THE HIGH COURT

JUĐICIAL REVIEW

[2022] IEHC 669

[Record No. 2022/320JR]

BETWEEN

R.N.

APPLICANT

ANĐ

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONĐENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 29th day of November 2022.

INTRODUCTION

1. The Applicant is a 27-year-old man from Zimbabwe who has made a claim for international protection in the State. In these proceedings, he challenges the decision of the First Respondent (hereinafter "the decision") to recommend refusal of his claim for international protection on the basis that the First Respondent erred in law in making adverse credibility findings and in not considering the possible exposure of the Applicant to future persecution in the light of known conditions in Zimbabwe. The Applicant further claims that the decision is vitiated by error of fact.

BACKGROUND

2. The Applicant made a claim for international protection to the Second Respondent on 9th of August, 2019 on the basis that, if he were return to Zimbabwe, he would face persecution/serious harm. In his application for international protection he identified his ethnic origin as 'Ndebele' and confirmed that he spoke English and Ndebele.

3. In advancing his claim, the Applicant said that he was born in 1994 in Johannesburg, South Africa. His parents were from Zimbabwe and the family moved back to Bulawayo, Zimbabwe, a very short time after he was born. The Applicant has two younger brothers and his father died in 2003. When he finished secondary school, he studied construction studies at Bulawayo Polytechnic before working for a number of years as a junior construction supervisor in Bulawayo.

4. The Applicant's two younger brothers are gay. The Applicant claims that on the 31st of July, 2019 he received a telephone call from his mother in or around 2pm while he was at work. She was upset and she told the Applicant that his two younger brothers had been taken into police custody because they were gay. She said that the men who had arrested his brothers had given her an arrest warrant in connection with their arrest.

5. The Applicant claims to have left work immediately and gone directly to the Central Police Station in Bulawayo. Despite waiting several hours, the Applicant was told that his brothers were not there but checks were made to see if they were in a different district. He finally went home without any information as to his brothers' whereabouts. He claims that he returned to the Central Police Station in Bulawayo with his mother the next morning on the 1st of August, 2019. Despite waiting at the police station all day, they received no information as to the whereabouts of the Applicant's brothers. The Applicant claims to have returned to Central Police Station on his own on the 2nd, 3rd and 4th of August, 2019 but there was still no news of his brothers.

6. The Applicant claims to have gone to work as normal on the 5th of August, 2019 but he received a call from his mother who said that there were police officers looking for him because they said he was gay. The Applicant left the construction site at which he was working and went to a location on the other side of Bulawayo where he stayed until about 6pm before returning home. When he got home his mother told him that the men who had come that morning were different men to the ones who had arrested his brothers and that they had been in a different car. She did not recognise them. They left an arrest warrant with her before they left.

7. The Applicant claims to have decided that he needed to leave Zimbabwe for his safety. He made his way to South Africa and then arranged to travel to Ireland via Dubai. He travelled

to Ireland on a false South African passport. He destroyed the passport before he arrived in Ireland on the 8th of August, 2019.

8. In his long form application completed in September, 2019, the Applicant claims (in response to question 68) a fear that he would be arrested for looking for his brothers and could disappear in the same way they did. Similarly, in response to question 87, he reiterated that he was at risk because he had been looking for his brothers.

9. In accordance with ss. 35 and 70 of the International Protection Act 2015 [hereinafter 'the 2015 Act'], the Applicant was interviewed on the 2nd of September, 2021 in relation to his application for international protection. When asked during the interview why the police targeted him, he suggested that it could be because he had been looking for his brothers. He confirmed that he was not gay but that he is being targeted under suspicion of being gay adding "*that was just a reason for picking me up*" and "*they do a lot of things that are above the law*."

10. He was asked why the police would leave an arrest warrant rather than a letter or summons. He said he could not answer for them but that it could have been intended for use by them to take him. He made the point that the warrant was not even from his district. He said this made him fearful and he did not know if it was a real warrant. When it was put to him that the warrant had purportedly issued in Hwange (at some distance from Bulawayo where the Applicant lived) and did not have an official insignia or signature, he replied that these factors made him very suspicious as to how the authorities were approaching matters. He said the police were falsifying records and making up things. He considered that they had a reason to pick him up and had their own agenda.

11. The Applicant claims that his mother has told him that unknown men have come looking for him since he left Zimbabwe and left fresh arrest warrants at the house dated the 22nd of December, 2020 and the 19th of August, 2021. The Applicant's mother posted those two warrants, as well as the warrant that had been left on the 5th of August, 2019, to the Applicant in Ireland.

12. The Applicant and his mother have had no news of the Applicant's brothers since they were taken from the family home in Bulawayo on the 31st of July, 2019.

13. The Applicant relies on country of origin information (hereinafter "COI") which demonstrates that Zimbabwean police and authorities are homophobic, as is Zimbabwean society generally. The Applicant claims that he is afraid that he will be harmed if he is returned to Zimbabwe. He fears that he will be harmed at the hands of the Zimbabwean police who seized his brothers because his brothers are gay. The essence of his claim as it emerges from the questionnaire and interview record is that he believes the police are also in pursuit of him, on various pretexts including that he too is gay, but in reality because he was asking questions about the whereabouts of his disappeared younger brothers.

14. On the 29th of September, 2021 an International Protection Officer ['IPO'] recommended, pursuant to s. 39 of the 2015 Act, that the Applicant should not be given a refugee declaration on the basis that he had not established a well-founded fear of persecution in Zimbabwe. The same decision recommended that the Applicant should not be given a subsidiary protection declaration on the basis that substantial grounds had not been shown for believing that the Applicant would face a real risk of suffering serious harm if returned to Zimbabwe. His claim, which was characterised as one of being targeted by the Zimbabwean authorities on suspicion of being gay, was not accepted as a material fact.

15. By Notice of Appeal received by the First Respondent on the 22nd of November, 2021, the Applicant appealed against the IPO's decision on the basis that it was wrong in fact and in law. The fact that the Applicant claimed the charges to be *"trumped up"* was pointed out in the appeal submissions.

DECISION OF IPAT

16. An oral hearing took place before the First Respondent in February, 2022 at which the Applicant was legally represented. In the Tribunal's decision dated the 25th of March, 2022, the First Respondent recommended that the decision to refuse a recommendation that protection be granted made by the IPO at first instance be affirmed.

17. The Decision of the Tribunal contains a summary of the allegations made in support of the Applicant's claim which appears to be taken from the Applicant's oral evidence before the First Respondent. Although issue was taken with some elements of this account in argument before me, the Applicant has not sworn on affidavit that the decision misrepresents or

inaccurately reflects the evidence he gave. His account as recorded at paragraphs 2.5 and 2.6 of the decision is:

> *"[2.5] On 31st July 2019 the appellant was at work when he got a phone call from his mother at about 2pm. She was upset and she told the appellant that his two younger brothers had been taken to the Central Police Station in Bulawayo because they were gay. She said the men who had arrested the appellant's brothers had given her an arrest warrant in connection with their arrest.*
>
> *[2.6] The appellant told his mother to stay at home. He left work immediately and went directly to the Central Police Station in Bulawayo. He got there at about 3pm on 31st July 2019. He spoke to the police officer on the front desk. He told the police officer that he had received information from his mother that his two younger brothers had been taken to the police station because they were gay. The police officer asked for the names of the appellant's brothers. After a few minutes he told the appellant that there was no-one in custody with those names. The appellant reiterated that his mother had told him that his brothers had been taken to the Central Police Station. The police officer said he would put the appellant in touch with the officer in charge of the station. A few hours passed before the appellant was brought to the office of the officer in charge of the station. The officer in charge of the station said the appellant's brothers were not in custody but that he would check if they were in another police station in the district called Darlington Police Station. Time passed and the appellant received no information. The police officers changed shift and the appellant was told to come back the next day. He left the police station at about midnight and returned home."*

18. Further, at paragraph [2.10], the First Respondent records:

> *"[2.10] The appellant decided that he needed to leave Zimbabwe for his safety. He made his way to South Africa and then arranged to travel to Ireland via Dubai. He did not bring any of the arrest warrants with him because he did not want to be found with anything suspicious. He travelled to Ireland on a false South African passport. He destroyed the passport before he arrived in Ireland. He arrived in Ireland on 8th August 2019."*

19. This record of the evidence is referred to on behalf of the Applicant in these proceedings as containing an error of fact insofar as it is noted that he did not bring the arrest warrants with him when he left Zimbabwe.

20. In setting out the record of the case facts, the First Respondent records [paragraph 2.12] that the Applicant claims a fear of harm because the Zimbabwean police are in pursuit of him because they are of the view that he is gay. Of note, no reference is made to his claim advanced in his original application and during the s. 35 interview that he was being pursued for asking questions about his brother's whereabouts.

21. In the assessment of the application, the First Respondent accepts that the Applicant was from Zimbabwe [paragraph 3.1] but made no reference to his tribal grouping, the Ndebele. He then proceeded to identify the material facts in the claim which required to be considered as follows [paragraph 4.2]:

> *"I assess the material facts of the claim to be that:*
>
> - *The appellant's brothers were arrested by unknown men on 31st July 2019 for being gay*
> - *Unknown men called to the appellant's home on 5th August 2019 seeking to arrest him for being gay even though he is, in fact, straight*
> - *Since the appellant arrived in Ireland, unknown men have called to his family home in Bulawayo seeking to arrest him using arrest warrants stamped 22nd December 2020 and 19th August 2021."*

22. No reference is made to the claim that the Applicant was targeted because he had asked questions about his brothers and that the arrest warrants were trumped up. Having identified the above as the material facts, the First Respondent proceeds to set out its credibility assessment and findings noting that it had taken into account the fact that there is COI that shows that there is hostility towards members of the LGBTQIA+ community in Zimbabwe.

23. The first adverse credibility finding is recorded at paragraph 4.4 as follows:

"[4.4] At the appeal hearing the Tribunal raised the section 35 interview with the appellant where he had stated the following in response to a question asking him to give his reasons for seeking protection in Ireland: 'So, on 31 July 2019 my brothers were picked up by the police. I didn't know where they were taken. My first reaction was to go to the central police in town.' The appellant was asked why, in his account to his legal representative earlier in the appeal hearing, he had repeatedly stated that his mother had phoned him and told him directly that his brothers had been taken to the Central Police Station and that he had always known where they had been taken. The appellant responded that things had been 'fuzzy' in his head at the time of the section 35 interview but that his memory of material events had become clearer by the time of the appeal hearing. Looking at the case in the round, the Tribunal does not accept that a reasonable explanation has been offered for the inconsistency in the appellant's account and finds the inconsistency to be undermining of his credibility."

24. The second adverse credibility finding was based on the arrest warrants which had been presented. It is recorded in the decision as follows [paragraph 4.5 to 4.9]:

[4.5] At the appeal hearing the Presenting Officer raised the arrest warrants with the appellant. First, a number of points were put to the appellant in relation to the warrant dated 31st July 2019, which was allegedly left at the appellant's house on 5th August 2019. The appellant agreed that, on its face, the warrant was issued by a magistrate in Hwange in Matabeleland North, which is some 330km from Bulawayo. He agreed that he had no connection to Hwange and had never been there. He agreed that the warrant, on its face, stated that he had failed to answer charge in a court in Hwange on 24th July 2019 for an offence contrary to s.73 of the Criminal Law (Codification and Reform) Act, which he said he understood to be an accusation of sodomy. He agreed that he had never received a summons to attend a court in Hwange on 24th July 2019. He agreed that it was odd that the warrant was left with his mother on 5th August 2019 even though he was not in the house at the time and therefore the arrest warrant had not been executed. When asked if he thought that the warrant might not be genuine and that it might be some sort of prank, he said the thought had crossed his mind but the fact that his brothers had been taken on 31st July 2019 and had not been heard of since meant that it was no joke.

[4.6] The appellant was next asked about the warrant dated 22nd December 2020. He agreed that, as with the warrant dated 31st July 2019, on its face it concerned an alleged failure by the appellant to appear in a court in Hwange. Specifically it alleged he had failed to appear there on 22nd December 2020 to face a charge of 'public violence'. He agreed that it was odd that he would face such a charge in circumstances where he had left Zimbabwe on 5th August 2019. He agreed that, although the template for the warrant was exactly the same basic template as the warrant stamped 31st July 2019, the entry next to 'Crime Reg. No' was inconsistent, in form, with the entry against the same line on the 31st July 2019 warrant. He said he could not comment on the apparent inconsistency. He agreed that it was odd that the warrant was left with his mother in December 2020 even though he was not in the house at the time and therefore the arrest warrant had not been executed.

[4.7] The appellant was next asked about the warrant dated 19th August 2021. He agreed that, as with the other two warrants, on its face it concerned an alleged failure by the appellant to appear in a court in Hwange. Specifically it alleged he had failed to appear there on 21st August 2021 to face a charge of 'disorderly conduct in a public place'. He agreed that it was odd that he would face such a charge in circumstances where he had left Zimbabwe on 5th August 2019. He agreed that, although the template for the warrant was exactly the same basic template as the warrant stamped 31st July 2019, the entry next to 'Crime Reg. No' was inconsistent, in form, with the entry against the same line on the 31st July 2019 warrant. He said he could not comment on the apparent inconsistency. He agreed that it was odd that the warrant -was left with his mother in August 2021 even though he was not in the house at the time and therefore the arrest warrant had not been executed.

[4.8] The Tribunal questioned the appellant further in relation to the warrant dated 31st July 2019. The appellant was asked whether he could say anything about the fact that, given the date stamped on that warrant, together with the fact that his brothers were allegedly arrested on 31st July 2019, the police had apparently waited until 5th August 2019 to come and look for him and had not sought to apprehend him or detain him even though, on his own account, he was at the Central Police Station for lengthy periods of time on 31st July 2019, 1st August 2019, 2nd August 2019, 3rd August 2019 and 4th August 2019. The appellant said he could offer no comment concerning why events unfolded as they did.

[4.9] The Tribunal has considered the warrants submitted by the appellant. They are extremely basic in form. The same, basic, typed template is used for each and the only distinction between each is the different hand-written entries, together with different date stamps. The warrants have no security features and would be very easy to produce by anyone with access to a word processor, a printer and a pen. The warrants lack coherence in that, on the appellant's own admission, they bear no relation, geographically, to the appellant's whereabouts when he was in Zimbabwe. A further difficulty with the warrants is the fact that they were left with the appellant's mother on each occasion that an effort was apparently made to execute them, notwithstanding that the appellant was not present at the family home on any of the three occasions. The warrants are written in English and bear a rudimentary resemblance, on their face, to 'bench warrants' of the kind issued in countries with a common law tradition. The Tribunal finds it to be implausible that arrest warrants were simply left at the appellant's home on three different occasions even though he was not there on any of the three occasions. In arriving at this finding, the Tribunal notes that the warrants themselves distinguish between the concept of being summoned to appear in court and a direction to the bearer of a warrant to arrest the person named in the warrant. In other words, the warrants themselves suggest a distinction between a summons that might be served on, or left for, the summoned person and an arrest warrant that is only given effect to at the point of arrest of the person named in the warrant. For all of the aforementioned reasons, the Tribunal rejects the three warrants as reliable evidence in support of the appellant's claim for protection."

25. Finally, the First Respondent identifies [paragraph 4.10] a difficulty with the core of the Applicant's claim in that it is of a second-hand nature as he was not present for any of the alleged material events. The First Respondent found *"a vagueness and lack of specificity in the core of the appellant's claim arising from the second had nature of key evidence in the claim."*

26. While the Tribunal expressly states that the warrants are not reliable evidence in support of the claim at paragraph 4.9, it goes further in paragraph 4.11 in referring to the findings with regard to the warrants and vagueness as to core elements of the claim based on the second-hand nature of the evidence as "*adverse credibility findings*" which looking at the case in the round, and "*having regard to the cumulative impact of the adverse credibility findings*" caused

the First Named Respondent to reject the material facts of the Applicant's claim as not having been established on the balance of probabilities.

27. Having thus rejected the material facts of the Applicant's claim as characterised by the First Respondent at paragraph 4.2, the First Respondent proceeded to consider the question of future risk on the basis that the only accepted fact was that the Applicant was from Bulawayo in Zimbabwe. The First Respondent determined concisely:

> *"[5.2] The Tribunal finds insufficient support for a finding that, purely on the basis that he is from Bulawayo, there is a reasonable chance that if he were to be returned to Zimbabwe the appellant would face a well-founded fear of persecution."*

28. This finding was repeated in respect of the claim for subsidiary protection, where the First Respondent stated that:

> *"the Tribunal finds insufficient support for a finding that, purely on the basis that he is form Bulawayo, substantial grounds have been shown that the appellant faces a real risk of torture or inhuman or degrading treatment or punishment in Zimbabwe."*

29. Accordingly, the First Respondent affirmed the recommendation made by the IPO that the Applicant should be given neither a refugee declaration nor a subsidiary protection declaration.

PROCEDURAL HISTORY AND ISSUES IN PROCEEDINGS

30. The impugned decision was notified on or about the 31st of March, 2022. The within proceedings were filed in the Central Office on the 21st of April, 2022.

31. Leave was granted by the High Court (Meenan J.) on the 16th of May, 2022. In the Statement of Grounds on foot of which leave was granted the Applicant challenges the credibility findings of the First Respondent, *inter alia*, on the grounds that the reasons for rejecting the authenticity of the warrants were irrational and/or failed to relate to the substantive basis for the Applicant's claim and/or insofar as the finding at [paragraph 4.4] was concerned

related to a peripheral matter. It was further contended that there had been a failure to consider the possible exposure of the Applicant to future persecution in the light of known conditions pertaining in Zimbabwe and that the decision is vitiated by error of fact insofar as reliance was placed on the failure to bring any of the arrest warrants with him, when two did not exist at the time the Applicant fled.

32. The Statement of Opposition was filed on the 15th of July, 2022. In opposing the proceedings it is pleaded, *inter alia*, that the findings of the First Respondent in respect of the purported arrest warrants were based on a close study of the warrants in question and on a fair and proper analysis of same. It is pleaded that the First Respondent engaged in the necessary task of assessing the probative value of the purported arrest warrants in a clear and rational manner and denied that the findings made by the First Respondent related to a peripheral matter. It is pleaded that the Applicant is, in effect, asking this Honourable Court to substitute its own view regarding the documentary evidence submitted to the First Respondent and that the impugned findings were made within jurisdiction.

33. As regards the assessment of future risk, it is pleaded that the First Respondent considered the possible risk to the Applicant on return to Zimbabwe, *inter alia*, at paragraphs [5] to [8] of its decision.

34. As for the asserted error of fact, the First Respondent pleads that when stating at paragraph 2.10 of its decision that the Applicant did not bring any of the arrest warrants with him because he did not want to be found with anything suspicious the Tribunal was reciting the Applicant's evidence rather than making an adverse finding. Further, it is contended that there was no error of fact in the said statement as it was a reflection of the Applicant's claim which is that there were at least two warrants in existence at the time of his departure from Zimbabwe — at least one warrant in respect of his brothers and one in respect of himself. Thus, to state that he did not bring any of the arrest warrants was a correct statement of fact.

COUNTRY OF ORIGIN INFORMATION

35. The COI referenced as having been considered in the decision-making process in this case paints a damning picture. The Freedom House Zimbabwe Report for 2020 states:

"Due process protections stipulated in the constitution are not enforced. Police and other security personnel frequently ignore basic rights regarding detention, searches, and seizures, and accused persons are often held and interrogated for hours without legal counsel or explanation of the reason for their arrest. Perceived opponents of the regime faced arbitrary arrests and detentions throughout 2019… Security forces backed by ZANU-PF have long engaged in acts of extralegal violence, including against opposition supporters, and impunity is the norm for such abuses. Detainees and protesters often face police brutality, sometimes resulting in death. The security crackdown associated with the January 2019 protests included 17 fatalities and hundreds of cases of torture or other forms of egregious physical abuse."

36. The US Country Report on Human Rights Practices for Zimbabwe for 2020 states:

"Significant human rights issues included: unlawful or arbitrary killings of civilians by security forces; torture and arbitrary detention by security forces; cases of cruel, inhuman, or degrading treatment or punishment; harsh and life-threatening prison conditions; political prisoners or detainees; arbitrary or unlawful interference with privacy; serious problems with the independence of the judiciary; serious government restrictions on free expression, press, and the internet, including violence, threats of violence, or unjustified arrests or prosecutions against journalists, censorship, site blocking, and the existence of criminal libel laws; substantial interference with the rights of peaceful assembly and freedom of association; restrictions on freedom of movement; restrictions on political participation; widespread acts of corruption; lack of investigation of and accountability for violence against women; crimes involving violence or threats of violence targeting women and girls, and the existence of laws criminalizing consensual same-sex sexual conduct between adults, although not enforced. Impunity remained a problem. The government took very few steps to identify or investigate officials who committed human rights abuses, and there were no reported arrests or prosecutions of such persons."

37. It continues:

"Impunity was a significant problem in the security forces and the civilian authorities who oversee them, including police, military, and intelligence officers. To date, no one has answered for disappearances, civilian deaths, rape, abduction, or torture allegations from the 1980s to as recently as November. Security forces were firmly under the control of the ruling party and were often directed against the political opposition."

38. And:

"Arbitrary Arrest: The government regularly used arbitrary arrest and detention as tools of intimidation and harassment, especially against political activists, civil society members, journalists, attorneys, and ordinary citizens asserting their rights."

39. Whereas the Gay and Lesbian Community of Zimbabwe (GALZ) reported in 2020:

"its membership had more than doubled since 2015. The group noted a decline in the arrest and detention of LGBTI community members but reported half of gay men had been physically assaulted and 64 percent had been disowned by their families. Of lesbians, 27 percent reported harassment, assault, or disownment."

40. The Australian Department of Foreign Affairs and Trade Country Report for Zimbabwe records in 2019 that:

"Article 78(3) of the Constitution specifically prohibits persons of the same sex from marrying each other. The Constitution does not prohibit discrimination based on sexual orientation or gender identity. Section 73 of the CLCRA criminalises as 'sodomy' anal sexual intercourse between male persons, or 'any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act'. Sodomy is punishable by up to a year's imprisonment, a fine of up to USD5,000, or both. Section 73 does not distinguish between consensual and non-consensual cases, meaning that the media occasionally misreports some cases of male-on-male or male-on-child rape as 'homosexual sex'. .... actual prosecutions in relation to consensual same-sex sexual activities were very rare. In many cases where police

did arrest LGBTI (lesbian, gay, bisexual, transgender or intersex) individuals, the charges were usually unclear from the outset and, at most, police would charge individuals with low-level misdemeanours such as loitering, indecency, or public order statutes."

41. As regards the Applicant's tribe, the Ndebele, the report states:

"DFAT assesses that Ndebele face a moderate level of official discrimination in that systemic marginalisation makes them far less likely than Shona to be able to achieve senior positions in state institutions, despite the lack of any official policy of discrimination. Societal discrimination is unlikely to include violence and is less likely to occur in areas in which Ndebele are the majority population."

DISCUSSION AND DECISION

42. I propose to address each of the grounds of challenge relating to credibility findings, assessment of future risk and error of fact in turn.

Credibility Findings

43. It appears from the terms of the impugned decision that the adverse credibility findings in this case were based "*cumulatively*" on:

1. The Applicant's statement during interview that he did not know where his brothers were taken which contrasts with his evidence before the Tribunal that his mother said they had been taken to the Central Police Station and his explanation when this inconsistency was pointed out to him that he was "*fuzzy*" at the time of the s. 35 interview;
2. The absence of security features on the warrants, the lack of coherence noting that they were all purportedly issued by a magistrate in Hwange, some 330 km from Bulawayo and two related to a failure to appear to face a charge of public violence on the 22nd of December, 2020 and a charge of disorderly conduct on the 19th of August, 2021, when the Applicant was no longer living in Zimbabwe and his inability to comment and the

implausibility that arrest warrants were simply left at his home on three different occasions, even though he was not there on any of the said occasions,;

3. The police waiting until the 5th of August, 2019 to come to his house to arrest him when he had been at the police station in previous days.

44. The legal submissions advanced on behalf of the Applicant are succinct. It is contended that the manner in which the First Respondent assessed credibility by reference to the three arrest warrants failed to accord with the criteria set out in the seminal decision of Cooke J. in *I.R. v. MJELR & Refugee Appeals Tribunal* [2009] IEHC 510, [2015] 4 I.R. 144. It is further contended as regards the adverse finding in relation to the different accounts given as to why the Applicant went to the Central Police Station, that these findings were based on a peripheral matter which ought not properly ground a negative credibility finding in reliance on *I.E. v MJE & Anor* [2016] IEHC 85.

45. On behalf of the Respondents, it is submitted that the credibility findings were properly made and fall within the jurisdiction of the First Respondent.

46. The Applicant has not denied that he gave different accounts during the hearing and at interview as to his knowledge that his brothers were taken to the Central Station. That being the case it appears that the Applicant changed his narrative relating to his state of knowledge in respect of the circumstances surrounding the disappearance of his brothers between his interview and the hearing before the Tribunal. For the Applicant to say that his recollection was "*fuzzy*" at the time of the interview was no explanation for his giving a positive account at that time, as opposed to claiming at that time to be not clear on the sequence of events. It seems to me that the Tribunal was quite entitled to find the different accounts as to why the Applicant went to the Central Police Station as undermining of the Applicant's credibility. As Humphreys J. held in *R.A. v R.A.T.* [2015] IEHC 686 at para. 12:

> "*It is well established that the weight to be assigned to particular matters before the Tribunal Member is a matter for that member... In my view the analysis of the alleged contradictory or incomplete account given by the applicant is well within the jurisdiction of the Tribunal Member.*"

47. Nor do I consider this element of the claim to be "*peripheral*" and to be improperly relied upon to ground an adverse credibility finding as has been contended on behalf of the Applicant. The details in relation to the reason for the Applicant's attendance at the Central Station relate to a core part of the Applicant's claim. The Tribunal was entitled to reject the Applicant's evidence as lacking credibility on the basis of a contradiction of this nature. This is clear from a series of judgments including the judgment of Humphreys J. in *I.E. v M.J.E.* [2016] IEHC 85 where he stated at para. 30:

> "*I take the view that the tribunal is entitled, if it has reason to do so, to reject the credibility of an applicant and may do so on the basis of any element of the applicant's evidence that it considers to be fundamentally undermining of the applicant's credibility. There is no general obligation either in law or in logic requiring a decision-maker to make such credibility findings only on the basis of difficulties with the central claim being made. Indeed, the implications of that contention are clearly unacceptable. Such an approach would allow an applicant to dissemble with impunity on any matter other than the central allegation of persecution, which may not be capable of verification, and then complain if his or her credibility is called into question.*"

48. Similarly, in *S.A. (Ghana and South Africa) v I.P.A.T and M.J.E.* [2018] IEHC 97, Humphreys J. held at para. 8:

> "*...if an applicant gives incredible testimony on any matter it is open to a decision-maker to draw inferences of a lack of credibility generally.*"

49. Accordingly, I agree with the submission on behalf of the First Respondent that the finding made with regard to the different accounts giving rise to a credibility issue was a perfectly rational finding and was a matter for the First Respondent and was properly within the province of the First Respondent. This finding at paragraph 4.4 is the only finding actually referred to as going directly to credibility in the terms of the First Respondent's decision.

50. In arriving at conclusions on credibility with regard to the warrants and the action of the men in coming to the Applicant's house, it is contended on behalf of the Applicant that the

Tribunal proceeded as if the Applicant were relying on the warrants as legitimate warrants, properly issued and as if the Applicant bore an onus to establish that the warrants were authentic if they were to be relied upon in evidence but had instead produced warrants which appeared to be false, thereby undermining his credibility. In approaching the arrest warrants in this way, it is contended that the Tribunal ignores the central premise of the Applicant's case.

51. In their submissions, the Respondents stand over the Tribunal's credibility findings and refer to the Applicant's claim that his brothers had been arrested overtly by the police who then persistently denied knowledge of their being detained when the Applicant repeatedly presented himself at the local police station. It is submitted that objectively that position was either: (a) incongruous given the Applicant's evidence (reflected in paragraph 2.5 of the Tribunal decision) that the persons who arrested the Applicant's brothers openly left a warrant in connection with their arrest with the Applicant's mother; or (b) consistent with the persons who seized the Applicant's brothers not being police officers at all.

52. I agree with the submission on behalf of the Applicant that it does not appear to ever have been the Applicant's case that the warrants were authentic. During interview he freely admitted that he himself had harboured doubts in relation to their provenance and he accepted that they are of dubious authenticity and relied on this fact as a basis for his own concerns. Rather than contending that the arrest warrants were legitimate, instead, it was essentially the Applicant's case that the police act with impunity in Zimbabwe and that the warrants were a set up. Indeed, it seems clear from his evidence that the Applicant was not sure that the individuals who came in plain clothes and left the warrants with his mother were in fact police, although they said they were. While he suggested during interview that an explanation for their pursuit of him might have been because they thought he was gay too, he repeatedly said throughout the questionnaire and interview process that he believed the reason he was being pursued was because he had been asking questions about his brothers' whereabouts. This claim as made by the Applicant is not reflected in the detail of the considerations by the First Respondent.

53. In *I.R.* Cooke J. found the process engaged in by the Tribunal in assessing personal credibility without reference to relevant documents which had been submitted in support of the application to be flawed as follows (p. 158):

"[28] 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 decision maker 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.

[29] 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."

54. In *I.R.*, the High Court quashed the Tribunal decision for one reason, namely that the Tribunal member erred in failing to consider all of the relevant evidence going to credibility because no mention was made in its decision and no regard was apparently had to a number of pieces of documentary evidence which the applicant had produced and which appeared to the court to be directly pertinent to his credibility.

55. This case is clearly different to *I.R.* in that there has been no identified failure to consider documents. However, it seems to me that a failure to consider the documents by reference to the claim made, which is that the documents were trumped up to provide a false pretext for pursuing the Applicant, requires to be considered. As I read it, *I.R.* is authority for the proposition that the assessment of credibility must be made by reference to the full picture that emerged from the available evidence and information, taken as a whole, when rationally analysed and fairly weighed.

56. I have carefully reflected on whether the failure of the Tribunal to set out in its decision that a core part of the Applicant's case was that he was being pursued not because he was gay (or the police believed him to be), albeit they ostensibly asserted this as a reason by way of excuse for targeting him, but because he had been asking questions about his brothers' whereabouts undermines the process leading to an adverse credibility finding bearing in mind that it was part of the Applicant's case that he himself was dubious about the authenticity or legitimacy of the warrants. Accordingly, the case the Applicant made was that his brothers were gay and had been arrested and disappeared and that he believed he was targeted by police on a trumped-up basis because he had been asking questions about his brothers' whereabouts.

57. I accept that in circumstances where the Applicant never relied on the documents as "*authentic*" but rather indicated that the fact that the documents were suspicious fuelled his concerns, it would be unfair for the First Respondent to proceed as if the claim was that the Applicant was being pursued for being gay and these documents were evidence that this was so. This was not the case the Applicant made. Just as the Court in *I.R.* found that a finding of lack of credibility must be based on correct facts, it seems to me that it must also be made by reference to the claim actually made and not a distortion of that claim.

58. There is some suggestion in the First Respondent's considerations at paragraph 4.9 where reference is made to the template used and the absence of security features that the First Respondent harboured concerns as to the authenticity of the arrest warrants. While this concern is present, I am satisfied from my reading of the decision that it did not ground an adverse credibility finding. The finding actually made in paragraph 4.9 was that the three warrants were rejected as reliable evidence in support of the Applicant's claim for protection, not that they undermined the Applicant's credibility because he asserted them to be authentic when this seemed unlikely.

59. The First Respondent proceeds in paragraph 4.9 in express terms to find it implausible that the arrest warrants were simply left at the house even though the Applicant was not there. In arriving at this conclusion, the First Respondent distinguishes between arrest warrants and summons to appear in court, the point being that an arrest warrant is only given effect to at the point of arrest and would not be left at the house in the absence of the Applicant. This is a conclusion which it was open to the Tribunal to arrive at regardless of whether the warrants were "*trumped up*", authentic or falsified.

60. There is considerable and persuasive force to the Respondents' submissions that whether authentic or not, it was not plausible that three warrants would be left as evidence by the police if they were engaged in covert operations. I am satisfied that adverse credibility findings relating to the arrest warrants were properly open to the First Respondent for so long as those findings are made having regard to the claim made by the Applicant. Were the First Respondent to base its conclusions as to the Applicant's credibility on the fact that the warrants may not be authentic, this could be problematic when he never contended that they were. Where, however, the First Respondent bases its conclusion as to credibility on the implausibility of three arrest warrants being left at the house in his absence, as I am satisfied it did in this case, then this is a conclusion which it seems to me is open to the First Respondent having regard to the claim made.

61. In this case the First Respondent refers to "*cumulative impact*" of its *"adverse credibility findings set out above".* Insofar as the authenticity of the arrest warrants was considered, it was not couched as undermining the Applicant's credibility. Just as it was quite properly open to the First Respondent to draw adverse conclusions as to credibility based on an inconsistency in the account given by the Applicant, similarly, I consider it was open to the First Respondent to draw adverse conclusions as to plausibility from the fact that it was claimed that arrest warrants were repeatedly left at the house in the Applicant's absence.

62. In circumstances where the First Respondent, having identified concerns which might bear on the authenticity of the arrest warrants, concludes that they are not therefore reliable evidence in support of the claim but does not tie his findings as to the credibility of the Applicant to this conclusion, then it seems to me that it cannot be said that a view that arrest

warrants might be in some-way bogus was weighed in favour or against the Applicant. Instead, it is clear that the First Respondent quite properly treats them as "*unreliable*" evidence.

63. Finally, I have not been persuaded by any submission made on behalf of the Applicant that there is a flaw in the Tribunal's reasoning that there is a lack of plausibility flowing from a claim that the police waited until the 5th of August, 2019 to come to his house to arrest the Applicant when he had been at the police station in previous days and could have been arrested at any time if the police wished to do so.

64. In *I.R.,* the Court cautioned against 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. In this matter before me, the cumulative impact of the First Respondent's adverse credibility findings were derived from a careful assessment of the probative value of the purported arrest warrants, the inconsistency arising from the account given regarding why the Applicant went to the Central Police station, the plausibility of purported arrest warrants being left at the house in his absence and the police waiting to seek to arrest him until they attended at his home on the 5th of August, 2019 when he had been at the police station every day over the previous number of days.

65. It is not open to me to substitute my own view regarding the documentary evidence submitted to the First Respondent, even if it were different or would have been expressed differently. I should not intervene to quash a decision on the basis of credibility findings made by the First Respondent so long as I have not been persuaded that the conclusions were legally flawed whether because , arrived at using an unfair process or based on incorrect facts or tainted by conjecture or speculation or that the reasons drawn from such facts were not cogent or bore no legitimate connection to the adverse finding to such an extent as to vitiate the decision or otherwise. I have not been so persuaded.

Assessment of Future Risk

66. As regards the assessment of future risk, it is clear from the decision that the First Respondent disposes of the appeal on the basis that the only fact established by the Applicant is that he is from Bulawayo. Flowing from the Tribunal's characterisation of the material parts of the claim, the First Respondent rejected the Applicant's claim, on credibility grounds, that

his brothers were arrested by unknown men for being gay; that unknown men called to arrest him for being gay even though he was in fact straight and that they have continued to call to his house even since he left Zimbabwe. These were the core elements of his claim.

67. In *M.A.M.A. v. RAT* [2011] 2 I.R. 729 Cooke J. was confronted with whether there had been a failure on the part of the Tribunal to consider future risk having found that the applicant's account of past persecution was not credible. Having considered arguments advanced in reliance on the English Court of Appeal decision in *Karanakaran v. Home Secretary* [2000] 3 All ER 449 which had been considered on a number of occasions by the High Court in this jurisdiction and notably by Peart J. in his judgment in *Da Silveira v. Refugee Appeals Tribunal* [2004] IEHC 436, (Unreported, High Court, Peart J, 9th July, 2004). Cooke J. adopted the statement of Peart J. in addressing the question as to the standard by which evidence of past persecution and possible future persecution must be judged by the First Respondent at p. 27 of his judgment in *Da Silveira* as follows:-

> *"The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that, owing to such well-founded fear for a Convention reason [the applicant] is outside the country of nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."*

68. To this Cooke J. added (at paras. 17 and 18):

> *"[17] This court accepts as correct the approach to the standard of proof outlined in this case law. The sole fact that 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.

[18] It must be borne in mind that in making an asylum claim there is a basic onus of establishing the fundamental elements of a claim which rests with the applicant even if the examination of the claim is strongly investigative in character on the part of the asylum authority and is to be carried out in cooperation with the applicant. Furthermore, one of the crucial elements in the definition of "refugee" as stated in s 2 of the Act of 1996 based upon article 1A of the Geneva Convention, is that the asylum seeker "is outside the country of his or her nationality" owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality, for example) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment."

69. He proceeded at para. 19 of his judgment to confirm that the issue in that case turned upon a consideration of the extent of the rejection of the applicant's story as incredible in the appeal decision. In that case, as here, there had been a square rejection of all of the factual

elements relating to the attacks, violence, interrogation and imprisonment claimed to have been suffered by the applicant as well as his version of his escape and travel to this country. Counsel for the applicant argued, however, that there was no express finding in the appeal decision that the applicant was not from Sudan and not of the Berti tribe in Darfur. Cooke J. concluded, having regard to the arguable familiarity of the applicant with the geography of part of that region and the absence of any element suggesting where else the applicant might be from apart from Sudan, that the case before him was an instance in which the obligation to consider the possible risk of future persecution on repatriation arose. He remitted the matter for consideration of whether, having regard to the possibility that the applicant may be a member of the Berti ethnic group from northern Darfur, there was any basis in current country of origin information relating to conditions in that country for considering that he may face a real chance of future persecution if repatriated to Khartoum.

70. Similarly, in *O.N. v. RAT* [2017] IEHC 55 O'Regan J. also addressed the obligation to consider future risk in the case of a Zimbabwean national who had been disbelieved as to his account of past persecution. From para. 14 to 16 of her judgment she stated:

> *"14. It seems to me clear that although the Tribunal was not in a position to verify the authenticity of the documentation, nevertheless having regard to the inconsistencies in the appellant's account the Tribunal found that the documentation was of little value in corroborating his version of events and therefore it seems to me this is not the case in which the documentation was not considered at all.*
>
> *15. In my view the fact that the Tribunal found the documentation to be of little value, as opposed to no value at all in corroborating the appellant's version of events is such that the documentation together with the fact that it was found that the applicant was a Zimbabwean national comprised two elements of the applicant's claim, which although remain insufficient to establish a past persecution, should nevertheless be considered in the context of a risk of future persecution and in this regard I refer to the judgment of Peart J. in De Silveria v. Refugee Appeals Tribunal [2004] IEHC 436, (Unreported, High Court, Peart J., 9th July 2004) and the judgment of Cooke J. in M.A.M.A. v. Refugee Appeals Tribunal & Ors. [2011] IEHC 147. The significant portion of the judgment in M.A.M.A. (para. 17) is already quoted by me in para. 54 of my earlier judgment in this matter and a portion thereof of particular significance is as follows:—*

"The sole fact that particular facts are 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 repatriation."

16. It is not for the High Court in a judicial review application to decide as to the precise impact of the finding of lack of credibility or indeed the precise impact of the finding "to be of little value in corroborating the applicant's version of events" but rather this is a decision to be made by the RAT. 17. I am of the view therefore that the decision impugned herein does not consider the risk of future persecution based upon the fact that the Tribunal was satisfied that the applicant was Zimbabwean and based upon whatever portion of the documentation that was of help (albeit little) to the applicant constituted an error of law on the part of the Tribunal."

71. It seems to me that this case falls to be distinguished from *I.R.* and *O.N*. Firstly, the argument urged on me during the hearing on behalf of the Applicant was that the First Respondent should have considered future risk of harm referable to the fact that the Applicant is a member of the Ndebele tribe (with resonances with the case advanced on behalf of the Applicant in *M.A.M.A*) which tribe was subject to a form of ethnic cleansing historically and in respect of whom COI suggests there is some ongoing discrimination. Quite apart from the fact that no complaint was made in the Statement of Grounds that there had been a failure to assess future risk on this basis, it is quite clear that it never formed any part of the Applicant's claim that he was at risk of persecution or serious harm because of his ethnicity. A future assessment of risk is linked to accepted facts presented on behalf of the Applicant. In the absence of any claimed risk of harm on grounds of ethnicity past or future, the First Respondent cannot properly be faulted for not considering it.

72. Secondly, this case is distinguishable on the basis the First Respondent did not ignore the assessment of future risk. It proceeded to address this question by reference to its characterisation of the Applicant's claim, all material elements of which had been rejected, with the exception of the fact that the Applicant was a national of Zimbabwe. It was not part of the Applicant's claim that he was at risk because he was a national of Zimbabwe. Where the Tribunal rejects all material parts of a claim, I am satisfied that there was no basis upon which the Tribunal could properly assess future risk in this case. There was no accepted "*island*

of fact" by reference to which such an assessment could be conducted. I note that in *O.N.*, the Court found that it was necessary to consider documentary evidence to which "*little*" weight was attached in the consideration of past persecution, again in the assessment of future risk. This case differs from *O.N.* in that the First Respondent in this case did not attach any weight to the warrants but rejected them outright as "*unreliable evidence in support of the applicant's claim for protection*". The conclusion clearly expressed was that the evidence could not be relied upon whether the claim for protection related to past or future harm.

Error of Fact

73. The reference at paragraph [2.10] of the decision to the fact that the Applicant did not bring arrest warrants with him because he did not want to be found with anything suspicious was identified on his behalf as an error of fact which vitiates the decision. Although the Applicant does not deny on affidavit that he said during the hearing before the First Respondent that he did not bring any of the arrest warrants with him because he did not want to be found with anything suspicious, it is nonetheless submitted on his behalf that two of the warrants only came into existence after he left Zimbabwe and therefore could not have been brought with him.

74. In response, it is contended on behalf of the Respondents that there were in fact two warrants in existence when the Applicant left Zimbabwe on the basis of his claim that a warrant had also been left in respect of the arrest of his two brothers.

75. I am satisfied that an evidential basis for this ground of challenge has not been laid in that it is not disputed by the Applicant in evidence that he told the First Respondent that he did not bring the warrants with him to avoid being found with anything suspicious on him. If this is what he told the First Respondent (and I repeat that it has not been denied in the proper form), then no error of fact has been recorded. Furthermore, it was not erroneous for the First Tribunal to query why he had not brought the warrants with him when there were in fact two warrants in existence, on the basis of the facts claimed, when the Applicant left Zimbabwe. I am satisfied that this ground of challenge is entirely without merit.

CONCLUSION

76. For the reasons set out above, I have concluded that the Applicant is not entitled to the relief sought.