other cases of a general situation in a particular part of the world, as long as that situation has not changed in the meantime Consistency in the treatment of asylum seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved."*
>
> *25. The trial judge cited this useful observation of Lord Woolf M.R. He also cited two earlier passages from his judgment which are worth quoting again. The first reads as follows at p. 529:-*
>
> *"Particularly when determining appeals brought where it is necessary to give consideration to the general situation in particular parts of the world, it is important*

for tribunals, when appropriate, to give their views as to that situation, so far as relevant, to claims for asylum in that part of the world."

In the later passage Lord Woolf M.R. continued at p. 529:-

"In administering the asylum jurisdiction, the tribunal (whether it be a special adjudicator or an appeal tribunal) has to consider not only whether the individual asylum seeker has the necessary subjective fear to be regarded as someone who is entitled to asylum, but in addition has to be satisfied that that fear is well-founded. Whether or not that fear is well-founded involves applying an objective standard [emphasis added] a standard which will depend upon the state of affairs in that particular country as well as the circumstances of the individual asylum seeker."

47. There may be circumstances where the evidence of different positions being adopted in respect of materially similar cases is so compelling as to suggest a level of capriciousness or arbitrariness which could potentially ground a challenge to a decision of the Tribunal on reasonableness grounds. It seems to me, however, that the level of factual similarities between a case treated differently to others would need to be very significant before a challenge could ever succeed on this basis alone. As Humphreys J, stated in *R.C. (Algeria) v The International Protection Appeals Tribunal & Ors* [2018] IEHC 694 (Unreported, High Court, Humphreys J., 3 December 2018) (para. 7):

"Stare decisis does not apply to the tribunal. To say that some super-special weight has to be attached to previous decisions would create an irresistible levelling-up whereby any decision, however outlying, would have to result in a general grant of protection to persons that could in any way be viewed as similarly situated. That would amount to a one-way ratchet system that would rapidly render the asylum process unsustainable. It is not necessary for the tribunal to distinguish any previous different decision as each turns on its own facts under our system; apart, of course, from cases where the applicants are all part of the same transaction, such as being family members. For any given country there are bound to be some favourable decisions and some unfavourable. It is not a legitimate process for an applicant to try to gather together any favourable ones and cry foul if they are not "followed". That would be a massive distortion of the process and would compromise the statutory independence of the tribunal member as

well as obscuring the inherent differences on the facts between different cases. 8. Having said all that, and notwithstanding that there is no obligation to distinguish any previous decision, the basis on which the previous decision was in fact viewed as different by the tribunal member was perfectly valid on its face and that has not been displaced."

48. It is also impossible to ignore the fact, expressly recognised in *PPA v Refugee Tribunals Appeals Tribunal* [2007] 4 IR 94 in the extract quoted from *Manzeka v. The Secretary of State for the Home Department* [1997] Imm. A.R. 524, that the significance of earlier decisions in this context is clearly tied to an evaluation of whether there has been a change in the situation in a particular part of the world in the meantime. These observations call to mind the words of Cooke J. in *A v. RAT* [2011] IEHC 147 where he said (para.9):

"Reports of cases in other jurisdictions are not, in the view of this Court, an acceptable source of information as to factual conditions in a country of origin. For one thing, the facts upon which a decided case which has reached a law report was based will invariably predate the circumstances under consideration in the case in which the decided case is sought to be relied upon. A decision-maker must be alive to the fact that in regions from which refugees may have fled, conditions are likely to be volatile and regimes may change and re-change within relatively short periods of time. Thus, it may be unwise to suppose that because a particular location was regarded in one case as being safe for repatriation in, say, 2004, that it will necessarily have remained safe two years later."

49. While the Applicant may have concerns as to whether the cease-fire will hold on this occasion, it is undeniable that there has been a clear change in position in Kashmir and in the vicinity of the Line of Control since the January, 2021 decision of the Tribunal by reason of the documented recommitment to the 2003 cease-fire which more recent COI relied upon in this case records. In this case the Tribunal clearly refers to the COI grounding the January, 2021 decision [at paragraph 8.2.11] by indicating that "*that decision [the January 2021 decision] must be seen against the level of violence at that stage versus the level of violence as of the date of hearing and report in this case*". In this way, the Tribunal makes a comparison with the violence outlined in the previous decision (and therefore the COI referred to therein)

as against more updated COI available and clearly gives reasons for his decision in this regard. When this matter was before the Tribunal a period of 18 months had passed since the previous decision. In the intervening time, a significant change in circumstances in Kashmir had arisen, namely, the re-commitment to ceasefire. It was therefore open to and logical for the Tribunal to conclude that the situation had changed in the meantime.

50. The Tribunal then went on to assess [at paragraph 8.2.9] of the decision whether there was "*in fact*", at that time based on up-to-date information, a situation of indiscriminate violence within an international or internal armed conflict in Datote, Kashmir. The Tribunal quoted from the October 2021 EASO Report (which post-dated the previous decision) in relation to the security situation in Kashmir and on that basis found that there was not a level of violence that rises to meet the threshold of serious harm under s. 2(c) of the 2015 Act (or Article 15(c) of the Directive it transposes). I find no error in the approach of the Tribunal to the previous Tribunal decision.

Error of Law by applying a Threshold of Casualties divorced from Geographical Area and the Nature of the Conflict

51. Referring to paragraphs 8.2.11 and 8.2.12 of the Tribunal Decision (quoted above), it is contended on behalf of the Applicant that the Tribunal erroneously sought to apply a threshold number of casualties but did so by reference to the entire population of Kashmir of more than 4 million people rather than the area near the Line of Control at Datote being the relevant area. The finding that COI demonstrated that attacks are targeted towards Indian forces is identified on behalf of the Applicant as a failure to reflect the "*tit for tat*" nature of the conflict. It is maintained on behalf of the Applicant that it is evident from the COI that there were almost as many alleged breaches of the ceasefire on the Pakistani side as the Indian side. The Tribunal [at paragraph 8.2.11] described how the attacks are targeted against Indian forces and that the COI referred to in the previous IPAT decision supplied by the Applicant showed a difference in the level of on-going violence. Specific reliance was placed on the re-commitment to ceasefire in May 2021, albeit the Tribunal acknowledged that there were certain breaches. Most significantly, the Tribunal found that "*there is no deterioration in the situation after May 2021*". Separately [at paragraph 8.2.12], the Tribunal found that the number of deaths and casualties shown in Kashmir is not such as to establish an entitlement on the part of the Applicant to protection under s. 2(c) of the 2015 Act.

52. I was referred on behalf of the Applicant to a recent CJEU decision of C-901/19 *CF and DN v Bundesrepublik Deutshcland* of 10 June 2021. There the Court of Justice found (at para. 45) that:

> *"..art.15(c) of Directive 2011/95 must be interpreted as meaning that, in order to determine whether there is a "serious and individual threat", within the meaning of that provision, a comprehensive appraisal of all the circumstances of the individual case, in particular those which characterise the situation of the applicant's country of origin, is required."*

53. The German legislative equivalent to the 2015 Act, considered in *CF and DN*, included a requirement for a '*ratio*' between population and deaths/casualties to meet a fixed threshold and form part of a decision under Article 15(c). This was ultimately found by the CJEU to be an improper interpretation of Article 15(c). The CJEU concluded that the application of a fixed quantitative criterion for the purposes of determining whether a "*serious and individual threat*" existed for the purposes of article 15(c) should not be used as it could lead to refusal of international protection without a comprehensive appraisal of all the circumstances of the individual case. Elements to be taken into account were found to include the intensity of armed confrontation, the level of organization of the armed forces involved, the duration of the conflict, the geographical scope of the indiscriminate violence, the actual destination of the applicant in the event that he or she returned to the relevant country or region and potentially intentional attacks carried out against civilians by parties to the conflict. While finding the application of a threshold to be incompatible with a proper application of Article 15(c) in *CF and DN*, the CJEU did not find that regard should not be had to the number of civilian casualties as part of the appraisal required under Article 15(c).

54. There is no equivalent legislative threshold in Ireland to that seen in *CF and DN*. Nor did the Tribunal apply a threshold in this case. The Tribunal did, however, have regard to the number of casualties as a measure of the level of violence. This seems to me to have been entirely appropriate. Conducting a comprehensive appraisal of all the circumstances of the individual case, as the Tribunal was required to do, includes considering the number of civilian casualties of indiscriminate violence in the area. Whereas applying a threshold is inconsistent

with a case-by-case consideration and operates without regard to particular factors which characterize the situation of the applicant's country of origin and is for this reason unacceptable, this does not mean that the number of casualties is an irrelevant consideration.

55. The essence of the decision of the CJEU in that case was that there should be no application of a threshold number of civilian casualties to determine eligibility for protection. The extent to which civilian casualties occur is a material consideration when assessing the risk of indiscriminate violence against civilians. I am satisfied that it was proper for the Tribunal to have regard to the level of civilian casualty in this case. There is no evidence that the Tribunal applied a fixed threshold or ratio in a manner which might bring it into conflict with the decision in *CF and DN*.

56. The final conclusions arrived at by the Tribunal under Article 15(c) in this case were based on a number of factors including the lack of any accepted personal characteristics of the Applicant that might increase a risk of indiscriminate violence. The recent re-commitment to ceasefire was of central importance in the Tribunal's reasoning. The Tribunal acknowledged that there was an increased risk of light arms fire closer to the Line of Control but nonetheless noted that the Applicant's home is a number of kilometers from the Line of Control. In this way, while the Tribunal had regard to the rate of occurrence of civilian casualties with reference to the overall population of Kashmir, it also had specific regard to the geographic area proximate to the Line of Control. The figures for casualties in the up-to-date COI did not show a high level of civilian casualty either throughout Kashmir or at the Line of Control arising from indiscriminate violence. The casualty figures for Kashmir relied upon included the area proximate to the Line of Control and while the risk was accepted to be higher in that area, it was open to the Tribunal to conclude that COI did not demonstrate significant indiscriminate violence against civilians following the recommitment to the cease-fire.

57. The approach to a threshold number of casualties which was found to be objectionable in *CF and DN v Bundesrepublik Deutshcland* was not in any way replicated by the Tribunal in this case. No threshold number was applied. In conducting its appraisal, the Tribunal was properly entitled to consider the population of Kashmir and the number of deaths and casualties in Kashmir where a high level of civilian casualties in the area proximate to the Line of Control

is not borne out by up-to-date COI and where the figures relied upon included casualties in the relevant area. The position might be otherwise were it established that a high level of civilian casualty in proximity to the Line of Control was not properly considered because the figures relied upon did not reflect the concentration of civilian casualties in the geographic area. That is not the position here. While there is an acknowledged higher risk of indiscriminate violence the closer one gets to the militarized area of the Line of Control, the Tribunal concluded that it was not then at a level in Datote, some kilometers from the Line of Control, as would trigger an entitlement to protection under Article 15(c). I do not consider that the Tribunal erred in the approach to assessing risk by reference to the number of casualties or the tit for tat nature of the documented violence or the relative proximity of his home to the Line of Control.

Error in Application of Forward-Looking Test

58. The Applicant maintains that the Tribunal failed to adequately consider the issue of prospective risk in the light of country conditions in Azad Kashmir near the Line of Control. The COI quoted in the decision under review (at paragraph 8.2.10) records *inter alia*:

> *"On 25 February 2021, Pakistan and India reaffirmed their commitment to the 2003 ceasefire agreement alongside the LoC. In the beginning of May 2021 both nations accused each other of violating the ceasefire agreement after an exchange of fire in the Ramgarh sector. At the end of June 2021, India stated that two explosive-laden Unmanned Aerial Vehicles (UAVs) crashed into the Indian-controlled territory of Kashmir."*

59. It is contended on behalf of the Applicant that reliance on a recent reaffirmed commitment to a cease-fire against a background of a cease-fire dating to 2003, more honoured in the breach than in the observance, to refuse the Applicant's application failed to properly apply a forward-looking test in relation to serious harm with due regard to the duration of the conflict including the fact that that there is a past pattern of cease-fire breach, and indeed evidence of some breach of the cease-fire even since the recent recommitment more suggestive of a lull than a cessation. Where the evidence is suggestive of a lull in the hostilities rather than a cessation, it is contended that the Tribunal should have considered whether it was likely to be permanent.

60. I am referred in this regard to the decision of the Supreme Court in a deportation context in *M v Minister for Justice and Equality* [2018] IESC 14 [2018] 1 IR 417 where (at para. 100) it is stated:

> *"In the same context it is also important to recall that the assessment which it is frequently necessary to carry out in the context of deportation (...) involves the assessment of future events. Much of immigration law is concerned with assessing the risks or likely consequences of a person being returned to another jurisdiction. The matters that a decision-maker is required to address in reality concern matters that will or may happen in the future in the event of return. While it may, theoretically, be possible to speak of a current risk of a future event such an analysis is unduly technical. In substance the decision maker is considering the potential consequences of a current decision to deport (or not to revoke an existing deportation order) by necessary reference to events or circumstances which will or may occur or pertain in the future."*

61. I have been further referred on behalf of the Applicant to Foster et al, "'*Time' in Refugee Status Determination in Australia and the United Kingdom: A Clear and Present Danger from Armed Conflict?"* Int J Refugee Law (2022) 34 (2): 163; *A v Refugee Appeals Tribunal* [2011] IEHC 147, [2011] 2 I.R. 729, and *O.N. v Refugee Appeals Tribunal* [2017] IEHC 55. The case-law that there may be circumstances in which a decision maker must take into account the possibility that alleged past events occurred even though it finds that these events probably did not occur. The reason for this is that the ultimate question is whether the applicant has a real substantial basis for his fear of future persecution. The decision maker must not foreclose reasonable speculation about the chances of the future hypothetical event occurring (see Sackville J. in *Rajalingam* [1999] F.C.A. 719 cited with approval by Cooke J. in *A v Refugee Appeals Tribunal* [2011] 2 I.R. 729 *)*.

62. As Cooke J. found in *A v Refugee Appeals Tribunal* [2011] 2 I.R. 729*,* solely because particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature

and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "*reasonable speculation*" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant. In *O.N.*, O'Regan J. relied on the decision of Cooke J. in *A v. Refugee Appeals Tribunal* to conclude that there were elements of the applicant's claim in that case, which although insufficient to establish a past persecution, should nevertheless be considered in the context of a risk of future persecution. As there had been a failure to consider future risk and there was a part in the applicant's history of events in that case which might have comprised the basis for a consideration of potential future persecution, she remitted the matter for consideration by the Tribunal of a future risk of persecution

63. In seeming contrast with *O.N.,* however, in this case the Tribunal explicitly deals with the concept of future risk [at paragraphs 4.3.59 and 4.3.60] when the Tribunal states that it is mindful of the assessment of future risk. As it was accepted that the Applicant was a 35-year-old Muslim male from Datote, Kashmir who would be returned as a failed asylum seeker, the Tribunal considered the risk to him in view of the level of indiscriminate violence against civilians arising from a situation of armed conflict. The Tribunal relied on both the reaffirmation of ceasefire and the distance of Datote from the Line of Control in terms of assessing the future risk. Granted the Tribunal did not expressly address the risk of the cease-fire not being sustained longer term. In consequence it is contended on behalf of the Applicant that there has been a failure to properly assess future risk. It is maintained on behalf of the Tribunal in response that to impose an obligation on the First Named Respondent to assess the permanency or otherwise of the ceasefire into the future would be to create a requirement for a threshold of a level of certainty which no decision maker could meet.

64. I agree with the submission on behalf of the Applicant that there is a necessity to consider the relative stability or instability of the situation near the Line of Control in this case. This conclusion is supported by the reference to foreseeability in the UNHCR Guidelines from which assessment of risk on a protection application requires looking beyond immediate or imminent harm on return to the reasonably predictable or foreseeable future. The case-law from Australia and the UK reviewed by the authors in Foster et al, "'*Time' in Refugee Status Determination in Australia and the United Kingdom: A Clear and Present Danger from Armed*

Conflict?" Int J Refugee Law (2022) 34 (2) demonstrates that courts in both jurisdictions reflect the view that fear of persecution must be current, the ill treatment feared may occur in the present or the future and the test is whether it is reasonably foreseeable. This in line with decisions of the Irish courts in cases such as *De Silveria v. Refugee Appeals Tribunal* [2004] IEHC 436 (Peart J.). Of its nature the assessment of future risk is an evaluative rather than a fact-finding exercise, albeit based on available information which includes information in relation to past patterns of observance of cease-fire in the case of Kashmir. Accordingly, the test in assessing future risk necessarily embodies a degree of informed speculation.

65. Where, as in the case of Kashmir, there is evidence of a long-standing cease-fire which has not been successful in safeguarding against outbreaks of violence against civilians, then the reality of improved conditions being sustained should be considered by a Tribunal where accepted facts exist to support a claim of future risk. However, the Tribunal does not have a crystal ball and must make its decision based on its assessment of whether there is a real chance of serious harm in view of available information. This assessment is done by reference to the actual state of affairs in the country of origin which includes the relative stability of that state of affairs.

66. In this case the Tribunal expressly noted the fact that the assessment of future risk is assessed on the balance of probabilities and proceeded to apply a "*real risk*" test in considering the fact that while there had been occasional breaches of the cease-fire even since re-commitment to it in early 2021, there had not been a deterioration in the months which followed up to the time of the Tribunal hearing in mid-2022 and little or no evidence of civilian casualty in that period. The Tribunal was clearly aware that there had been significant levels of breach of the cease-fire in the past (measuring in the thousands of recorded incidents the previous year and warranting the grant of protection to an individual from the area of the Line of Control in January, 2021) and that improvements following a re-commitment to the 2003 cease-fire were relatively recent. The Tribunal had express regard to the relative stability since recommitment to the cease-fire as evident from the Tribunal's reference to its duration and its references to specific incidents of breach since the date of re-commitment to the cease-fire. It has not therefore been established that the Tribunal failed to consider the evidence in relation to the fragility of the ceasefire. In view of the terms of the decision which reflect a finding that despite a small number of breaches since recommitment to the cease-fire, the situation had not further deteriorated, it cannot be concluded in judicial review proceedings such as these that the Tribunal did not properly consider whether there was a real risk of future harm having

regard to the foreseeability of the cease-fire not being sustained or honoured at an indeterminate time in the future.

67. I am satisfied from the terms of the Tribunal decision in this case that there was no failure to apply a forward-looking test which had regard to the fact that improvements since the recommitment to the cease-fire may not be permanent. It seems to me that the decision to reject the Applicant's protection claim based on a future risk of serious harm was a decision which was open to the Tribunal on the information available and having regard to the accepted elements of his claim. No error of law which might deprive the Tribunal of jurisdiction has been identified on behalf of the Applicant with regard to the approach of the Tribunal to the assessment of future risk.

Was there a structural failure in the treatment of documents by the Tribunal in making findings on credibility first and rejecting the documents on the basis of general credibility findings and without assessing the documents themselves?

68. On behalf of the Applicant, it is also complained that the decision maker decided on credibility without looking in any detail at the documents submitted in support of the claim and the documents were not included as part of the overall consideration of credibility. The manner in which the Tribunal rejected the personal credibility of the Applicant and the documentation submitted, most notably the evidence from JKLF and the newspaper article, is said by the Applicant to breach the criteria set out in *I.R. v MJELR & Refugee Appeals Tribunal* [2009] IEHC 353, [2015] 4 IR 144 and *R.A. v Refugee Appeals Tribunal* [2017] IECA 297. It is also complained that the Tribunal ought to have dealt with the documents in accordance with guidance contained in the EASO Practical Guide to Evidence Assessment of March 2015 which provides that consideration should be given to the relevance; existence; content; form; nature and author of documentation.

69. It is noted that the Tribunal refers to the decision of Humphreys J in *O.A. Nigeria v IPAT* [2020] IEHC 100 in setting out its approach to documents. In his decision in that case Humphreys J. observed that the general rule is that an assessment of the reliability of documents cannot be separated from an assessment of the credibility of the applicant; and if there are exceptions to that, then they are more theoretical than real for virtually all practical purposes. In recording this extract from the decision in *O.A.*, however, the Tribunal failed to note the context for these observations by Humphreys J. When the judgment in *O.A.* is read in its proper

context it becomes clear that the sentiments relied upon were expressed in response to the decision of the Court of Appeal in *R.A.* (on appeal from Humphreys J.), which Humphreys J. sought to further explain. The observations relied upon by the Tribunal from *O.A.* reflect a practical and common-sense recognition of the fact that assessing the reliability of documents is often tied with the general credibility of the applicant. However, Humphrey J. clearly did not intend his words to be relied upon by decision makers to absolve them from a requirement to consider documents submitted as part of the assessment process. Afterall, the decision of the Court of Appeal in *R.A.,* which prompted these observations from Humphreys J., was itself a clear reiteration of then established principles which had previously been expressed by Cooke J. in *I.R. v MJELR & Refugee Appeals Tribunal* [2015] 4 I.R. 144.

70. In *R.A.* the Court of Appeal (Hogan J.) traced the approach of the Courts to the assessment of credibility referring to both to *I.R.* and to *N.M. (DRC) v. Minister for Justice and Equality* [2016] IECA 217 expressly endorsing the ten principles set out by Cooke J. in *I.R.* regarding the assessment of credibility which principles have been consistently followed ever since (see I.R. [2015] 4 I.R. 144, 151-152) and which included at principle (9) that where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is *prima facie* relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated. While Cooke J. found no fault with the conclusion as to lack of credibility on the basis identified in *I.R.*, he was concerned by the fact that the applicant's case rested not only on his personal testimony but also on documentary evidence, including a police report, a court decision and verdict, a handwritten letter said to be from the applicant's cell mate in the Belarus prison, the newspaper article said to have been written by the applicant's girlfriend with his photographs and a sample of a "*wanted*" poster or leaflet said to have been issued by the Belarus authorities naming the applicant and one other individual. Cooke J. said ([2015] 4 I.R. 144, 157):

> *"The court considers that what is crucial about this material so far as concerns the legality of the process by which the conclusion on credibility in the contested decision was reached, is that none of it is referred to anywhere in that decision except insofar as it might be said to have been included in the phrase "The Tribunal has considered all the relevant documentation…" which appears in the conclusion at section ….. It is true, of course, ….that the mere existence and submission of such documents does not*

necessarily render untenable a judgment as to the lack of credibility of the oral testimony of the applicant."

71. Cooke J. further added ([2015] 4 I.R. 144, 157-158):

"Indeed, it might well be that on closer scrutiny, some or all of these documents might be shown to be false and even to have been fabricated for the very purpose of the asylum application. However, the girlfriend's article, for example, looks superficially to be in an original newspaper surrounded by other typical items, advertisements and so on, but it could conceivably be shown perhaps that the names of the author and the photographer in the byline are names the girlfriend and the applicant have adopted in order to claim asylum. Thus, it may all be shown to be an elaborate contrivance and fraud. Nevertheless, unless and until such issues are addressed by the appropriate decision-maker, from the point of view of the validity of the contested decision as it now exists, the fundamental point is that this was, at least on its face, original, contemporaneous documentary evidence of potentially significant probative weight in corroborating key facts and events. If it is authentic, it may prove that the applicant has suffered persecution for his political activities. If that is so, then the judgmental assessment that is made of the quality of his answers to the questions about the BPF may possibly assume an entirely different weight when all of the evidence, both testimony and documentary, is objectively weighed in the balance."

72. All of this led Cooke J. to the following conclusions ([2015] 4 I.R. 144, 158-159):

"The court accepts that there may well be cases in which an applicant relies partly on oral assertions, partly on documents, and partly on country-of-origin information and in which the decision-maker has sound reason to conclude that the oral testimony is so fundamentally incredible that it is unnecessary to consider whether the documents are authentic and whether the conditions in the country of origin are such that the claim could be plausible. The decisionmaker in such a case is finding that what the applicant asserts simply did not happen to him. In the present case, however, the situation is materially different because the adverse finding of credibility is effectively based on the Tribunal member's premise as to the level of knowledge to be expected and the apparent lack of that knowledge, while the documents have the potential to establish

that specific events did happen and happened to the applicant. It is this which gives rise to the need for the whole of the evidence to be evaluated and the analysis to be explained. In the Court's judgment, the process employed by the Tribunal member in reaching the negative credibility conclusion as disclosed in the contested decision was, therefore, fundamentally flawed because the documentary evidence which had been expressly relied upon before the Commissioner and in the notice of appeal and which was on its face relevant to the events on which credibility depended, was ignored, not considered, and not mentioned in the contested decision. It is correct, as counsel for the respondents submitted and as is confirmed by the case law summarised at the beginning of this judgment, that a decision-maker is not obliged to mention every argument or deal with every piece of evidence in an appeal decision at least so long as the basis upon which the lack of credibility has been found can be ascertained from the reasons given. However, in the view of the Court, that proposition is valid only when the other arguments and additional evidence are ancillary to the matters upon which the substantive finding is based and could not by themselves have rendered the conclusion unsound or untenable if shown to be correct or proven. That cannot be said to be the case here. When the Tribunal member says in the decision, "He claims to have spent six months in prison on account of his political activities," and then finds that the applicant lacks the political knowledge one would expect from someone with that commitment, the Tribunal member is clearly indicating that he believes the applicant was never in prison or, at least, never imprisoned for the political offences he claimed. But if the documents are authentic and are correctly translated, the applicant was indeed in prison and the premise on which the conclusion has been made is therefore no longer tenable. The process is, therefore, flawed and the analysis incomplete. Accordingly, the Court finds that the contested decision in this case is sufficiently flawed to warrant its being quashed. The Tribunal member has erred in law in failing to consider all of the relevant evidence on credibility and adequately and objectively to weigh it in the balance in reaching a conclusion on that issue. Where, as here, documentary evidence of manifest relevance and of potential probative force is adduced and relied upon, the Tribunal member is under a duty in law to consider it and if it is discounted or rejected as unauthentic or unreliable or otherwise lacking probative value, there is a duty to state the reason for that finding."

73. In *R.A.* the Court of Appeal was also dealing with a case in which reliance was placed not only on oral testimony (which was not believed) but also on documentary evidence. The applicant had also produced a notification ("convocation") from the Chief of Police and sought to rely on a letter from a (named) Bishop attached to the Church of the Latter Day Saints of Jesus Christ in Abidjan. While the ORAC was unable to offer any views on the authenticity of these two documents, the Tribunal member made no specific finding in relation to the last of these four documents (namely, the identity card, the RPI membership card, the notice from the Police Commissioner and the letter from the Bishop) because he concluded that this information did not assist the applicant in circumstances where his credibility was found wanting to such a degree that the very basis of his claim was not believed. The Court of Appeal considered that in this respect the Tribunal member fell into essentially the same error as did the Tribunal member in *I.R.*, namely, to conclude that because the oral testimony of the applicant was so unsatisfactory from a credibility perspective there was no need in the circumstances to consider the documentary evidence which had also been proffered by him. The Court of Appeal observed with reference to the similarities between *R.A.* and the earlier facts in *I.R.* (paras. 60 and 61):

> *"Yet just as the Belarusian documents relation to conviction and imprisonment, the newspaper article concerning the rally etc., would, if shown to be authentic, have demonstrated that the Tribunal member's premise in IR that the applicant could not have been imprisoned or otherwise persecuted for his political beliefs was fundamentally flawed because of his general lack of knowledge of the leadership structures in the main opposition party in Belarus, the same can just as readily be said in the present case.*
>
> *The Tribunal member concluded that the applicant in the present case could not have been at risk because of his basic lack of knowledge of certain details concerning the political state of affairs in the Ivory Coast in the first five months or so of 2011 and the nature of the conflict between the Gbagbo and Ouattara factions. The premise of the adverse credibility findings was that anyone who had in fact participated in these political activities would have had a far greater knowledge of the relevant detail than this applicant appeared to have had. Yet if, indeed, the applicant was a member of the FPI or he had been summoned by the Chief of Police for his political activities or a Bishop of the Church of the Latter Day Saints was threatened in a menacing fashion by*

militants because it was rumoured that he had given the family of Mr. A. shelter as these documents all appear to show – assuming, again, that they were shown to be authentic - then the position would be very different."

74. The Court of Appeal concluded (at para. 62):

"62. This case presents yet another example of where the fourth principle identified by Cooke J. in I.R. assumes such importance: the assessment of credibility must be made "by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed." Given that it is not disputed that Mr. A. is an Ivorian national who arrived in Ireland at a time of intense civil conflict – in effect, what amounted to a civil war – in the Ivory Coast, the fundamental question was whether his account of involvement with the FPI and the consequent risks to his life and limb was credible. But given the alleged provenance of the documents and their obvious relevance to his claim, if true, it was incumbent in these circumstances on the Tribunal member to assess such documentary evidence – if necessary, by making findings as their authenticity and probative value - so that that very credibility could be assessed by reference to all the relevant available evidence. The potentially serious consequences for Mr. A. if an otherwise meritorious claim were to be rejected – assuming again, of course, that his account was a valid one – demanded no less."

It seems to me that the statement of approach by the Court of Appeal, endorsing principles previously enunciated by Cooke J. in *I.R.*, articulates a duty to assess credibility having regard to the contents of documents submitted in support of the application under Irish law.

75. In this case, the Applicant relies not only on the decisions in *I.R.* and *R.A.* but also on the requirements of EU law and specifically the Qualifications Directive insofar as the assessment of documentary evidence is concerned. It is well established as a matter of EU law that the assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what is at issue are matters relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union. Under Article 4 of the Qualification Directive (which appears identical to Article 4 of the recast Directive) the duties

on the State when assessing the facts of an application for international protection are spelt out. Article 4 in relevant part provides:

> *"1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.*
>
> *2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.*
>
> *3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:*
>
> *(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;*
>
> *(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;*
>
> *(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess 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;*
>
> *(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;*
>
> *(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.*

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established."

76. Article 4 of the Qualification Directive has been transposed by s. 28 of the 2015 Act in terms which appear to mirror exactly, at least insofar as relevant for present purposes, the protections provided for under that Directive. Specifically, s. 28 mandates the assessment of all relevant elements of the application and s. 28(4)(b) requires that the assessment carried out on an individual basis and shall take into the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm.

77. While the correct assessment of facts and circumstances is central to the identification of international protection needs, it is recognised to be a particularly challenging exercise due to a myriad of factors including cross-cultural communication barriers, the impact of trauma and other individual and contextual circumstances of each applicant. In the light of these of these challenges, it is correct, as Humphreys J. explained in *O.A.*, that it is often difficult to separate an assessment of the documents from the overall credibility of the applicant and overall credibility may be the determining factor, the onus remains to assess the documents as

part of the determination process. In accordance with Article 4(1), Member States have a shared duty to cooperate actively with the applicant at the stage of determining the relevant elements of an application. Article 4(3) provides a non-exhaustive list of elements including facts, statements, documentation and circumstances which must be taken into account in the assessment on an individual, objective and impartial basis. Only once there has been a specific evaluation of the facts and circumstances of a case in accordance with Article 4 can national authorities make an assessment of the extent of risk of persecution and/or serious harm.

78. In case C921/19 *LH v. Staatssecretaris van Justitie en Veiligheid,* Advocate General Hogan (as he then was) placed considerable reliance on the jurisprudence of the European Court of Human Rights in arriving at his opinion in that case. In so doing he recalled that under Article 52(3) of the Charter, the rights affirmed by the Charter, where they correspond to rights guaranteed by the ECHR, have the same meaning and scope as those laid down by that convention. Advocate General Hogan examined two decisions of the ECtHR dealing with the issue of the authentication of documents in asylum cases. The first of these was *Singh v. Belgium* (Application no. 33210/11). In its judgment, the ECtHR found a breach of Article 13 ECHR (the effective remedy provisions) coupled with Article 3 ECHR arising from the treatment by the Belgian authorities of new and relevant documentation found to have no convincing value on the basis that they were of a type that was easy to falsify. Pointing to the otherwise potentially serious consequences for the applicants, the ECtHR concluded that the obligation of the State authorities was to show that they had been as rigorous as possible and that they had carried out a careful review ('*un examen attentif*') of the claims based on Article 3 ECHR. Advocate General Hogan observed of this decision in his Opinion in *L,H.* that this means that the national authorities must rule out any doubt, however legitimate, as to whether an application for protection is ill-founded, whatever the scope of the authority's competence. The Court observed that since the documents were at the heart of the request for protection, the rejection of them without '*checking their authenticity*' fell short of the careful and rigorous review expected of national authorities by the effective remedy requirements of Article 13 ECHR in order to protect the individuals concerned from torture or inhuman or degrading treatment under Article 3 ECHR in circumstances where a (relatively) simple process of enquiry of the UNHCR would have resolved conclusively whether they were authentic and reliable.

79. The second decision of the ECtHR referred to by Advocate General Hogan in his Opinion was *M.D. and M.A. v. Belgium* (Application No. 58689/12, 19 January 2016. In this case fresh applications for protection (fourth applications) were dismissed for lack of 'new elements' having been presented on the basis of the determining authority assessment that the 'new elements' submitted did not emanate from an objective source, that the date of the document provided as new evidence preceded the previous application and should therefore have been presented at that stage, and that (only) originals of documents they had already submitted previously were presented. The reasons the applicants gave as to why they had not been able to present those documents earlier did not make any difference to this assessment. Following an application to the ECtHR, that Court held that, in the particular circumstances of those applicants, the threatened removal of the applicants to Russia without the Belgian authorities having first re-examined the risk they faced in the light of the documents submitted in support of their fourth asylum request would constitute a breach of Article 3 ECHR. The ECtHR considered that the fact that the documents presented were not considered to be new elements meant, de facto, that there was no examination whatsoever into the alleged risk that the applicants would be facing if they were expelled. The Court held that to disregard these documents, which were at the heart of the applicants' request for protection, did not fulfil the required standards of a careful and rigorous independent examination that is to be expected from the national authorities in order to provide for an effective protection against a violation of Article 3 ECHR. The ECtHR also criticised the unreasonable burden of proof placed on applicants if documents that they provide are simply rejected because they predate the time of their last application, irrespective of their efforts to show that they were not in a position to present them previously.

80. The facts of these two cases are quite stark and are not comparable with the facts in this case. Nonetheless the decisions establish that under the jurisprudence of the ECtHR there may be cases with particular facts where it would be simply remiss of the Member State in question not to conduct an inquiry as to the authenticity of documents. A rejection of documentary evidence without sufficient investigation as to their authenticity can, depending on the facts and the nature of the documents in question, be at variance with the requirement to conduct a close and rigorous scrutiny. In its decision in *LH* the CJEU found, albeit with reference to the

recast Directive (recalling, however, that Article 4 is unchanged between the two), that (at para. 44):

> *"It follows that any document submitted by the applicant in support of his or her application for international protection must be regarded as an element of that application to be taken into account, in accordance with Article 4(1) of Directive 2011/95, and that, consequently, the inability to authenticate that document or the absence of any objectively verifiable source cannot, in itself, justify the exclusion of such a document from the examination which the determining authority is required to carry out, pursuant to Article 31 of Directive 2013/32."*

81. It continued in similar vein (para. 61):

> *"in so far as a document constitutes evidence produced in support of the application, even if its authenticity cannot be established or its source cannot be objectively verified, the Member State concerned is required, in accordance with that provision, to assess that document in cooperation with the applicant."*

This statement of principle from the CJEU which is in line with the jurisprudence of the ECtHR is not new or extreme in the Irish context but is consistent with and echoes the approach of the High Court in *I.R.* and the Court of Appeal in *R.A.*

82. In terms of the complaint that the Tribunal ought to have dealt with the documents submitted by the Applicant in accordance with guidance such as the *EASO Practical Guide to Evidence Assessment* of March 2015, it is noted that the Respondent (at paragraph 11 of its Statement of Opposition) stresses that the EASO Guide is not binding on the Tribunal. This is not in dispute, but the Applicant nonetheless relies on the Guide. Curiously, while no provision has been made in Irish law requiring that EASO Guidelines be taken into account in decision making in the international protection context, reference is made to EASO in s. 2 of the 2015 Act as follows:

> *"European Asylum Support Office" means the European Asylum Support Office established by Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010;"*

83. The inclusion of the reference EASO in s. 2 and further references at s. 32(3), 72(4)(b) and 72A(3)(b) of the 2015 Act serve as a form of acknowledgment of its existence and role but does not serve to give its guidelines domestic law status. It is important to recall the purpose and origin of EASO Guidelines, however, as referred to by Advocate General Hogan (as he then was) in case C921/19 *L.H. v. Staatssecretaris van Justitie en Veiligheid* where at paragraph 4 he said (speaking of the recast procedures directive, not opted into by Ireland):

> *"The EU legislature was plainly aware that its aim of creating a common procedure leading to a situation where similar cases will be treated alike and result in the same outcome in the different Member States would depend on the uniform application of the Procedures Directive by the Member States. It accordingly stipulated in recital 10 of that directive that, when implementing it, Member States should take into account relevant guidelines developed by the European Asylum Support Office (EASO). So far, the EASO has issued practical tools and guidance in a number of areas..."*

84. In the absence of an opt-in, it is certainly true that insofar the recast procedures directive (Directive 2013/32/EU) provides that when implementing that Directive, Member States should take into account relevant guidelines developed by EASO, this requirement does not apply to Ireland. This does not mean, however, that regard may not be had to the Guide for an authoritative and persuasive statement of the proper approach to the assessment of evidence in this context. Indeed, while it is accepted that there is no equivalent of recital 10 of the recast procedures directive in the original directive, this did not prevent Advocate General Szpunar relying on an EASO document in his opinion on a reference from Ireland in case *C-756/21 X v. International Protection Appeals Tribunal & Ors.* (February, 2023)(at paragraph 111, footnote 81).

85. It seems to me that care is required in the approach taken to EASO Guidelines generally given that Ireland has not opted into the recast Procedures Directive and there is no transposed legal obligation to take account of the Guidelines. This does not mean, however, that the *EASO Practical Guide to Evidence Assessment* is not of assistance in identifying the scope and nature

of obligations on decision makers when assessing documents in the international protection context or in identifying the applicable law and practice for decision makers. In the introduction to the *EASO Practical Guide to Evidence Assessment* of March 2015 it is stated:

> *"The guide was created by experts from Member States, facilitated by EASO. A Reference Group, including the European Commission and UNHCR, further provided valuable input. Material provided by the Reference Group such as the UNHCR 'Beyond proof: Credibility Assessment in EU Asylum Systems' and the Hungarian Helsinki Committee 'Credibility Assessment in Asylum Procedures: Multidisciplinary Training Manual' were important sources of information for drafting this practical guide. The guide was then consulted and accepted by all Member States. It is the product of combined expertise, reflecting the common standards and the shared objective to achieve high quality asylum procedures."*

86. Accordingly, the *EASO Practical Guide to Evidence Assessment* is the product of considerable expertise, informed not just by EU law (which may vary between member states based on opt-in and out differences) but also draws on international expertise in this area, specifically the expertise of the UNHCR. Clearly, where the contents of an EASO Guide are referrable to a legal requirement which has no application in the State, then that guide is not relevant and is of little assistance. Where, however, the contents are based on well-established principles of international and European law which fall to be applied by the State, then the EASO Guide provides an accessible statement of applicable principles potentially of assistance to decision makers in this jurisdiction identifying the proper approach by them to the discharge of their functions in accordance with Ireland's protection obligations.

87. Mindful therefore of the legal source of an obligation referenced in an EASO Guide, it is appropriate to consider an EASO guide where it identifies principles which do not depend for their origin on a measure which has not been transposed domestically. It seems to me that this is the position with the *EASO Practical Guide: Evidence Assessment* (2015). This Guide signals the correct approach to the law applicable to the assessment of evidence under provisions which apply in the State (notably Article 4 of the Qualification Directive), without itself having force of law in the State. I therefore consider it an authoritative statement of the

law and practice regarding the proper approach to the assessment of evidence in protection claims.

88. The terms of the Guide are instructive insofar as a practical approach to the assessment of documentary evidence is concerned in the challenging context of international protection where reliance is placed on non-familiar documents. At paragraph 1.3.2.1 the *EASO Practical Guide: Evidence Assessment* (2015) says:

> *"Any documents presented by an applicant as evidence to support his/her claim must be examined thoroughly. The case officer should first ensure that he/she is aware of what documents are submitted and their relevance to the application. The case officer should also, where possible, obtain information as to the generally expected content and form of any of the documents presented (e.g. arrest warrants, court summons). Such information may be obtained through relevant country of origin information.*
>
> *The case officer should also be satisfied as to how the applicant has obtained the documents they have submitted. If an applicant submits a document that they would not ordinarily be able to obtain, this may have an impact on whether or not the case officer can rely on that document as a corroborative piece of evidence. If the applicant has obtained documents that they would not be expected to be able to possess, he/she should be given the opportunity to explain how he/she has acquired them.*
>
> *Passports should be checked for entry/exit stamps, visas, evidence of return to the country of origin, etc., both in order to confirm the applicant's immigration history, and to confirm the applicant's account of events for credibility assessment purposes.*
>
> *Where such expertise is available, documents could be examined by a relevant specialist to see if they are genuine, or if there is evidence that they are counterfeit. If documents are found to be counterfeit, the applicant should be given the opportunity to explain how he/she has obtained them.*
>
> *....."*

89. To my mind this statement of law and practice fits comfortably with the dicta of the High Court (Cooke J.) in *I.R.* and the Court of Appeal (Hogan J.) in *R.A.*, flowing also from the requirements of Article 4 of the Qualification Directive. Insofar as the Tribunal seeks to rely on the decision of Ferriter J. in *A.H. & Ors. v. IPAT* [2022] IEHC 84, where the decision

of Humphreys J. in *O.A.* referred to above was positively cited, it is clear from reading that judgment that the primary focus of the challenge and judgment in that case was the absence of documentation rather than the reliability of documentation actually submitted, with the single exception of FIRs which had been submitted. Although the Tribunal did not accept as reliable the FIRs submitted in that case, it is clear from the terms of the impugned decision quoted at para. 35 of the judgment of Ferriter J. that the said FIRs were in fact assessed by the Tribunal with reference to their contents. Accordingly, *A.H.* is not authority for the proposition that there is no requirement to assess a document where the credibility of the applicant is otherwise not accepted. Nor, for that matter is *O.A.* such an authority as it is clear from the terms of the judgment in that case that Humphreys J. was in fact satisfied that the tribunal had taken into account all statements and documentation presented.

90. This case is not a clear-cut one in which the documentation was not considered at all. Reference is made to some of the documentation in the body of the text of the Decision demonstrating engagement with the content of selected documentation in a manner which was wholly absent in *I.R.* Furthermore, the Tribunal correctly identifies that the reliability of documents submitted is assessed by reference to its contents, the details provided therein and by reference to the credibility of the Appellant and asserts that documentation will be assessed as each aspect of his claim is assessed. Having said this, however, I have concluded that the Tribunal did not proceed to apply this test. Instead, the Tribunal did not further consider ostensibly relevant documents as aspects of the claim are assessed.

91. Specifically, while the Tribunal engages with the contents of the membership cards, it notably does not address the letters from the JKLF or the newspaper article. There were many features of the JKLF correspondence in terms of names, numbers and addresses which made the letters amenable to scrutiny as to their authenticity. Similarly, the Tribunal does not engage in any way with the newspaper article dating to February, 1993. Instead, these documents appear to be captured by the global statement that the Tribunal could not accept as credible or reliable any of the documentation ostensibly from Pakistan where such documentation could not be independently verified. No detail is given for the broad assertion that the documentation could not be independently verified. If there are specific difficulties of authentication pertaining to the documents submitted notwithstanding that they are on headed paper which gives names and telephone numbers or are taken from a daily newspaper in circulation in Pakistan, these difficulties are not identified in the papers before me and are not self-evident.

The documents are not assessed as to their relevance, their content, their form or the nature and author of the documents.

92. There is nothing in the terms of the Decision or the record of the decision-making process to indicate that any consideration was given to the possibility of independent verification or to explain why it was not possible to pursue the question of independent verification. While there is no onus on personnel examining applications to endeavour to authenticate or verify every document, special features of some documentation can give rise to such a duty. It seems to me that the newspaper article from a daily newspaper and letters on headed paper with multiple personal identifiers for those involved with the JKLF are examples of the types of document which can give rise to a special duty of enquiry because they are potentially amenable to further verification.

93. Irrespective of whether a duty arises extending to an attempt to verify or authenticate a document because features of the documents prompt such enquiry, there is an overriding duty to consider documents submitted and not to reject them without further scrutiny simply because the account given is implausible or not believed. Where the account given is implausible and not believed, this may be the basis advanced for not attaching much weight to the documents even in the absence of reference to features of the documents themselves, but it should be clear that this conclusion was arrived having considered the terms of the documentation. A general lack of credibility should not be cited as an explanation for not considering documents submitted as to their contents as this is tantamount to a failure to assess and falls foul of the principles established in *I.R., R.A.,* Article 4 of the Qualification Directive and the EASO Guidelines. From each of these I consider it to be clear that the general lack of plausibility of an oral account given does not excuse the decision maker from assessing the documentation submitted. A decision on general credibility should be informed by an assessment of the documents submitted, even if the conclusion is that it is not possible to attach much weight to the documents in view of other identified elements assessed as undermining of credibility and difficulties in authenticating the documents.

94. In this case, while the Tribunal considered the contents of some of the documentation submitted in a manner which could support a conclusion that the Tribunal properly engaged in an assessment of this documentation, there were notable exceptions to this. The repeated statement to the effect that "*documentation*" was dependent on the Applicant's general

credibility and where this has not been accepted, the documentation could not be accepted, is consistent only with the conclusion that otherwise ostensibly relevant documentation was dismissed without assessment of its contents. This conclusion is underpinned by the failure to refer to the contents of the JKFL letters or the newspaper article, relevant documents which are not self-evidently incapable of being independently verified, in the assessment of the individual components of the Applicant's case despite the apparent support these provide for the Applicant's claim, if authentic. It seems to me that the Tribunal concluded that because the oral testimony of the Applicant was unsatisfactory from a credibility perspective and the application was so undermined by credibility issues that there was no need to considered the documents provided in evidence.

95. In the circumstances, notwithstanding multiple unchallenged findings in an otherwise careful decision, I consider that the decision is rendered unsafe by reason of an apparent error of law in the approach asserted by the Tribunal to the assessment of documentation. While the Tribunal might decline to attach weight to individual documents in the assessment of component parts of the claim because of general credibility concerns, the Tribunal should not have adopted the global position that relevant documentation could not be accepted unless the Applicant's general credibility was accepted thereby avoiding the need for individual assessment of the documents submitted as part of the assessment of component parts of the claim advanced.

CONCLUSION

96. Notwithstanding that adverse credibility findings were made in this case on multiple grounds which have not been challenged, it appears that these findings were also made without assessing potentially relevant documentation submitted by the Applicant because he was not otherwise considered credible. While general credibility is a factor in assessing documents submitted and may be determinative, the Tribunal erred in law in proceeding on the basis that as documents could not be accepted unless general credibility was accepted thereby failing to identify that there is a requirement to assess documents as to their contents in making findings as regards the claim made including findings as to general credibility. Accordingly, I will make an order quashing the decision of the Tribunal and remitting the matter for fresh consideration by a different Tribunal member. I will hear the parties as to the terms of any consequential order.