THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 28
RECORD NO: 2019/454/JR

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

MM(ZIMBABWE)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on the 12th day of January, 2021.

General

1. The Applicant is a national of Zimbabwe who applied for international protection in the State on 16 September 2017. In the course of her application, she asserted that she was married twice as a child, at the ages of 9 and 13, to brothers who were members of ZANU-PF. She also asserted that she was the fourth wife of her second husband. The Applicant claimed that she entered into a lesbian relationship in 2016 which was discovered by her partner's uncle in 2017. Arising from this, she was subjected to death threats from her own family and community. She stated that she fled from Zimbabwe with her partner to South Africa. She asserted that she was unable to return to Zimbabwe as her life would be in danger.

2. On 25 April 2019, an International Protection Officer (hereinafter referred to as an "IPO") recommended, pursuant to s. 39(3) of the International Protection Act 2015 (hereinafter referred to as "the 2015 Act"), that the Applicant should not be given a refugee or subsidiary protection declaration. She found that the Applicant lacked credibility. The IPO expressly rejected the claims that the Applicant had been married twice as a child; that she had entered into lesbian relationships in Zimbabwe; that she had been caught engaging in lesbian acts; and, that she was threatened and forced to leave Zimbabwe.

3. On 23 May 2019, the Second Respondent refused the Applicant permission to remain in the State pursuant to s. 49(4) of the 2015 Act.

Processing of the Applicant's Claim

4. Several affidavits, filed on behalf of the Respondents, set out what occurred regarding the processing of the Applicant's claim. Mr Luke Brennan, who is an IPO, arranged an interview of the Applicant pursuant to s. 35 of the 2015 Act, to take place on 28 January 2019. This arrangement had to be rescheduled, however. Mr Kieffer Corrigan, who also was an IPO and a clerical officer working in the Case Processing Support – Interview Scheduling & Arrangements Unit of the International Protection Office, arranged another interview of the Applicant, pursuant to s. 35 of the 2015 Act, for 31 January 2019.

5. Mr Ciaran McCarthy, who is a panel member engaged by the Second Respondent pursuant to s. 76(1) of the 2015 Act, was assigned to conduct this interview, prepare a s.

35(12) report, assist in the processing of the Applicant's application and prepare a draft report for the purpose of s. 39 of the 2015 Act.

6. Ms Ciara Roche, who is also an IPO, was assigned as the case-worker to the Applicant's file on 28 February 2019. As such, her role was to consider the Applicant's claim; determine whether the Applicant was entitled to a declaration of refugee status or subsidiary protection; and make the final recommendation in the Applicant' case pursuant to s. 39(3) of the 2015 Act.

7. On 24 April 2019, Mr McCarthy completed his draft of the s. 39 report. On 25 April, Ms Roche completed the s. 39 report. Ms Roche recommended that the Applicant not be granted a refugee or subsidiary protection declaration pursuant to s. 39(3) of the 2015 Act.

8. Mr McCarthy created a record of the s. 35 interview, whilst interviewing the Applicant, on 31 January 2019, as required pursuant to s. 35(12) of the 2015 Act. On 24 April 2019, Mr McCarthy completed a document which made recommendations to Ms Roche regarding s. 35(13) of the 2015 Act. On 25 April 2019, Ms Roche completed a document reflecting her opinion regarding s. 35(13) of the 2015 Act which differed slightly to that prepared by Mr McCarthy in terms of information which she considered relevant to the determination of whether the Applicant should be granted permission to remain pursuant to s. 49 of the 2015 Act.

9. An affidavit of Paraic O'Carroll, Assistant Principal Officer in the International Protection Office, averred to the general system which applies regarding the processing of international protection claims. He stated that each application is assigned to an IPO from the Case Processing Unit, usually after a s. 35 interview has been conducted. He also averred that a panel member may seek guidance from an IPO at any time and if such assistance is sought, the IPO who provided the assistance is assigned the case unless that is not possible.

10. On 23 May 2019, Ms Ruth Byrne, who is another IPO, determined on behalf of the Second Respondent, that the Applicant should not be given permission to remain within the State pursuant to s. 49(4) of the 2015 Act.

11. Leave to apply by way of Judicial Review was granted by the High Court on 22 July 2019 which permitted the Applicant to seek orders of Certiorari of the recommendation of the First Respondent refusing the Applicant a declaration of refugee or subsidiary protection pursuant to s. 39(3) of the 2015 Act, and the decision of the Second Respondent refusing the Applicant permission to remain pursuant to s. 49(4) of the 2015 Act.

Grounds of Judicial Review

12. The Applicant seeks these orders of Certiorari on the following grounds, having abandoned other grounds pleaded in the Statement of Grounds in light of the recent decision of the Supreme Court in *IX v. CIPO & Ors* [2020] IESC 44:-

vi) The Respondents acted in breach of the mandatory duty under statute to interview the Applicant pursuant to section 35(13)(b) of the 2015 Act and thereby failed to conduct a personal interview with the Applicant so as to address anything that would be relevant to the decision under section 49 of the 2015 Act.

vii) The decision under section 49 of the 2015 Act is unlawful by reason of it having been based on a prior unlawful recommendation of the first Respondent.

viii) The decision to refuse the Applicant permission to reside in the State was unlawful by reason of no proper reason or rationale having been provided for concluding that the State's non-refoulement obligations would not be breached by returning the Applicant to her country of origin.

ix) The failure of the first Respondent to make a decision on a core element of the application (the Applicant's sexual orientation) renders the decision/s invalid.

x) The failure of the first Respondent to comply with the requirement of s. 35(13) in the preparation of the s. 35 report and /or the failure of the first Respondent to include in a separate part of the s. 35 report "anything that would in the opinion of the IPO, be relevant to the Minister's decision under s. 48 or s. 49 renders the s. 49 decision invalid. The last two documents attached to the s. 35 Report in this regard do not have the effect of remedying this defect.

xi) The impugned recommendation of the First Respondent dated 25 April 2019 is invalid in circumstances where the statutory scheme has not been followed. In particular the statutory scheme contemplates a single identified IPO directing the processing of an application, including, at least, that this IPO causes an interview to take place with a designated Panel Member and assistance from that Panel Member.

The 2015 Act

13. Part 4 of the 2015 Act provides for the "*Assessment of Applications for International Protection"*. Section 28 of the 2015 Act provides *inter alia*:-

"(1) An international protection officer shall, in co-operation with the applicant, assess the relevant elements of the application.

(4) The assessment by the international protection officer of an application… shall be carried out on an individual basis and shall take into account the [matters set out at (a)-(f)].

(5) In the assessment of an application, an international protection officer shall in the case of an applicant who was a child at the time of a relevant occurrence… [take account of certain matters]."

14. Part 5 of the 2015 Act provides for the "Examination of Applications at First Instance". Section 34(1) of the 2015 Act provides:-

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

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

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

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

Section 35 of the 2015 Act provides *inter alia*:-

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

(2) An applicant interviewed under subsection (1) shall, whenever necessary for he purpose of ensuring appropriate communication during a personal interview, be provided by the Minister or international protection officer with the services of an interpreter

(5) A personal interview shall-

(a) take place without the presence of family members of the applicant unless the international protection officer considers it necessary for an appropriate examination to have other family members present,…

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

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

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

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

(9) Subsection (8) shall not of itself operate to-

(a) prevent information relating to the application from being submitted to the international protection officer by or on behalf of the applicant,

(b) prevent the international protection officer from making a recommendation under section 39 in respect of the application, or

(c) adversely affect the recommendation referred to in paragraph (b).

(10) The applicant, the High Commissioner or any other person concerned may make representations in writing to the Minister in relation to any matter relevant to an examination of an application for international protection and the international protection officer shall take account of any such representations made before or during a personal interview.

(11) Subsection (10) shall not be construed as preventing the international protection officer from taking into account any representation made following a personal interview provided that such representations are made prior to the preparation of the report under section 39(1) in relation to the application.

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

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

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

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

15. Section 39 of the 2015 Act, provides:-

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

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

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

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

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

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

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

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

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

(b) the application should not be given a refugee declaration and should be given a subsidiary protection declaration; or

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

(4) Where a report under this section includes a recommendation of the international protection officer referred to in subsection (3)(c), the report may also include one or more of the following findings:

(a) that the applicant, in submitting his or her application and in presenting the grounds of his or her application in his or her preliminary interview or personal interview or at any time before the conclusion of the examination, has raised only issues that are not relevant or are of minimal relevance to his or her eligibility for international protection;

(b) that the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his or her claim to be eligible for international protection clearly unconvincing;

(c) that the applicant has failed without reasonable cause to make his or her application as soon as reasonably practicable having had opportunity to do so;

(d) that the applicant, for a reason referred to in section 32, is not in need of international protection;

(e) that the applicant's country of origin is a safe country of origin.

(5) Where a recommendation referred to in subsection (2)(b) cannot be made within 6 months of the date of the application, the Minister shall, upon request from the applicant, provide the applicant with information on the estimated time within which a recommendation may be made.

(6) The provision under subsection (5) by the Minister of an estimated time within which a recommendation may be made shall not of itself oblige the international protection officer to make a recommendation within that time.

16. Section 40 of the 2015 Act provides *inter alia*:-

"(1) Where an international protection officer has prepared a report under section 39, or caused such a report to be prepared, the Minister shall notify, in writing, the applicant concerned, the applicant's legal representative (if known) and, whenever

so requested by him or her, the High Commissioner of the officer's recommendation referred to in section 39(2)(b).

(3) Where the international protection officer's recommendation is that referred to in section 39(3)(a), the notification under subsection (1) need only consist of that fact.

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

(a) a statement of the reasons for the recommendation that the application not be given a refugee declaration,

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

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

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

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

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

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

(6) Nothing in this Act shall be construed as requiring the disclosure of any information that has been supplied to the Minister, an international protection officer, a Department of State or other branch or office of the public service by or on behalf of the government of another state subject to an undertaking (express or implied) that the information would be kept confidential, other than in accordance with the undertaking, or with the consent of the other state."

17. Section 74(4) of the 2015 Act provides:-

"An International protection officer shall be independent in the performance of his or her functions."

18. Section 75(3) of the 2015 Act provides:-

"The functions of the chief international protection officer under this Act shall include the managements of the allocation to international protection officers, for examination under this Act, of applications for international protection."

19. Section 76 of the 2015 Act provides:-

"(1) The Minister may enter into contracts for services with such and so many persons as he or she considers necessary to assist him or her in the performance of his or her functions under this Act and such contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.

(2) The Minister may authorise a person with whom the Minister has entered into a contract for services in accordance with subsection (1) to perform any of the functions (other than the function consisting of the making of a recommendation to which subsection (3) of section 39 applies) of an international protection officer under this Act."

Does the IPO who makes the final determination pursuant to s.39(3) have to be assigned prior to the s. 35 interview? (Ground (xi))

20. The Applicant asserts that Part 5 of the 2015 Act requires that a designated IPO be assigned to an applicant's case prior to a s. 35 interview being arranged who then has the function of examining the application and making the final recommendation pursuant to s. 39(3) of the 2015 Act. In the instant case, reflecting usual practise, the designated IPO was not assigned to the Applicant's case until after the s. 35 interview was conducted: another IPO arranged for the s. 35 interview to take place. Accordingly, it is submitted that the entire process is tainted with this asserted illegality.

21. While Part 5 of the 2015 Act refers, although not exclusively, to "*the*" IPO in the relevant sections dealing with matters both prior to and post a s. 35 interview being conducted, the Act does not specifically require that an IPO be designated to an Applicant's case before a s. 35 interview occurs, or that the IPO who "causes" an interview to take place pursuant to s. 35 must be the same IPO who examines the application and makes the final recommendation pursuant to s. 39(3) of the 2015 Act.

22. Counsel on behalf of the Applicant argues that the interpretation he asserts reflects the intention of the Oireachtas when enacting the 2015 Act and is clear and unambiguous on a literal interpretation of the Act having regard to the almost exclusive use of the definitive term within Part 5 of the 2015 Act; that it is necessitated to give effect to s. 35(8) of the 2015 Act which permits the IPO to dispense with a s. 35 interview in particular circumstances and also to permit the possibility of the IPO conducting the s. 35 interview herself, as referred to by the Supreme Court in *IX v. CIPO & Ors* [2020] IESC 44; and, that the requirement of the independence of the IPO as provided for by s.74(4) of the 2015 Act is interfered with if the s. 35 interview is arranged by another IPO.

23. Counsel for the Respondents argues that the interpretation asserted by the Applicant does not reflect the intention of the Oireachtas whether a literal or purposive interpretation is applied to the 2015 Act; that the Act does not specifically require that a specific IPO be assigned to an applicant's case prior to the s. 35 interview being arranged who then examines and determines the claim; and that s. 76(2) of the 2015 Act is of significant importance in the overall interpretation of the Act. It is submitted that while s. 76(2) was not invoked in this case, as an IPO arranged the s. 35 interview, the fact that s. 76(2)

permits any function of an IPO to be carried out by a panel member except for making the final recommendation pursuant to s. 39(3) of the 2015 Act must mean that the function of arranging a s. 35 interview or indeed any other function which is required to be carried out by an IPO under the Act, can be carried out by another IPO, or authorised panel member pursuant to s. 76(2), except for the final recommendation pursuant to s. 39(3).

24. The Court must therefore determine the intention of the Oireachtas with respect to the 2015 Act. To do so, it must in the first instance apply a literal interpretation to the Act and apply the natural and ordinary meaning to its words, as this should best reflect the legislative intent (*AWK v. Minister for Justice & Equality* [2020] IESC 10). In doing so, account must be had to the entire of the Act so that it is construed as a whole rather than on an individual or partial basis (*Cork County Council v. Whillock* [1993] 1 IR 231). The consideration which the Court must apply to this task are very helpfully set out in the Supreme Court decision of *Meagher v. Minister for Social Protection* [2015] 2 IR 633 where McKechnie J states at paragraphs 38 and 39 of the judgment:-

> *"38. The task therefore is to ascertain the intention of the legislature through the ordinary and natural meaning of the words and phrases used with the text being the primary reference source (Rahill v. Brady [1971] IR 69). Regard may be had to other provisions, even extending, if necessary to the Act as a whole. The object and purpose are matters for consideration and of particular relevance in this case is the nature of the legislation in question. In effect, it is more likely that the provision in issue will be accorded their true meaning if the contextual setting in which they operate is kept at the forefront of this exercise.*
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> *39. This approach is simply the application of the nosicutur a sociis principle, a good example of which is to be found in The People (Attorney-General) v. Kennedy [1946] IR 517 where Black J. said at p. 536:-*
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> > *"[we] have an express grant of the right of appeal without any express limitation of parties, and it is said that as the words are clear there can be no limitation. I am satisfied that to look at the provision in that way is to adopt an erroneous measure method of final approach.*
> >
> > *A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.*
> >
> > *If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and nosicutur a sociis utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which,*

standing alone, has a clear meaning must be given quite a different meaning when viewed in the light of its context."

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

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

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

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

28. Based on that analysis, it is certainly arguable that the 2015 Act requires the assignment of a designated IPO prior to the s. 35 interview being arranged, who will then examine and determine the application. However, the above analysis does not take account of the effect of s. 76(2) of the 2015 Act. Clearly s. 76(2) envisages that a person who enters into a contract for services with the Second Respondent, commonly known as a panel member, can be authorised to carry out any function of an IPO except the function of making the final recommendation pursuant to s. 39(3). The plain and ordinary meaning of the language used in s. 76(2) makes this quite clear. That obviously means that in any international application, two people can be involved in the entire process both before and after the s. 35 interview and that every decision required to be made by the IPO could be made by an authorised panel member except for the final recommendation. Accordingly, what appear to be significant decisions which must be made by the IPO examining an application, can in fact be made by a panel member authorised pursuant to s. 76(2). By clear implication, if a panel member can make any decision which the designated IPO can make except for the final recommendation, then another IPO must also be able to do so.

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

30. The more significant question, however, is whether there is a necessity to have a designated IPO appointed to an application prior to the s. 35 interview occurring so that the application is processed under a designated IPO even though all decisions bar the final recommendation can be made by an authorised panel member or by another IPO, as I have found. While this may seem like a logical manner of processing applications, the Act does not specifically require this and, having regard to s. 76(2) of the 2015 Act, it is clear that either an IPO or an authorised panel member can make any decision which they are authorised to make without reference to the IPO who makes the final recommendation. Words would in fact, have to be inputted into s. 76(2) for such a meaning to be found. Accordingly, the plain and ordinary meaning of the 2015 Act when considered as a whole clearly does not require this.

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

32. Furthermore, adopting the interpretation submitted on behalf of the Applicant would have the consequence that another IPO could not take over from a designated IPO should the designated IPO become unavailable, for whatever reason, before making the s. 39(3)

recommendation. On the Applicant's interpretation, the entire process would have to recommence with another IPO designated and another s. 35 interview required to take place. It would be non-sensical that another s. 35 interview would have to occur exploring matters which already were explored and recorded with an applicant. This simply cannot have been the intention of the legislature.

Was section 35(12) and (13) of the Act of 2015 complied with? (Ground (vi) and (x)

33. As already recited, the interviewer, Mr McCarthy, created a simultaneous written record of the interview on 31 January 2019. The requirements of s. 35(13) were attended to by the interviewer on 24 April 2019, and by the IPO who made the s. 39(3) recommendation on 25 April 2019.

34. The Applicant asserts that this is not in compliance with s. 35(12) and (13) of the 2015 Act; that it is not possible for an interviewer to add an addendum to s. 35 report. I have determined this issue in a related case of *HK v. Minister for Justice* (Unreported, High Court, Burns J., 12 January 2021) and found that such a course of action is not unlawful for the reasons set out at paragraphs 18 and 19 of that judgment:-

> *"18. In light of what is required to be addressed pursuant to s. 35(13) of the 2015 Act, which relates to a previously recorded written interview conducted by the interviewer, it seems to me that an addendum can clearly be made at a later stage to the s. 35 report to reflect the necessary requirements of s. 35(13)(a) and (b). Indeed s. 35(13) can only ever be complied with after the compilation of the written interview as it involves an assessment by the IPO of matters referred to in the interview which are of relevance to the international protection claim and to the issue of whether the applicant should be granted permission to remain, if that arises. This is an assessment which clearly can only take place after an assessment of the written interview. Accordingly, the creation of an addendum to the s. 35 written interview to reflect the requirement of s. 35(13) can be made after the written report of the interview comes into existence.*
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> *20. This issue has, by implication, already been decided by Barrett J in the IX decision having regard to the order made in that case which quashed the s. 49(4) decision and remitted the s. 49(4) issue to the Respondent for reconsideration. Quite clearly, Mr Justice Barrett envisaged an appropriate s. 35(13) report coming into existence so that the s. 49(4) issue could be re-determined on foot of an amended s. 35(13) report."*

Validity of s. 49(4) decision if s. 39(3) recommendation was unlawful (Ground vii)

35. As the Court has found that the s. 39 recommendation is not invalid on the challenged grounds, this ground of challenge does not arise in the instant case.

Asserted failure to provide reasons in s. 49(4) decision regarding the finding that the State's non-refoulment obligations would not be breached if the Applicant was returned to her country of origin

36. Having set out s. 50 of the 2015 Act, the Second Respondent's decision refusing the Applicant permission to remain pursuant to s. 49(4) of the 2015 Act sets out the following under the section of the decision dealing with the prohibition of refoulment:-

"The applicant has made representations regarding the prohibition of refoulment. The applicant stated at Q68 of her questionnaire "If returned will put my life in danger there is no guarantee of safety in that country homophobic is countryside with no reputable organisations which can guarantee me protection and the instigators of my case. They know my personal information and links which make be trailable and traceable in the modern society and unbearable to live a free and progressive life without challenges."

The section 39 report found that the applicant was not at risk of torture, other inhuman or degrading treatment or punishment in Zimbabwe.

The applicant's application for international protection was considered at first instance and an [IPO] has recommended that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration. Therefore, for the purposes of this consideration the applicant is considered to be a failed asylum seeker and the applicant's claims made in relation to International Protection are not revisited in this report.

The following country of origin information from US State Department Country Reports on Human Rights Practices 2017 state

> *"The constitution and law provide for freedom of internal movement, foreign travel, emigration and repatriation, but the government restricted these rights. The government generally cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organisations in providing assistance to refugees, asylum seekers, stateless persons, and other persons of concern at Tongogara refugee camp, but it interfered with some humanitarian efforts directed at internally displaced persons. The Registrar General continues to delay implementing a joint statelessness study as part of UNHCR's campaign to end statelessness by 2024."*

It is noted that the applicant's immediate family members are still living in Zimbabwe.

I have considered all the facts of this case together with relevant current country of origin information in respect of Zimbabwe. The prohibition of refoulment was also considered in the context of the International Protection determination. The prohibition of refoulment has also been considered in the context of this report. The Country of origin information does not indicate that the prohibition of refoulment applies if the applicant is returned to Zimbabwe.

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

37. Counsel for the Applicant referred to *KA (Ghana) v. Minister for Justice and Equality* [2018] IEHC 511. In that judgment, Humphreys J. found that the Second Respondent's decision on refoulement which stated "*the country of origin information does not indicate that the applicant would be at risk of refoulment if the applicant returned to Ghana*" was ambiguous as it was not clear whether the Second Respondent found refoulement not to be in issue because the risk depended on the applicant's account and that it had been disbelieved, or if the account was believed, the country of origin information did not support a risk of refoulement.

38. In *KA (Ghana*), the impugned decision was the decision on review under section 49(7), the applicant having made submissions to the Second Respondent subsequent to the refusal of international protection. In the instant case, the Second Respondent accepted the findings in the s. 39 Report, as the Second Respondent expressly refused to revisit the claims which had already been rejected under section 39. No further submissions had been made by the Applicant, nor documents furnished by her, before the section 49(4) decision was made. Accordingly, the situation arising in *KA (Ghana)* where a review decision was under consideration, submissions having been made regarding the issue of refoulment, is different to the instant case where a s. 49(4) decision is under consideration having been made on foot of a refusal of international protection where no additional submissions were made to the Second Respondent. The ambiguity arising in *KA (Ghana)* does not arise as the decision makes it clear that the Second Respondent was not revisiting the claims made by the Applicant which were rejected by the IPO under s. 39 of the 2015 Act.

Effect of Failure of First Respondent to determine a core element of Applicant's claim

39. Counsel on behalf of the Applicant asserts that the First Respondent failed to determine a core element of the Applicant's claim, namely whether she was a lesbian: It is asserted that this is a significant assertion in its own right separate to her claims, which were not accepted, that she was involved in a lesbian relationship which was discovered arising from which she was threatened and had to flee Zimbabwe. It is submitted that as this is a core element to her claim, she is entitled to a first instance decision in relation to it.

40. Counsel for Respondents asserts that this issue was determined and determined against the Applicant.

41. While the decision of the IPO does not actually state that it did not accept that the Applicant is a lesbian, it is clear from an analysis of its reasoning under the heading "*The applicant entered into a lesbian relationship in Zimbabwe*" that it did not accept this claim. The IPO clearly did not include a determination on the Applicant's sexuality in its acceptance of the applicant's personal circumstances, limiting these to her age, ethnicity and nationality. However, in the section of the decision dealing with the assertion that the applicant entered into lesbian relationships in Zimbabwe, the Applicant's sexuality and her realisation of her sexuality is explored. Several relevant questions and answer relating to this issue in a general context are set out. It was further noted that the Applicant was unaware of the names of any gay and lesbian support groups and had not engaged with any either in Zimbabwe or Ireland. From an overall perspective, it is

implicit that the IPO determined this issue against the Applicant. Accordingly, the Applicant has had the benefit of a first instance decision in this regard. Obviously, the matter can be reconsidered by the International Appeals Tribunal at the Applicant's appeal.

42. Accordingly, I refuse to grant the Applicant the reliefs sought on all grounds argued before me and will make an order for the Respondents costs as against the Applicant to be adjudicated upon in default of agreement.

43. A motion seeking to cross examine one of the respondent's deponents was brought by the Applicant prior to the hearing of the action. The Court held against the Applicant but indicated that the Respondents should admit a certain fact which was implicit from an affidavit of Paraic O'Carroll. The Court reserved the question of costs lest any further issue arose in the course of the hearing which might necessitate that the motion to cross examine be re-visited. In light of the fact that this did not arise, I will also make an order for the Respondent's costs with respect to the motion as against the Applicant.