THE HIGH COURT
JUDICIAL REVIEW

[2023] IEHC 695

[Record No. 2023 / 1123 JR]

BETWEEN:

A.E.

APPLICANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 6th day of December, 2023

INTRODUCTION

1. The Applicant is an International Protection applicant from Georgia who seeks to challenge a first instance decision of the International Protection Office (hereinafter "IPO") refusing him international protection arising from an admitted failure to consider documents during the decision-making process.

BACKGROUND

2. The Applicant arrived in the State in or about the 25th of October, 2021 and applied for international protection the following day. The Applicant claims to have been present in his capacity as a border guard for the Georgian Government at an incident in August, 2012 when

there was an attempt by an armed group to cross the border into Georgia at a village called Lapankuri *(*also known as 'Lapanquri') in Georgia, near the border with Dagestan. The armed group took some Georgian hostages. There were over a dozen deaths which included all the known members of the armed group and some Georgian personnel. This became known as the "*Lopota Incident*." It was an occasion of considerable political tension involving the Georgian State's relationship with Russia. There were fears concerning terrorist activity near the Georgian border and a risk of this being used as a pretext to Russian incursion into or military interference in Georgian territory. Several members of the armed group who were shot by Georgian authorities transpired to be Georgian citizens of Kist ethnicity. There were accusations against the Georgian authorities of having acted unlawfully in deliberately obscuring the facts surrounding the incident. The incident was also a focal point of internal political tensions between opposing Georgian political factions.

3. A man who was shot (but survived) the incident was named Ahmed Chataev. He claimed to have been acting as a go-between for the Georgian Authorities and the armed group at the request of the Georgian authorities. He was arrested and put on trial by the Georgian authorities for participation with the armed group having failed to surrender to the Georgian authorities but was acquitted. The Applicant claims to have been brought to the trial by his employers to positively identify this man but he refused to do so as he had not himself seen him. The Applicant nonetheless believes that he himself was identified by reason of his presence at the trial by members of the Kist community who believed that he was personally involved in the wrongful deaths of Kists in the incident. He believes he became at risk in consequence. As set out in the Notice of Appeal, this man, Ahmed Chataev, was later killed as the leader of a Russian-speaking faction of Islamic State (IS) during a siege by Georgian special forces of an apartment block in Tbilisi in November, 2017. It is pointed out on behalf of the Applicant in these proceedings that the Applicant was not asked for the name of this man during the investigation of his claim and no information referring to him was relied on at first instance. The Applicant also claims to fear that he would be part of a group who may ultimately be scapegoated by the Georgian government as having been personally responsible for unlawful acts during the incident.

4. The Applicant was interviewed on the 15th of August, 2022 on behalf of the IPO further to the examination of the Applicant's international protection claim. Material parts of the personal interview of the 15th of August 2022, comprising the *'examination'* of the claim

within the meaning of ss. 34 to 39 of the International Protection Act 2015 ("the 2015 Act"), arise at questions 21 to 25 in which the interviewer specifically seeks:

(i) proof of employment;
(ii) proof of Police Academy training; and
(iii) bank statements showing the payment of his wages.

5. It is recorded in the record of interview that the Applicant was told at question 25 of the said interview:

"You have ten working days to provide this office with both the evidence of your bank statements and evidence that you were in the police academy in Tbilisi."

6. The Applicant is recorded as then specifically asking whether it was acceptable to submit an electronic copy of the documents sent to him and whether he needed to translate them. He was assured that it was acceptable to submit the documents electronically and that the IPO would attend to the translation of the documents.

7. On the 20th of August, 2022 the Applicant sent two emails to the IPO which contained different file formats of two documents. The first document purported to be a copy of a certificate from 2010 confirming that the Applicant had attended special basic training courses for border guards of the Contact Service of the Land Border Protection Department of the Border Police of the Ministry of Internal Affairs of Georgia at the Academy of the Ministry of Internal Affairs of Georgia. The second document purported to be a bank statement for a bank account of the Applicant's showing payments from the Department of Border Protection being made between the 20th of January, 2021 and the 24th of August, 2021.

8. On the 24th of August, 2022 the IPO replied to the Applicant stating:

"I wish to acknowledge receipt of your correspondence. Can you please quote your full name, Person ID number, current address and reason for sending so we may assist or process accordingly?"

9. The Applicant replied by return on the same date providing his name, Person ID number and Eircode. The Applicant communicated with the IPO using the email address that was

requested of him on the questionnaire provided to him by the IPO. The Applicant sent a further document, provided to him on the 23rd of August, 2022, to the same address a few days later. This third document purported to be a certificate from the Ministry of International Affairs of Georgia confirming the Applicant's role as a border guard for that Agency between the 10th of November, 2010 and the 30th of August 2021.

10. Notwithstanding this email exchange and the submission of documentation by the Applicant in response to the IPO request, in the Report prepared by the IPO pursuant to s. 39 of the 2015 Act, it was recorded under the heading "*Documentation*" that:

> *"The applicant has submitted no documentation in support of his application.*

11. Under the heading "*credibility*" the Report recorded:

> *"All documentation and representations furnished by the applicant or on behalf of the applicant have been considered in the investigation of the application and in the preparation of this report.*
>
> *In accordance with Section 28 of the International Protection Act 2015, I have assessed the credibility of the applicant's claim having had regard to all relevant matters. The material facts of the applicant's claim are as follows:*
>
> - *The applicant's nationality and personal circumstances*
> - *The applicant was a border police officer*
> - *The applicant was involved in an incident in August 2012 while at work*
> - *The applicant was threatened by his superiors for his involvement in the incident in August 2012*
> - *The applicant was threatened by members of the Kists community for his invo1vement in the incident in August 2012."*

12. Thereafter, the decision maker records that she accepted that the Applicant is a national of Georgia, that he is married and an Orthodox Christian with two children and a wife living in Georgia. As regards his work as a border guard she records:

> *"The applicant was asked if he had any evidence that he was a border police officer."*

13. The decision maker indicated that his response that he had not been given a contract of employment was not credible. She then stated:

> *"The applicant was also asked if he could provide proof that he went to the police academy in Tbilisi, to which he stated that he could. As of the time of writing, no such proof has been provided to this office. The applicant was also asked then if he could provide a copy of the contract to which he stated that he could try but it most likely will be difficult to do so. (S.3S, Q23). At the time of writing no copy has been provided to this office. Despite this the applicant was able to provide a detailed account of what he did in his job. Given this the benefit of the doubt will be applied and it will be accepted that the applicant was a border police officer."*

14. Having wrongly stated that the Applicant had not submitted, requested and promised documentation, the decision maker then proceeded to reject the credibility of all other elements of the Applicant's claim in relation to his involvement in the August, 2012 incident and the threatening behaviour he claimed he had been subjected to afterwards by his employer and members of the Kist community.

15. An appeal has been lodged against this decision to the International Protection Appeals Tribunal (hereinafter "IPAT"). In the Notice of Appeal it was pointed out on behalf of the Applicant that no documentation had been included with the recommendation of the IPO but that reference was made to information and documentation considered in the s. 39 Report. A request was made that full copies of any such documentation be provided both to the Applicant and the IPAT.

16. According to an affidavit sworn by the Applicant's solicitor, the omission of the documentation which had been submitted by the Applicant post-interview from consideration in the decision under appeal only became apparent to the Applicant and his advisors during a pre-hearing consultation prior to an intended appeal hearing, when, with the assistance of a Georgian interpreter, it was discovered that the documentation which the Applicant knew he had submitted was not acknowledged by the IPO in their decision (he does not speak English, and no translation of the decision was provided). His legal advisors confirm on affidavit in these proceedings that they were not previously aware of the existence of this documentation

because the file provided by the IPO did not include it.

17. When informed of the apparent anomaly, the IPAT decided to adjourn the appeal hearing on the 8th of November, 2022, and to make a statutory request to the IPO under s.44(2) of the 2015 Act which is a power:

> "*to make such further inquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary*."

18. In exercise of its power under s. 44(2), IPAT requested as follows:

> *"The Appellant submitted the attached documents to the IPO on 20 August 2022. It appears that they were not translated or taken into account by the IPO. The Tribunal's hearing of this appeal has had to be postponed as a result. We would be grateful if you could provide translations to the Appellant and the Tribunal at your earliest convenience."*

19. The s. 44(2) request related to the first two sets of documents listed above, in circumstances in which it was not yet apparent that the third document (the employment reference) was also submitted by the Applicant and omitted from the file. A reply which contained translations of the first and second documents was subsequently provided by the IPO. The Applicant himself obtained a translation of the third document.

20. In circumstances where it appeared that the IPO had failed to consider the additional information submitted following the interview in arriving at the decision refusing the Applicant international protection, the IPAT was called upon not to decide his appeal pending the determination of a challenge by way of judicial review to the decision of the IPO.

PROCEEDINGS

21. Leave to seek relief by way of judicial review was granted (Meenan J.) on the 23rd of January, 2023 on foot of a Statement of Grounds filed on the 14th of December, 2022 in which an Order of *Certiorari* quashing the decision of the IPO dated the 31st of

August, 2022 and notified the 6th of September, 2022 refusing international protection to the Applicant was sought together with an extension of time. Comprehensive affidavit evidence was addressed to the reason why the application was not moved in time and to justify an extension of time. The legal grounds advanced for challenge were succinctly stated as follows:

i. the impugned decision was made without regard being had to material evidence which had been submitted by the Applicant in support of his claim to the IPO;
ii. the IPO breached the Applicant's right to natural justice in arriving at their decision made on the 31st of August, 2022 by failing to take into account material evidence and further failing to assess the Applicant's claim for international protection as set out by the Applicant.

22. A stay on the hearing of the appeal of the impugned decision was granted at leave stage.

23. A Statement of Opposition was filed on the 9th of May, 2023, grounded on the affidavit of an Assistant Principal Officer within the IPO, but not the decision makers. The IPO accepted that all three documents were received by the IPO in three emails but that they were not associated with the Applicant's file. It is not disputed that the documents ought to have been included on the file but were not "*through administrative error."* It is accepted that the documents were not considered by the IPO decision maker. No objection is made in the Opposition papers to the grant of an extension of time. The IPO nonetheless contests the within proceedings on the basis that the documentation at issue was not "*material to the impugned decision reached.*" This is because it was accepted in the IPO decision that the Applicant had worked as a border guard for nine years. It is therefore contended that no prejudice flowed from the failure to have regard to the documentation submitted post interview. It is contended that the Applicant has not established a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal in circumstances where the Applicant has been accorded a full oral hearing on appeal (which the Applicant points out is not accorded automatically as of right by virtue of Georgia's designation as a safe country but in exercise of the IPAT's discretion pursuant to s. 43(b) of the 2015 Act).

DISCUSSION AND DECISION

24. As a preliminary matter, I am satisfied that as the documents that a full explanation for the delay in instituting proceedings have been given on affidavit and that good and sufficient reason has been established to justify the exercise of my discretion to extend time.

25. The 2015 Act was enacted, inter alia, to comply with the requirements of EU law by giving "*further effect"* to Council Directive 2004/83/EC of the 29th of April, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("*the Qualifications Directive*") and the Council Directive 2005/85/EC of the 1st of December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("*the Procedures Directive*")**.** While Ireland has not yet opted into the recast Qualification Directive or the recast Asylum Procedures Directive, the provisions of the 2015 Act provide for the domestic discharge of obligations assumed by the State pursuant not alone to EU law commitments but to long standing commitments under international (specifically, the Convention relating to the Status of Refugees done at Geneva on the 28th of July, 1951 and the Protocol relating to the Status of Refugees done at New York on the 31st of January, 1967).

26. The 2015 Act is divided into thirteen separate parts. Part 4 of the 2015 Act is entitled "*Assessment of Applications for International Protection*" and mirrors provisions of the Qualifications Directive in relation to the assessment of facts and circumstances, most particularly Article 4 thereof which is closely aligned in its language with the terms of s. 28 of the 2015 Act as contained in Part 4 of the 2015 Act. The duty to co-operate in the provision of information on the part of an applicant for international protection is contained in this part of the Act. It is tied to the corresponding duty on the IPO at first instance and the IPAT on appeal to assess that documentation pursuant to s. 28 of the 2015 Act.

27. The importance of the role played by documentation in the assessment process established under the 2015 Act is clear from the terms of s. 28 which provides in material part as follows:

> *"28. (1) An international protection officer shall, in co-operation with the applicant, assess the relevant elements of the application….*

(3) The elements referred to in subsections (1) and (2) consist of the applicant's statements and all the documents submitted by him or her regarding his or her—

(a), (b), (c), (d), (e), (f),(g), (h),

(i) reasons for applying for international protection.

(4) The assessment, by the international protection officer of an application, and by the Tribunal of an appeal under section 41, shall be carried out on an individual basis and shall include taking into account the following:

(a)…;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c)..; (d)..; (e)….;

(f) the general credibility of the applicant.

(5) (a), (b), (c)

(6)

(7) Where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation where the international protection officer or, as the case may be, the Tribunal, is satisfied that—

(a) the applicant has made a genuine effort to substantiate his or her application,

(b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given,

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case,

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so, and

(e) the general credibility of the applicant has been established."

28. It is clear from the language of s. 28 that an applicant for international protection is entitled, as of right, to have the documentation submitted assessed both at first instance before the IPO and on appeal before the IPAT. Assessing documentation submitted by an applicant in support of those elements of the claim which have been queried during the assessment process is of fundamental importance. In the absence of documentation, there is a heavier burden on an applicant to establish his or her case by showing that an effort has been made to obtain documentation, to explain its absence and to establish his or her general credibility. Where a decision-maker proceeds ignorant of the fact that documents have been submitted, not only are those documents not assessed in terms of the support they provide for an applicant's claim, but the very absence of documentation may also undermine the general credibility of the claim. It is manifest from the terms of s. 28 that both the presence or absence of documentation are important factors in assessing the claim and in making findings on credibility. Weight may be attached to the absence of documentation in the assessment of the claim but the weight to be attached depends on factors such as the extent to which it is considered that a genuine effort has been made to substantiate the claim. Accordingly, where some documentation is submitted, the structure of the Act is such that the absence of other documentation may not undermine the claim.

29. Following on from the assessment of the application under Part 4 of the 2015 Act, Part 5 makes detailed provision for the "*examination*" of the application at first instance by the IPO culminating in the s. 39 Report which sets out the recommendation of the IPO following examination of the application. The examination of the application at first instance is conducted in part through the conduct of a personal interview (in accordance with s. 35) conducted in a "*comprehensive*" manner by a person who is sufficiently competent to take account of the personal and general circumstances surrounding the application (s. 35(3)(a)). The interview is conducted under conditions that ensure "*appropriate confidentiality*" (s. 35(5)(b)). The s. 39 report of examination is required to, *inter alia*, refer "*to matters relevant to the application*" which are raised by the applicant (s. 39(2)(a)(i)) and contain the recommendation of the IPO in relation to the application. The recommendation is required to be "*based on the examination of the application*" (s. 39(3)).

30. Part 6 provides for appeals against recommendations contained in the s. 39 Report of the IPO as notified by the Minister. While Part 6 of the 2015 Act provides for an appeal

to the IPAT, there is no automatic entitlement to an oral hearing in cases in which, among the findings made, any one of the additional findings listed under s. 39(4) of the Act is contained. Section 39(4)(e) and s. 43 of the 2015 Act operate to exclude an automatic entitlement to an oral hearing in cases where it has been found by the IPO that the appeal involves a national of a "*safe country of origin*." Appeals in such cases are treated as "*accelerated appeals*" and will be dealt with by the IPAT without an oral hearing unless the IPAT considers that it is in the interests of justice to hold an oral hearing in accordance with s. 42(1)(a) or (b) of the 2015 Act. In this case, although a finding under s. 39(4)(e) had been made, the IPAT exercised its discretion to conduct an oral hearing on foot of a request on behalf of the Applicant. The fact that an oral hearing is not an automatic entitlement in many cases, however, serves to underline the central importance of the personal interview in the examination of the claim for international protection. In some cases, it is the only oral stage of the international protection process.

31. In the provisions dealing with the conduct of the appeal contained in Part 6 of the 2015 Act, it is noteworthy that the word "*examination*" appears only in relation to the examination and cross-examination of witnesses under s.42(6)(f) of the 2015 Act. Section 44 of the 2015 Act makes specific provision for the IPAT to be furnished with copies of the documents provided to an applicant under s. 40. As referred to above, the IPAT may also request the Minister to make such further inquiries and furnish the Tribunal with such further information as the IPAT considers necessary (s. 44(2)). In this way, the IPAT is empowered to seek further information thereby enabling it to consider documentation not considered during the examination of the application by the IPO. As set out above, this power was exercised by the IPAT in this case when it became apparent that the Applicant was relying on documents which had been submitted but not translated and considered during the examination of the application for the purpose of the s. 39 Report. It is clear from the statutory framework, however, that while the duty to assess the application under Part 4 of the 2015 Act falls on both the IPO and the IPAT, the examination function rests squarely with the IPO. The appeal against the first instance recommendation following examination by the IPO results in a *de novo* assessment of the case by the IPAT. A failure in the examination at first instance may therefore be cured on appeal by the IPAT, albeit that whether this constitutes an adequate or effective remedy depends on the nature of the identified flaw.

32. Relevant case law on the issues arising in the present case are cited in the written submissions before me and included in the agreed book of authorities include *Stefan v Minister for Justice* [2001] 4 I.R..203, *A.K. (Kayode) v. ORAC* (unreported, *ex tempore* judgment of Supreme Court, Murray CJ, 28th of January, 2009); *M.M. v. CIPO* [2022] IECA 226, *B.N.N. v. MJELR* [2009] 1 I.R. 719; *L.C.H. v. IPAT* [2014] IEHC 499; *E.S.O. v. IPO* [2023] IEHC 197 and *M.H. v. IPAT* [2023] IEHC 372. These cases address the dividing line between instances in which it is appropriate to intervene by way of judicial review where an alternative remedy in the form of an appeal exists and those in which it is not.

33. The decision of the Supreme Court in *Stefan v. Minister for Justice* is particularly relevant because it is addressed to the very issue which arises in these proceedings, namely, the omission of documentary material from consideration in a first instance decision. *Stefan* concerned a decision by the Supreme Court to quash a first-instance decision refusing refugee status, in circumstances in which the questionnaire submitted by the applicant had not been fully translated in respect of the question, "*Why are you seeking asylum*?". The Applicant was also interviewed, so the questionnaire was not the only examination of the relevant narrative. Denham J. gave the unanimous decision of the Court, and in respect of the question of whether *certiorari* should be granted notwithstanding the availability of appeal, distinguished the case from *The State (Abenglen Properties) v. Corporation of Dublin* [1984] LR. 381, in observing (at p. 212 of the judgment in *Stefan*) as follows:

> *"However in this case, there was the error of omission of part of the evidence not being before the decision-maker. Such a situation brings into consideration the basic fairness of the procedures.* "

34. The *ratio* of the Court's decision in *Stefan* is as follows (at pp. 217 and 218):

> *"In this case the decision of the first respondent ... was a decision made in breach of fair procedures in that evidence, which was not immaterial, was not before the decision maker because of the section omitted from the translation ...*
> *Consequently, the procedures were unfair. There may well be many instances where omissions in translation occur but which are not such as to render the proceedings unfair. However, in this case in light of the material omitted there was such an omission as to be a breach of fair procedures. Consequently an order of*

certiorari may lie. It was for the High Court to exercise its discretion and determine whether the order of certiorari would be appropriate…..the appeals authority process would not be appropriate or adequate so as to withhold certiorari. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."

35. Of course, *Stefan* was decided in the context of an administrative appeal prior to the enactment of a statutory appeal process, a fact to which the Respondents attach some importance as a distinguishing factor given the detailed provision now made in law for an elaborate appeal process. The Respondents refer instead to the need to show "*a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal*" before a Court will intervene to quash a first instance decision because of the availability of an appeal which provides an opportunity to cure the identified frailty in the process. This formulation derives from *B.N.N. v MJELR* [2009] l I.R. 719 (Hedigan J.) where a remedy by way of judicial review was refused in circumstances where certain documents were not put to the applicant as it was not demonstrated that the statutory appeal would not constitute an adequate and effective remedy in that case. The situation in *B.N.N. v MJELR* is entirely distinguishable, however, from a situation where documents submitted in support of a central part of the claim are neither translated nor considered at all. From the Supreme Court decision in the case of *A.K (Kayode) v. ORAC* (unreported ex tempore judgment of Supreme Court, Murray CJ, 28th of January, 2009), made in the context of a later statutory regime (under the Refugee Act, 1996), it remains clear that a failure to consider a material document may give rise to a situation which would warrant court intervention notwithstanding the availability of an appeal.

36. In *A.K. (Kayode)*, the Supreme Court re-iterated its findings in *Stefan* as follows (Murray C.J.):

"In [Stefan] there was what the Court described as a key passage in a key document which had been written by an applicant and which the Commissioner concerned was required to consider but which had not been translated Accordingly the Commissioner was deprived of the opportunity, by a default on the part of the State machinery for providing translations of such documents, from

fully considering a key element of the application. Self-evidently that was a serious matter since if the State could willy nilly gloss over the failure to translate key parts of key documents in applications of this nature before a Commissioner it would undermine the integrity of the application and appeals system provided by the Act of 2000. That case was thus concerned with the process by which the Commissioner arrived at his decision in the absence of the fair procedures just referred to."

37. It seems that key to a court's decision as to which side of the dividing line between granting and refusing relief a case may fall where an appeal is available is whether the failure to consider a document gives rise to such a fundamental unfairness in the process as to undermine the integrity of the process or, put otherwise, whether the substance of the excluded evidence is such that its exclusion so prejudices the assessment of the claim as to render the process so unsatisfactory as to undermine its integrity. Ultimately, the answer as to which side of the line a case falls may depend on the degree of potential unfairness which flows from the identified error or what Murray C.J. termed "*the degree of fairness of procedures*" or "*the degree to which fairness of the hearing was compromised*" in *A.K.(Kayode)*. This is determined by an assessment on the facts of a given case of whether the process has broken down in a manner which draws into question the overall reliability or trustworthiness of a decision to be taken on the fundamentally important issue of an entitlement to international protection.

38. Turning then to the facts of this case, the question which is prompted is whether the examination at first instance is so flawed by the failure to examine the omitted documents as to risk undermining a sound decision on appeal such that the integrity of the process as a whole cannot be fully stood over. As seen above, the decision recorded in the s. 39 Report clearly remarks on the fact that despite the invitation by the IPO to the Applicant to provide documentation, none had been provided. While it was accepted in the light of his knowledge of the role that the Applicant was a border guard (at some unstated time), all other aspects of his claim were rejected as non-credible. Indeed, although it is accepted that he was a border guard, it is not clear that it was accepted that he was a border guard at the time of the *Lapota* incident.

39. Crucially, in this case the Applicant's claim was rejected at first instance on credibility grounds. The absence of documentation which the Applicant might be expected to produce was undoubtedly treated by the IPO as undermining of his general credibility. It is long established and reaffirmed in cases such as *R.A. v Refugee Appeals Tribunal* [2017] IECA 297 and *I.R. v RAT* [2015] 41.R. 144 that the lawful assessment of the credibility of a claim in the international protection context is made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It is now trite law that documentation relied upon in advancing the claim must be considered if there is to be a lawful assessment of credibility. As found in *I.R.*, where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is *prima facie* relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.

40. The documentation submitted is undoubtedly supportive of core parts of the Applicant's claim. The bank documentation and the employment reference of the Applicant contained not just important chronological information *viz.* that he was employed at the time of the controversial "*Lopota Incident*," and up to when he left Georgia, but also important geographical information. Furthermore, the Applicant's bank statement not only shows alleged payment of his wages for his border guard role, but also have a geographical link to the claim by reason of the bank being the Telavi Branch of TBC Bank recalling that the Applicant claimed that he lived in Telavi (the same location as his bank branch), and which he notes is the capital of the Kakheti region in the east of the country (see question 1-5 at interview). His border guard division, "*Lagodekhi*," is also located in the Kakheti region. The "*Lopata incident*" of 2012 which the Applicant claims is relevant to his claim, took place in Lapakuri, which is also in Kakheti (as borne out by COI included in the papers before me). The information not considered therefore places the locus of the work of the Applicant within the location of the incident in question in a manner which is supportive of or consistent with his claim.

41. The Applicant set out at question 3.2 that he was employed as a border guard from the 10th of November, 2010 to the 30th of August, 2021. The third document he submitted purports to reflect the records of the Ministry of Internal Affairs, and not only shows that he was indeed employed by them between these two dates but also that he held the position of Border Sector Specialist (Border Guard) of Border Police in "*Division NS (Lagodekhi*)" of

the Land Border Protection Department of the Georgian Border Police and that he was awarded the special title "*Senior Sergeant of the Border Police*" on the 9th of September, 2013. The Applicant claimed in his questionnaire to be an ordinary employee and was not let close to the firefight. As submitted on behalf of the Applicant, the documentation not considered suggests a chronology which shows that he was an entry-level serviceman from his commencement in 2010 to his promotion in September, 2013 (a year after the *"Lopota incident"*), consistent with his claim in his protection application. None of this geographical information in the documentation which tends to support the Applicant's claim of being stationed at that part of the border was examined or assessed by the IPO at first instance.

42. On the facts of this case and in view of the terms of the s. 39 Report following the Part 5 examination of the application, I cannot accept the Respondents' contention that the acceptance by the IPO that the Applicant was a border guard disposes of the relevance and materiality of the documentation submitted. The documentation at issue properly fell to be weighed by the IPO in its consideration of core claims, the credibility of which was rejected in the decision including, specifically, whether the Applicant was working as a border guard at the time of the "*Lopota Incident*," and whether as a consequence of this, he was (i) brought to attend a subsequent trial as an intended witness and was further exposed to risk as a consequence by reason of this; and, (ii) exposed to a risk of being latterly scapegoated for the *"Lopota incident"*.

43. I agree with the submission made on behalf of the Applicant that had this documentation been considered as part of the Applicant's file, the IPO could have sought to verify the information contained in the employment reference as elicited during its examination of the application, including whether the NS Division (Lagodekhi) existed as part of the Land Border Defence Department of the Ministry of Internal Affairs. The certificate showing the Applicant's completion of police training is consistent with his account in terms of both when and where it occurred. Not having the documents and having not sought the name of the division within which the Applicant worked, the IPO did not pursue enquiries which might otherwise have been prompted by the terms of this documentation leading to a more thorough examination of his claim. This in turn has implications for the sustainability of the findings made in circumstances where the burden of examining the claim rests on the IPO under the statutory structures in place under the 2015 Act.

44. In the context of the case as a whole and the way it has been approached, it seems to me to be undeniable that the documents not considered in this case are material and potentially relevant to the adverse credibility findings made against the Applicant notwithstanding that it was accepted, with the benefit of the doubt, that he was a border guard. These three documents support the propositions that he:

(a) worked at the time of the Lopata incident as a border guard; and
(b) that his division was in the region where the Lapota incident took place.

45. Neither of these facts (both of which tend to support his claims) were considered in the impugned decision before the IPO rejected the proposition that the Applicant's claims concerning the "*Lopota incident*" were non-credible.

46. In my view the documents not considered are indeed material and potentially relevant to the adverse credibility findings made against the Applicant notwithstanding that it was accepted, with the benefit of the doubt, that he was a border guard. The benefit of the doubt might have further availed the Applicant had it been concluded that his claims were substantiated in material part by documentation. In view of the nature of the claim advanced by the Applicant, I am satisfied that the omission of the documentation likely undermined the thoroughness with which the application was examined.

47. In the circumstances of this case, I have concluded that the failure to examine the three identified documents at first instance as required under Part 5 of the 2015 Act is not cured by a request that the documentation be translated and available for the purpose of the appeal, recalling that the IPAT's function on appeal is based on an examination at first instance at which the application is comprehensively presented. Indeed, under s. 42 of the 2015 Act, on the occasion of an oral hearing, the IPAT assesses the case by hearing the case presented on behalf of the appellant and the explanation for the recommendation of the IPO presented before it by an officer of the Minister or other person nominated by the Minister to present at and participate in the appeal hearing. Any such presentation and participation is, perforce, in turn informed by the examination which has occurred under Part 5 of the 2015 Act. In this instance the said examination has been curtailed through the improper failure to assess relevant documents in a

manner which I consider is such as to undermine not just the decision of the IPO but the entire decision-making process in this case.

48. I am satisfied that an Order of *Certiorari* may be granted because the first instance decision was made in breach of the requirements of fair procedures in a manner which I consider to have fundamentally undermined the integrity of the process. In considering the separate question of whether an Order of *Certiorari* should issue, I am very mindful that an alternative remedy exists. This is a particularly weighty consideration which leans against intervening to grant relief in judicial review proceedings. While I refrain from commenting on the merits of the claim for risk of trespassing beyond my function, the facts and circumstances which provide a counterbalance to the existence of an appeal in this case include the Applicant's right to have documentation submitted considered at both first instance and on appeal, the conduct of the Applicant in seeking to co-operate with the investigation of his claim through the submission of documents which had been sought by the IPO, the fact that these documents were not considered by reason of an administrative failing on the part of the IPO and the clear relevance of the documents excluded from consideration to an assessment of the credibility of the Applicant's claim.

49. It seems to me on weighing these competing factors, notwithstanding the degree of fairness of the procedures before the IPAT which have already been effective in operating to ensure that the appeal did not proceed in the absence of the documents in question, that the balance is tipped in favour of a conclusion that *certiorari* is the appropriate remedy as it is the remedy necessary to attain a just result. A just result is one which reflects the fact that the Applicant has a statutory entitlement to have his claim assessed and examined at first instance based on his comprehensive account and reassessed on appeal pursuant to the provisions of the 2015 Act. I consider the documents not assessed and considered in the examination of the claim were material in a manner akin to the document not translated in *Stefan*.

50. A failure to process documents so that they are examined as part of the claim in circumstances where they have been requested during the interview process cannot be glossed over. Such a failure may affect the merits of facts and circumstances addressed in the decision but more fundamentally it concerns the process by which the decision was arrived at. As the

documents were not considered at all by the IPO (but their perceived absence is likely to have reflected against the Applicant's credibility) or examined as part of the claim, the first consideration of these documents would be by the IPAT in circumstances where they have not been examined at all by the IPO, unless the decision is quashed. Just as in *Stefan*, I have concluded that the availability of a fair appeal does not cure the absence of a fair first instance decision in this case. To conclude otherwise would be to give licence to the IPO to ignore documents in a manner which would be seriously undermining of the integrity of the process. An appeal is not an adequate remedy in the circumstances.

CONCLUSION

51. For the reasons given, I am satisfied that it is appropriate to exercise my discretion to extend time for the bringing of the within proceedings pursuant to s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000 (as amended) as good and sufficient reason has been established on the affidavit evidence explaining the delay in commencing proceedings. I extend time up to and including the 23rd of January, 2022 when the leave application was moved before Meenan J.

52. I also make an Order of *Certiorari* in terms of paragraph D(1) of the Statement of Grounds. In the absence of an agreement of the parties as to the final form of order, I will list this matter fourteen days post-delivery to hear submissions directed to the form of my final order and any consequential matters.