Neutral Citation [2015] IEHC 759

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2012 No. 335 J.R.]**

**IN THE MATTER OF THE REFUGEE ACT 1996, AS AMENDED, AND**

**IN THE MATTER OF THE IMMIGRATION ACT 1999, AND**

**IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, AND**

**IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)**

**BETWEEN**

**B.W.**

**APPLICANT**

**AND**

**REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**(No. 2)**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of November, 2015**

1. The applicant's claim for refugee status arises from difficulties she encountered in Nigeria, her country of origin, arising from the involvement of her late husband as leader of a political group known as "*Asatoru*" in the Niger Delta. Following the killing of her husband on 2nd October, 2006, the applicant says she had to flee her home in fear of retribution from a number of sources. She particularly feared:-

> (i) her husband's family who blamed her for his killing;
>
> (ii) the political group to which her husband belongs, who were seeking money and documents from her; and
>
> (iii) the governmental authorities in Nigeria on the grounds of her imputed political opinion, or a perception that she had knowledge relating to the political group in question.

2. The applicant arrived in Ireland on 17th March, 2007, but did not make an application for refugee status until 27th September, 2011. She accepts that she failed to make an application as soon as reasonably practicable after her arrival in the State. By reason of a finding to this effect, her appeal to the Refugee Appeals Tribunal was confined to an examination of the papers only, without an oral hearing, and she raises no complaint in relation to this procedure in the present case.

3. The s. 13 report of the Commissioner rejecting her claim is dated 8th November, 2011. The applicant's statements were found "*to be lacking in coherence and plausibility and her general credibility has not been established".*

4. A notice of appeal to the tribunal was issued on her behalf dated 29th November, 2011. Following this notice of appeal, a further letter dated 8th December, 2011was sent by her solicitors to the tribunal enclosing a newspaper article which was believed to be of relevance to her appeal. Mr. Michael Lynn, S.C. and Mr. Garry O'Halloran, B.L. who appeared for the applicant were not in possession of instructions at the hearing as to why this newspaper article was not put before the Refugee Applications Commissioner. The article was a copy of the front page of the *Independent Monitor* newspaper of 9th October, 2006, together with an article on p. 6 referring to the death of the applicant's husband.

5. The tribunal replied on 17th January, 2012, seeking the original newspaper and asking for observations on an apparent discrepancy between the article which referred to a death by shooting of the husband, and the medical certificate which did not refer to gunshot wounds as a cause of death. This letter of 17th January, 2012 was not formally exhibited but I was provided with a copy on an agreed basis.

6. The applicant's solicitors replied by letter dated 30th January, 2012, enclosing an original copy of the newspaper and offering what they considered to be an explanation for the discrepancy between the medical certificate and the newspaper article, essentially that the medical certificate was confined to the medical cause of death.

7. The tribunal ultimately decided to affirm the decision of the Commissioner and issued a decision dated 15th March, 2012, under cover of a letter dated 22nd March, 2012. This decision contained a number of adverse findings in relation to the applicant.

8. The notice of motion seeking leave to apply for certiorari by way of judicial review to quash the tribunal decision is dated 16th April, 2012, and is therefore approximately a week out of time.

9. I am informed that the applicant has since been given some form of leave to remain in the State, although Ms. Silvia Martinez, B.L., for the State was not in possession of instructions as to the exact duration of this leave to remain.

**Extension of time**

10. In view of the relatively short delay in issuing the notice of motion, the absence of objection from the State, the absence of prejudice to the State, and the furnishing of reasons for the delay, I will make an order extending time for the bringing of the application.

11. In my earlier judgment dated 17th November, 2015, I have already dealt with an application for leave to amend on behalf of the applicant and I now address the issues as they arise on the pleadings as so amended. On that date I also gave liberty to the respondents to file a formal statement of opposition, which had not previously been done in this case.

**Was the decision tainted by a fundamental error of fact?**
12. To understand the submission made by Mr. Lynn under this heading, it will be necessary to refer to the opening paragraph of the newspaper article relied on by the applicant, because the case made under this heading is that this article was essentially ignored.

13. The article begins by stating that:-

> *"The leader of 'ASATORU GROUP' one of the plethora of autonomous smaller Militias operating in the Niger Delta Region of Nigeria under the control of Niger Delta People's Volunteer Force leader Alhaji Mujahid Dokubo-Asari has been shot dead by unknown gunmen on 02/10/2006 …"*

14. Turning to the decision of the tribunal, there is a reference to the newspaper article on p. 13. However, the tribunal goes on to say on p. 16 of the decision that apart from a particular court document,

> *"the applicant has put forward no objective country of origin information, viz newspaper reports or police or medical reports to corroborate or substantiate her claims linking her deceased husband to well known Niger Delta resistance groups."*

15. The applicant's complaint is essentially that because the applicant *did* put forward a newspaper report which the tribunal had regard to in an earlier part of its decision, the tribunal fell into fundamental error by stating at this later point that the applicant had *failed* to put forward newspaper reports linking her deceased husband to "*well known Niger Delta resistance groups".*

16. However, the meaning of this latter phrase appears to be explained by the following paragraph of the decision, in which the tribunal Member states that country of origin information does not mention the "*Asatoro*" organisation.

17. I therefore can only read the statement about the failure to produce newspaper reports as meaning that in the view of the tribunal, the applicant had failed to put forward reports linking her husband to a "*well known*" resistance group as opposed to any resistance group. The tribunal was clearly aware of the linkage to the "*Niger Delta Peoples Volunteer Force*" because that is referred to (by what appears to be an incorrect acronym NDPVE) in the very next paragraph of the tribunal decision.

18. Given that the tribunal was clearly aware of the article and considered its contents, I can find no error of fact in this regard, still less a fundamental error of fact.

**Did the tribunal findings on credibility infringe the applicant's right to fair procedures?**
19. At the risk of repetition, this was not a case in which there was any challenge to the denial of an oral hearing as such. But given that the appeal was being dealt with on a papers-only basis, it is clear that a high level of care was required to ensure that no unfairness was caused to the applicant. Clark J. in *K.M. v. RAT* [2013] IEHC 24, referred to the need for "*extreme care*" in a papers-only appeal, which very much emphasises the potential dangers of denial of an oral hearing if there could be any consequential impact on fairness for the applicant. It seems to me that the need for fairness requires that if a point on which the applicant has not previously had a fair opportunity to comment (including an opportunity inherent in the duty to explain a glaringly obvious matter actually known to the applicant) should be specifically put to the applicant: see *S.K. v. Refugee Appeals Tribunal* [2015] IEHC 176 and *B.Y. v. Refugee Appeals Tribunal* (Unreported, High Court, Stewart J., 5th February, 2015).

20. This does not, however, mean that every new point must be put to the applicant, or that the tribunal cannot make any additional credibility findings and is confined to those made by the Commissioner unless the applicant is specifically notified of the point. It seems to me that whether the applicant needs to be notified of the issue will very much depend on the nature of the new point and the category into which it falls (see the authorities cited in Hogan and Morgan, Administrative Law in Ireland (4th ed.), pp. 643-644 at n.40). I would identify the different potential categories of relevance to the present case to be as follows:-

> (i) *A point where an aspect of the applicant's case is not inherently implausible as a matter of probability but where an explanation might reasonably be called for.* In such a case, the tribunal might well decide to disbelieve the explanation once an opportunity for it had been afforded, but it must afford that opportunity if it has not already arisen. Into this category falls a decision by the tribunal to cast doubt on the husband's death certificate because the death certificate is dated the same day as the death. The tribunal says that this *"must be seen as unusual and must call into question the authenticity of the document".* When I asked Ms. Martinez how an applicant was supposed to know that a matter like this was of concern to the tribunal, she accepted that normally the tribunal would have to make the applicant aware of that. I find that a matter falling into this category is one that should be specifically put to the applicant if the tribunal is to rely on it. This was not done in the present case.
>
> (ii) *Contradiction or confusion on the face of the papers.* Where a decision-maker identifies contradiction or confusion on the face of the material submitted to it, it seems to me that it is not, in general, required to go back to the applicant to give the applicant a further opportunity to address that matter. There must be an onus on an applicant to read all documents and material before the decision-maker and to address, of his or her own motion, any contradictions, inconsistencies or ambiguities in that material (see comments of MacEochaidh J. in *M.A. v. Refugee Appeals Tribunal* [2015] IEHC 528, para. 22). A decision-maker is not required to go back to an applicant in this regard. I would regard a number of the applicant's complaints in this case as falling under this heading, such as whether those seeking to pressurise the applicant called her on the phone or called to her, and whether her account tended to contradiction and confusion as found by the tribunal.
>
> (iii) *Points where the applicant already has had an opportunity to deal with the issue*. In the case of an appeal to the tribunal, the applicant has already been through the Refugee Applications Commissioner process and would have been put on notice of a number of issues. Whether those issues are the subject matter of a specific adverse finding or are simply raised on the papers is not especially relevant for this purpose, because the onus must be on the applicant to address

those issues (see *M.A.,* para. 22). The tribunal, or any decision-maker, does not normally have to give an applicant a specific opportunity to comment on matters of which he or she has already had fair warning. Into this category fall the applicant's complaints that she had not given any account of the Nigerian authorities acting against her, that she had not explained the inaction of the authorities, and that she lacked credibility having regard to her lack of knowledge of her husband's movements. These were all matters on which the applicant was sufficiently on notice having regard to the Commissioner's decision.

(iv) *Where the applicant's account is implausible on its face*. A decision-maker is not required to specifically contact an applicant to inform him or her that the account presented is inherently implausible on its face. This is something an applicant must have some onus to address. Implausible stories are, of course, sometimes true, but where a story is or appears to be inherently implausible, an applicant cannot complain too strenuously of invalidity as to the decision unless he or she addresses that implausibility and if necessary provides sufficient supporting information or material to show that an apparently unlikely account is, in fact, one which could reasonably have happened. The points referred to under (iii) above could also be viewed under this heading. (See *T.A. v. Refugee Appeals Tribunal* [2014] IEHC 204, which supports the proposition that simply disbelieving the applicant on an implausible story does not need to be specifically put to the applicant.)

(v) *Where the decision-maker comes into possession of new information*. Whether new information needs to be put to an applicant depends on whether it materially changes the picture before the decision-maker. If there is such a material change, adverse to the applicant, then as a matter of generality that new information should be put (*M.A.,* para. 22). But where new information comes to light after the applicant has had an opportunity to comment, which does not alter the picture before the decision-maker, the decision is not invalid by reason only of a failure to put that information. In the present case, the tribunal carried out its own private research on country of origin information, which was not put to the applicant, but that research did not throw up anything different to the country of origin information which was before the tribunal in the first place. On that basis, there was no breach of duty on the part of the tribunal.

(vi) *Where the finding is one of an absence of evidence.* The onus is on the applicant to submit whatever appropriate and available evidence he or she has. If there is a clear omission in the material furnished by the applicant, a decision-maker is not necessarily obliged to go back to the applicant to point out this omission unless it is one which does not inherently call for an explanation from the applicant. In the present case, the tribunal made a comment that the applicant had not proved her marriage to her deceased husband by producing any certificate in that regard. This is simply a legitimate and probably a reasonably predictable comment arising from the state of the material presented on behalf of the applicant and did not need to be put to the applicant. In any event, reading it in context, it appears to be a comment rather than a specific finding against the applicant. Had the tribunal latched onto a less obvious omission there might have been an onus to draw that specifically to the applicant's attention.

21. In the light of the foregoing, while I find that there was no substance to the vast majority of the complaints made by the applicant under the heading of breach of fair procedures, the tribunal should have, and failed to, put its concerns regarding the veracity of the death certificate to the applicant specifically, because the certificate was not inherently implausible on its face so the applicant could not reasonably have foreseen that the tribunal would have had an issue with its validity. I will deal with the effect of this failure later in this judgment.

**Were the tribunal's findings irrational?**
22. As well as a challenge based on unfairness, the applicant also made a complaint of irrationality against a number of the findings of the tribunal, specifically the following views expressed by the tribunal:

(i) that there was an inconsistency between the medical certificate which did not mention a shooting and a newspaper account of a shooting;

(ii) that it was unusual that a death certificate would be issued on the same day as the death of the applicant's husband;

(iii) that there was inconsistency between the applicant being called on the telephone and being called to by those seeking to pressurise her;

(iv) that her narrative tends to contradiction and confusion; and

(v) that the omission of any reference to the applicant's husband from a Nigerian Supreme Court decision relating to the leader of one of the groups in question tended to undermine the credibility of the applicant's account.

23. Ms. Martinez submitted that the test for irrationality is that set out in *Meadows*. I accept that this is the correct position because the pre-*Meadows* case law must now be read in the light of that decision.

24. Leaving aside the question of the date of the death certificate, I am not persuaded that there is anything irrational or disproportionate about any of the other findings of the tribunal, in the *Meadows* sense. All of these findings seem to me well within the jurisdiction of the tribunal.

25. As regards the finding that it was unusual, tending to incredible, that a death certificate would be issued on the same day as a death, I do not think that such a finding could be arrived at without some knowledge of the practices of hospitals in Nigeria. No such knowledge appears on the face of the decision. I therefore find that this aspect of the decision is irrational in the legal sense, as well as having been arrived at by an unfair process as I have held.

**Does the concept of "residual credibility" assist an applicant whose credibility is generally rejected?**
26. In supplementary written submissions the applicant sought to argue that following a general rejection of an applicant's credibility, the applicant still enjoyed a "residual credibility" which the tribunal was required to consider. Reliance was placed on the decision of McDermott J. in *B.M. (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324. In that case, the phrase "residual credibility" is used in the context where certain elements of the applicant's account, which are themselves independently capable of justifying a finding in favour of the applicant, are accepted as factually correct, and others are not. The decision-maker should under those circumstances go on to consider whether the claim should be allowed by reference to the elements that are correct. The doctrine has no application to a situation where either there is a general rejection of the applicant's credibility overall or where the uncontested elements are not such as to warrant allowing the claim (for example, where they relate only to matters such as the applicant's identity and nationality but do not connect the applicant to the persecution alleged by him or her).

**Does one invalid credibility finding vitiate the decision overall?**
27. Mr. Lynn argues that the overall decision is invalid if any one part of it falls, because the tribunal states that the decision is "*cumulative*" and the tribunal has not specifically attached weight to different elements of the decision.

28. A decision relying on multiple factors may be phrased in a number of different ways. A decision-maker may say, for example, that the application is rejected on grounds X, Y and Z, and may express the relationship between those factors in a number of different ways, for example:-

> (i) that the application would have been rejected on any of those grounds, and each of them stands independently as a separate ground for rejection;
>
> (ii) the decision-maker may identify particular weight attaching to one or more grounds, for example, that factor X is of major importance but regard has also been had to Y and Z which are of minor importance;
>
> (iii) that the decision is based on X, Y and Z, taken together or cumulatively; or
>
> (iv) the decision-maker may simply say nothing about the relationship between the different factors and may simply conclude that in the light of the findings, the application is rejected – probably the most common approach.

29. There is no dispute that where the decision-maker states that a number of grounds are independent of each other, and one of them falls, the decision can nonetheless be sustained on the basis of the other grounds. The same must presumably be accepted if the decision-maker expressly identifies as major a ground that is sustained, or as minor a ground that is condemned. The question that arises in this case is how the court should approach a decision where this is not stated, or indeed where the decision-maker expressly states that it is making a "*cumulative*" finding.

**The I.R. approach**
30. An examination of the caselaw suggests that there are two divergent strands of approach to the question of how to approach a multi-element decision in these circumstances.

31. The first approach arises from the judgment of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 which sets out a number of general principles regarding review of tribunal decisions. One of those principles is that:-

> *"A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts" (para. 11.7).*

32. A closely related principle is that:

> *"When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person" (para. 11.8)*

33. Cooke J. also expressly acknowledges the traditional administrative law position that the court should not substitute its own view for that of the decision-maker. The net effect of this analysis is that the court's view as to whether an overall conclusion can be "*tenably sustained*" is to be based, not on the court's view as to what the conclusion should have been, but on reading the decision "*as a whole"* and "*overall*". Cooke J. could not have intended that this would be dependent upon the tribunal Member having *expressed* the weight to be attached to particular aspects of the decision, as his judgment would have been phrased in very different terms if that was his view.

34. The *I.R.* decision was followed in a later decision of Cooke J. in *T.M.A. v. Minister for Justice Equality and Law Reform* [2009] IEHC 606, a case in which he decided that:-

> *"notwithstanding possible discrepancies of detail as raised in some of the grounds, the central thrust of the tribunal member's finding as to lack of credibility is sufficiently well grounded in the material before him and in the testimony of the applicant as to be incapable of being quashed by judicial review."*

35. There is no trace in this approach, which is a practical application of that particular aspect of the *I.R.* case, of any attempt to speculate as to what weight the tribunal expressed as applying to the elements condemned. Rather the court is to read the decision itself and on the basis of that decision assess whether the "*central thrust*" of the finding on credibility is sustainable.

36. The approach of looking at the "core" or "essence" of the decision was taken by McDermott J. in *T.M. v. Refugee Appeals Tribunal* [2012] IEHC 284 (see paras 4.5 and 4.6). This approach was not to ask whether a mis-statement of evidence by the tribunal (which was found in the judgment at para. 3.8) might possibly have gone to the core of the matter, but whether in the view of the court it actually did so. I would consider this approach as very much in keeping with the *I.R.* line of authority.

37. The *I.R.* test was followed by Noonan J. in *N.E. v. Refugee Appeals Tribunal* [2015] IEHC 8, relying *inter alia* on *N.U.Z v. Refugee Appeals Tribunal* [2010] IEHC 141 (Edwards J.) which held that the applicant's "*core story*" had been correctly assessed by the tribunal. The approach taken by Noonan J. in this context was to ask whether an impugned credibility decision goes "*to the core of the matter*". He held that in that particular case an impugned finding did not appear to him to be a core finding of fact and on that basis refused relief. This approach involves the court itself deciding whether the decision can be tenably sustained on the basis of the elements that remain following the striking down of any particular element, again of course in the context of the decision overall and not on the basis of the court's own opinion as to the correct result.

38. Finally, there are two important decisions which emphasise that it is for the court to assess, having regard to the decision in the round (which thereby indirectly takes into account the intentions of the decision-maker as they appear in the decision overall) whether the result of a partly invalid decision can be sustained. The first decision is that of McCarthy J. in *S.A. v. Refugee Appeals Tribunal* [2009] IEHC 383, a decision that does not seem to have been cited in many of the subsequent cases, and which the applicant in this case refreshingly admits "*does not fit neatly into any of the … principles*" urged by her upon the court. McCarthy J. said that, notwithstanding a failure by the tribunal to expressly assign weight to invalid factors:-

> *"one is entitled to at least consider whether or not, as a matter of reason, a greater weight must have been attached*

*to one factor rather than another, and, of course ultimately to look at the decision in the round."*

39. While phrased as a decision taking account of *Keagnene*, a case which I discuss further below, the approach followed by McCarthy J. seems on the face of it to be much more consistent with the *I.R.* approach whereby the court itself will assess "*as a matter of reason*" what weight individual factors attracted, having read the decision in the round, notwithstanding that the decision-maker may not have expressly identified the weight to be attached to particular findings.

40. The second case that requires mention in this context is the judgment of MacEochaidh J. in refusing a certificate for leave to appeal in *E.S. v. Refugee Appeals Tribunal* [2014] IEHC 534, in which he states that severability of lawful from unlawful reasons does not depend on the expression of weight attached to reasons by a decision-maker (see para. 9) and requires the court to be certain that the surviving reason is "*capable of sustaining the impugned decision*" (para. 10). In MacEochaidh J.'s view, the weight attached by the decision-maker to the decision does not need to be expressly stated but is "*indirectly*" considered by the court when the court itself comes to the view "*that sufficient weight attaches to a surviving reason or reasons*" (para. 10). Again, while this acknowledges the (unexpressed) views of the decision-maker, such acknowledgment is reflected in the court's own reading of the decision itself, and is not dependent on the presence of an expression of weight by the tribunal, or on wider speculation as to the precise weight the decision-maker could or might have attached to individual elements. The substantive decision in that case (*E.S. v. Refugee Appeals Tribunal* [2014] IEHC 374) involved rejecting two of three reasons offered by the tribunal but upholding the decision on the basis that the one surviving reason was, in the court's view "*sufficiently robust to overcome the applicant's complaints*" (para. 18). This is, in essence, the *I.R.* approach.

**The Keagnene approach**

41. An alternative approach arises from *Keagnene v. Minister for Justice, Equality and Law Reform* [2007] IEHC 17, in which Herbert J. found that a number of credibility findings should be set aside and went on to consider the effect of this on the overall decision. He said that *"as the court cannot be aware of what weight the member of the Refugee Appeals Tribunal attached to each of the six reasons given by him"* for finding a lack of credibility, the setting aside of three of those reasons meant that "*the entire decision must, of necessity, be therefore set aside" (emphasis added).* One must first ask why it must be on that approach that the court cannot be aware of what weight the tribunal attached to individual reasons. As the judgment does not attempt an assessment of whether, as a matter of reason and reading the decision in the round, the reasons were major or minor, it would appear that what Herbert J. had in mind was that the court cannot be so aware *in the absence of an expression of that weight by the tribunal.* More fundamentally, *Keagnene* presupposes that where a list of reasons exists, it is open to the court to simply say that it cannot be aware of what weight the tribunal attached to them. No further reason is given as to why that is not open to the court. It is hard to see why such an approach is not open unless it is implicit that it is not open because the tribunal has not stated the weight. If weight could be implied, at least in principle, it is hard to see why the court simply stated that it "*cannot be aware*" of such weight without further analysis.

42. *Keagnene* was relied on by Edwards J. in *A.A. v. Minister for Justice Equality and Law Reform* [2010] IEHC 143, but only for the purposes of demonstrating the existence of substantial grounds for applying for leave. The *A.A.* decision does not therefore reach the issue at hand.

43. In *C.C.A. v. Minister for Justice and Equality* [2014] IEHC 569, where the decision of Cooke J. in *I.R.* was apparently not opened on this point, Barr J. was asked to consider the question of whether an overall credibility finding based on a number of matters would have to be set aside if three of the findings on credibility were arrived at without adequate reasons. The *Keagnene* decision was opened to Barr J., but, as I have said, not the *I.R.* decision. Under those circumstances, it is not altogether surprising that Barr J. found that:-

> *"As the three impugned findings were part of a wider set of credibility findings which had a cumulative effect in the decision, it is not possible to say whether these were major or minor credibility findings. In the circumstances, it is necessary to quash the entire decision" (para. 25).*

44. If this was a development of Keagnene, in the sense that it introduced the notion of the cumulative decision, a phrase not specifically used in the earlier case, it was a natural one if the test is to be construed as a requirement that the necessity to quash the entire decision arises from the absence of an expression by the tribunal as to the weight to be attached to individual elements, for example by stating that the decision was cumulative. The word "*as*" in the quoted passage suggests that the *reason* why it is not possible to say why findings were major or minor is because the decision is cumulative. That seems to involve the consequence that an expression of cumulativeness cannot be investigated further and indeed cannot be overcome by asking whether as a matter of reason some factors in that cumulative decision are minor.

45. The *Keagnene* approach was also followed by Barr J. in *A.M.K. v. Refugee Appeals Tribunal* [2014] IEHC 380, another case in which the relevant portion of Cooke J.'s decision in *I.R.* does not appear to have been opened to the court.

46. In *P.M. v. Pillay* [2014] IEHC 497, Barr J. cited the *I.R* test (as quoted in *N.U.Z. v. Refugee Appeals Tribunal* [2010] IEHC 141) with approval, stating that a conclusion would not be impugned by adverse findings which did not "*go to the core of the decision*", and indeed also quoted Cooke J.'s view in *R.R. v. Refugee Appeals Tribunal* [2008] IEHC 406 that individual findings which related to "*collateral matters or peripheral matters*" might not taint the decision if they could not be sustained. However he held in relation to one aspect of the credibility findings that it "*was a clear error which, if it had not been made, may have resulted in the tribunal reaching a different conclusion*". Another finding was also condemned and, in the context of a cumulative decision, it was held that "*it is not possible to say what the decision of the RAT would have been without the two impugned findings*" (paras. 65-67). This seems in effect to be an application of the *Keagnene* approach.

47. In the recent decision of *M.O.S.H. (Pakistan) v. Refugee Appeals Tribunal* [2015] IEHC 209, Eagar J. followed *Keagnene* and *C.C.A.* and held, in relation to particular credibility findings that were unsustainable, that:-

> *"As the impugned findings were part of a wider set of credibility findings which had a cumulative effect in this decision it is not possible to say whether they were major or minor credibility findings. In the circumstances it is necessary to quash the entire decision" (para. 62).*

48. In that case the *I.R.* decision was opened to Eagar J., but apparently only as regards a different extract from the case, and the particular relevant paragraph relating to whether the remainder of a decision can be "*tenably sustained*" does not appear to have been drawn to the court's attention and is not referred to where the court references the submissions that were made.

49. I have also considered the judgment of Faherty J. in *O.N. v. Refugee Appeals Tribunal* [2015] IEHC 585 which reflects an approach

taken in a number of similar cases. In that case the court acknowledged that "*the legality of a decision could nonetheless be sustained notwithstanding errors in one or more findings as to credibility*" but went on to say that this "*will always be a question of fact and degree in each case and assuming one can discern from the decision the respective weight attributed by the decision maker to various factors in assessing credibility. However, I find that it is not possible to discern what weight the Tribunal Member attached to the two impugned findings … The credibility findings were cumulative in nature. Furthermore, the impugned finding that the applicant resided in Greece impacted on her core claim. Therefore, I am satisfied that the decision on credibility cannot stand"* (para. 45). Two reasons are identified for the conclusion that it was not possible to discern the weight to be attached to the impugned findings. The first was that the decision was cumulative. The second was that one of the findings "*impacted on [the applicant's] core claim*". The phrase "*impacted upon"* is important here and I read it as meaning "*was relevant to*". One might observe that many matters, some major, some minor, may "*impact upon*" a core claim in this sense. For example, a finding that a particular document should not have been disregarded or viewed with suspicion "impacts" on the core claim, but the approach set out in *O.N.* suggests that that is enough to conclude that it is therefore not possible to say whether the decision-maker would have wanted the decision to stand in the absence of impugned ground. That these are the only grounds identified for the court being unable to discern the "*respective weight attributed by the decision maker to various factors*" would suggest that this decision is best viewed as an application of the *Keagnene* approach.

**If the approaches are not fully consistent, which is preferable?**

50. At the hearing of the present action, Ms. Martinez argued that there were "*different lines of authority*" on the issue and that I should prefer the *I.R.* approach over the *Keagnene* approach. In supplementary written submissions the State alternatively comments that in *S.A.*, the Keagnene case was viewed as "*an example of the application of [the I.R.] principle to given evidence of facts*" (supplementary submissions p.4). Perhaps theoretically, it might be possible for a court to say, having assessed each ground as major or minor, as a matter of reason and reading the decision in the round, that there might be a particular impugned reason which could not be put into one or the other category and that the decision ought to be quashed for that reason. One would have thought however, if such cases exist, that in practice they would be few and far between. *Keagnene* and its progeny are not "*example[s] of the application of [this] principle*" because they do not conspicuously attempt to apply this principle. It is hard to detect in those cases an endeavour by the court itself to assess whether each of the individual elements are major or minor. Rather the court seems to inquire into what precise or respective weight the decision-maker attached to these elements and to find difficulty or impossibility in doing so by reference to general matters such as whether the decision is cumulative. This is not an example of the application of I.R.

51. Having regard to what seems to be the less than altogether consistent state of the caselaw, exacerbated by a pattern whereby a number of cases have been decided without full authorities having been opened to the court, I have come to the view that at least some clarification as to the preferable approach would promote the public interest in certainty as to the legal position and in consistency of decision-making. To my mind, the two approaches cannot logically be entirely reconciled without doing at least some violence to one or the other. On one approach, the weight of valid factors should be assigned by the court, on the basis not, of course, of its own opinion, but as a matter of reason on reading the decision in the round. The other approach takes the view that either in the absence of an assignment, possibly express assignment, of weight by the decision-maker, or in the case of a decision that is, or is expressed to be, cumulative, a partly invalid decision must, "*of necessity*", be quashed.

52. In my view any test that is based on the precise weight which the tribunal expressed as attaching to individual elements, or even which it would have attached, should be rejected for a number of reasons.

53. *Workability at the level of judicial review*: Such a test is essentially virtually unworkable in practice because it is never possible to say with certainty what weight, still less what precise weight, the individual tribunal member would have attached to particular items. Virtually anything in a decision, no matter how peripheral, could potentially bear upon material issues, or impact upon the core claim, especially if a broad view is taken as to what constitute important elements of that claim. For example, if a particular document is (wrongly) rejected by the tribunal, no matter how peripheral it may be to the applicant's story, can a judge be said to be clearly wrong if he or she holds that the document *might* (not would) have had an effect on the ultimate decision? The only way this question can be addressed to a clearly justiciable standard is not to ask what the decision-maker would have intended in terms of precise weight to be attached to particular points, but rather to ask whether, taking together all of the valid elements of the decision, and reading the decision in the round, the conclusion is tenably sustainable.

54. The one thing to be said in favour of the theory that a multi-element decision must be rejected unless the decision-maker expressly stated the weight to be attached to invalid elements of a partly valid decision is that it at least sets out a clear hurdle to be crossed by a judicial review applicant (namely the presence or absence of an express statement of weight set out on the face of the decision), albeit that the hurdle thus set is unacceptably low. The intermediate position between that approach and *I.R.,* an approach whereby a court might ask itself what precise weight the decision-maker *would have* given to the invalid factors, lacks even that advantage and risks a collapse into complete subjectivity.

55. The choice therefore is between the *I.R.* approach, whereby the court asks itself whether it thinks the decision can be tenably sustained on the basis of reading the decision in the round, and what I refer to as the intermediate position, whereby the court asks itself what precise weight the tribunal *would have* attached to individual invalid factors. But the phrasing of the issue in the latter manner just has too much potential to be hopelessly subjective in practice. If there is clear evidence in the decision as to what weight the decision-maker attached to individual factors, then that is all well and good. However, in the absence of such evidence, the court must assume that the decision-maker approached the matter in accordance with rationality and common sense, as the court sees those considerations (or "*as a matter of reason"* as it was put in *S.A.*). On that approach, there should be little or no difference between a conclusion as to whether the court thinks that the result can be tenably sustained, using rationality and common sense in the context of reading the decision in the round, and whether it thinks that the decision-maker *would have thought* that it could be so sustained, using the same reasoning process. The question then becomes one as to which way the test should be phrased. To phrase it in the former way invites objectivity, rationality and clarity; in the latter way, subjectivity, speculation and unpredictability. The latter formulation simply loosens the moorings between the result of the case and clearly ascertainable rational standards. It almost inevitably invites the beguilingly simple riposte that the impugned matter *might have* influenced the tribunal, or that it is not possible to say what the decision of the tribunal would have been without the impugned findings, and consequentially that an order quashing of the decision should be made.

56. Indeed, if I were in any doubt about the workability of this intermediate position, which I am not, a clear indication of what is in store for the court if such a position were to be adopted was provided in para. 17 of the applicant's further written submissions, which referred, with disarming candour, to "*the difficulty, if not impossibility, which would face the Court if it tried to assess the weight given to adverse credibility findings by a tribunal in the absence of a clear indication by the tribunal itself as to the degree of rejection found in each finding, or of the weight of each finding"*. In short, if *Keagnene* were to be reformulated in terms of a test as to what exact weight the tribunal *would have attached* to the invalid factors, the court will be facing a never-ending groundhog day

whereby the issue of whether the degree of difficulty in ascertaining the weight which the decision-maker would have so attached will be subjectively re-fought on a case-by-case basis, with the difficulties involved perhaps appealing to some judges and not others, and any individual judicial decision absolutely immune from review on appeal by virtue of its being shrouded in a cocoon of the facts and circumstances of each individual case. The court will thus not be required to stand over any conclusion as to whether a decision can be tenably sustained on the basis of reason as applied to the decision in the round, but simply to answer the much more diffuse question as to whether the degree of difficulty in ascertaining what precise weight the decision-maker would have assigned to individual elements is too great to enable an answer to be arrived at. Accountability for the result disappears in such a process.

57. *Workability at the level of the decision making process*: In *S.H.M. v. Refugee Appeals Tribunal* [2009] IEHC 128, Clark J. stated that "*the decision-making process must be a workable one and impractical requirements should not be imposed upon Tribunal Members*" (at para. 43). Kenneth Clark put it more broadly in *Civilization* (London, 1969) (writing of the public administrators painted in 17th century Holland by Frans Hals): "*a corporate effort for the public good"* represents "*the practical, social application of the philosophy that things must be made to work*" (at pp. 195-197).

58. One overarching principle that seems to me to be important is that the law should not hold administrative decision-makers (such as the Refugee Appeals Tribunal) to a higher standard than that applicable to the High Court. In general, judges do not laboriously assign weight to each element of a multi-factor test. Double standards are normally to be avoided, and are also normally an indicator of an error in reasoning somewhere along the line.

59. An expectation that a decision-maker could assign weight to all possible combinations of factors or an attempt to divine what the decision-maker did think or would have thought on these matters is illusory and unreal. As the respondents put it in their further written submissions (p. 1), to apply such a requirement would be "*to impose an impractical requirement on a decision-maker"*.

60. A decision-maker will not realistically have individually contemplated each of the possible permutations of factors taking together. Where there are only two reasons given for a decision, X and Y, there are only three combinations of options: reason X suffices, reason Y suffices, or both X and Y are necessary. However, if the number of reasons increases to three, there are seven combinations of possible options. The mathematics of combinations dictate that the number of such combinations more than doubles with the addition of every additional reason. A six-factor conclusion, such as in *Keagnene*, involves 63 combinations. It is not realistic to expect a decision-maker to have considered all of these and to have decided which would hold water in the event of one or more factors being held invalid.

61. The fundamental point is that in a list of more than two reasons, there is vanishingly little reality to the assumption that the decision-maker actually did assess, or would have assessed, the weight to be attached to each of the permutations where individual reasons were found to either stand or fall. In short a test based on the weight in the mind of the decision-maker is simply an illusion.

62. The more realistic way to approach the matter is for the court to ask itself whether the decision can objectively be tenably sustained, despite the excision of any impugned element, based on the court's own assessment of how major or otherwise the impugned element or elements were, in the context of reading the decision in the round.

63. *Consistency with asylum law overall*: Reading the various decisions on both perspectives, the impression I have formed is that the decisions based on *I.R.* sit more comfortably within the overall body of law relating to asylum judicial review. The *Keagnene* line of jurisprudence is relatively self-contained and does not seem to thrive when its individual legal ecosystem is punctured by a wider set of authorities being opened to any particular court called on to decide upon it.

64. *Consistency with wider administrative law context*: The *I.R.* approach seems better to reflect a wider approach in administrative law, not simply confined to the asylum context. Where a decision-maker bases a decision on a number of grounds, one (or more) of which cannot be sustained, it would normally be a matter for the court to determine whether the remaining valid grounds are sufficient to justify the decision in the context of the court's examination of the decision overall. This exercise does not depend on whether the decision-maker has expressly attached weight to the different grounds, or whether he or she has expressed that the decision is made having regard to those grounds cumulatively. In *International Fishing Vessels Ltd. v. Minister for the Marine (No. 2)* [1991] 2 I.R. 93, at p. 103 *per* McCarthy J., where there were "*a number of grounds, some of them sub-divided, any one of which would clearly have justified the Minister in refusing to grant the applications*", the decision was upheld despite a breach of fair procedures in respect of a certain number of the reasons.

**Conclusions on the issue**

65. Having regard to the foregoing I conclude in summary that:

> (i) The approach to be followed as a correct statement of the law is reflected in *I.R.* and its progeny, and amounts to a test that it is for the court to assess whether the decision can be tenably sustained in the absence of the invalid reasons, having regard to the importance, in the view of the court, of the valid reasons, based on reason and common sense and the court's reading of the decision as a whole, regardless of whether the issue impacted in some sense on the core claim, or whether the decision-maker expressed the decision as cumulative or failed expressly to attach weight to individual reasons;
>
> (ii) Insofar as *Keagnene* and its progeny, identified above, suggest that the court cannot be aware of the weight attached to individual factors by reason either of an absence of express weight being attached to such factor by the tribunal, or by reason of the decision being, or being expressed to be, cumulative, or by reason of the matter impacting on the core claim, that is not an approach I would propose to follow as I consider that it does not represent an approach consistent with the *I.R.* approach, as set out above;
>
> (iii) I would also decline to adopt, for similar reasons, an approach which is based on attempting to divine (in the absence of material to that effect) what precise weight the tribunal *would have* assigned to the valid factors in the absence of the invalid ones (other than insofar as this is indirectly done on the *I.R* approach by reading the decision in the round), on the grounds that such a test is unworkably subjective and it not in practice a justiciable test at all.
>
> (iv) The appropriate test does not involve the court in forming its own view as to whether or not it would have made the underlying decision. This would be impermissibly to step into the shoes of the decision-maker. What it involves is the court deciding, as a matter of reason and common sense, and on reading the tribunal's decision in the round, whether the invalid reasons are major and go to the core of the decision (as opposed simply to impacting upon, in the sense of being relevant or potentially relevant to, the core claim), or alternatively phrased, whether the decision can be tenably sustained on the basis of the valid reasons. This conclusion can only be arrived at by an examination of the decision

overall and the extent to which the court considers in that context and as a matter of reason and common sense that invalid reasons are major or minor, when read in the context of that overall decision. The mind of the decision-maker is not to be accessed by some form of complex speculation as to the weight he or she would have attached to precise individual invalid factors (what Cooke J. referred to in the above-quoted passage as "*attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination*"), but simply reflected in the exercise of reading the decision in the round. The upholding of a conclusion in a partly invalid decision can be carried out even if the decision is cumulative, and does not depend on any express assignment of weight by the decision-maker to individual factors.

(v) Applying the *I.R.* approach to the present case, I am of the view that the unsustainable finding regarding the date of the applicant's husband's death certificate is minor in the overall context and that the decision can be tenably sustained on the basis of the remaining credibility findings and upon reading the decision in the round.

**Order**

66. Having regard to the foregoing, I will order as follows:-

(i) that time be extended for the making of the application up the date on which it was made;

(ii) that leave be granted to apply for judicial review in terms of the applicant's amended statement of grounds;

(iii) that the substantive application for judicial review be dismissed.

(iv) that the matter be adjourned to afford the parties an opportunity to consider any consequential applications; and

(v) that any party intending to make such application give the other party advance written notice of particulars in that regard.