**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2018 No. 364 J.R.]**

**BETWEEN**

**M.E.O. (NIGERIA)**

**APPLICANT**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**[2018 No. 296 J.R.]**

**BETWEEN**

**U.O. (NIGERIA)**

**APPLICANT**

**AND**

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 7th day of December, 2018**

1. Last year, after a three-day hearing, O'Regan J. rejected a claim that international protection applications were being decided on an incorrect standard of proof *(O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, 17th January, 2017). Not much more than twelve months later, an attempt is made to re-run the same point yet again, but with next to nothing new being advanced on behalf of the applicants. To use the phrase of Scalia J. commencing his opinion in *Glossip v. Gross* 576 US__ (2015) at slip op. p. 1, "*Welcome to Groundhog Day*".

**Facts in *U.O.***
2. The applicant was born in Nigeria in 1984. He claims persecution or serious harm because of his sexual orientation. He arrived in Ireland on 30th August, 2015 on his own passport and applied for asylum on 1st September, 2015. That was rejected by the Refugee Applications Commissioner on 29th November, 2016. On 3rd March, 2017 he applied for subsidiary protection. That was rejected on 29th August, 2017. He appealed to the IPAT on 28th September, 2017. That appeal was rejected on 14th March, 2018. Leave in the present proceedings, seeking *certiorari* of the IPAT decision, was granted on 16th April, 2018.

**Facts in *M.E.O.***
3. The applicant was born in 1982 and claims persecution or serious harm by reason of his sexual orientation. He arrived in Ireland in June, 2014 on false papers and was arrested and detained for a time. He applied for asylum on 13th June, 2014. That was refused by the Refugee Applications Commissioner on 19th January, 2015. He appealed to the Refugee Appeals Tribunal on 3rd February, 2015. He then sought subsidiary protection, which was rejected by the IPO on 15th June, 2017. He appealed that refusal to the IPAT on 13th August, 2017. His appeals were rejected on 3rd April, 2018. Leave in the present proceedings, seeking *certiorari* of the IPAT decision, was granted on 3rd May, 2018.

**Oral submissions**
4. I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicants in both cases and from Mr. David Conlan Smyth S.C. (with Ms. Elizabeth Cogan B.L.) in *U.O.* and (with Mr. Alex Finn B.L.) in *M.E.O.* for the respondents.

**Allegation that incorrect standard of proof was applied**
5. The applicants submit that the correct standard should be a reasonable degree of likelihood or a reasonable chance, but the applicants' submissions overall massively exaggerate the difference between the standard argued for by the applicants and that actually applied by the IPAT.

6. As far as the forward-looking test is concerned, the tribunal *does* apply the test of a reasonable chance of persecution or sufficient reasons for believing that the person concerned would face a real risk of serious harm (see para. 27 of the affidavit of Hilkka Becker). Mr. O'Shea concedes that the applicants have to be content with that approach, apart from the extent to which that may be influenced by the approach to past persecution. But as far as past or present facts are concerned, it is clear from the tribunal's methodology that not all facts have to be accepted on the balance of probability test, and facts which have "*a reasonable chance of being true"* (see exhibit HB4) can be accepted if the benefit of the doubt is extended to them.

**First problem for the applicants - A reasonable degree of likelihood test would not have benefited them on the facts**
7. The tribunal decision in *U.O.* at para. 4.31 referred to "*inconsistencies, negative credibility findings and implausibility surrounding substantial parts of the appellant's evidence".* Benefit of the doubt was not extended. One precondition of the benefit of the doubt is that the applicant's general credibility has been established, which is not the case here. A similar problem arises in *M.E.O.* at para. 4.24 of the decision, "*the appellant did not appear to be able to give an internally consistent or coherent account and has never done so".* In para. 4.25, the tribunal member went on to consider the sexual orientation issue notwithstanding the overall finding and made favourable references to the possibility of exaggeration, and that she had considered the issue with care. Thus she did not stop at the application of the balance of probability test but went on to say on this issue that "*his account…was lacking in detail. Core facts relating to his sexuality were inconsistent, majorly so"*. These are manifestly not applicants that cleared the reasonable degree of likelihood test but fell just short of the balance of probabilities. It is clear that neither applicant would have succeeded even if a reasonable degree of likelihood test had been adopted, so neither applicant has standing to challenge the decision in question on that

ground.

**Second problem for the applicants – The point raised is not adequately or properly pleaded**
8. Even if I am wrong about the foregoing, the applicants have the difficulty that the basis of the point being made under this heading is not set out on the pleadings. In each case, ground 1 of the statement of grounds baldly asserts the lack of a correct standard but fails to specify whether the appropriate standard derives from EU law, international law or domestic law, leaving the argument entirely elastic for the High Court hearing, if not beyond. Even the applicants' written submissions failed to particularise the basis of the claim, and it was only when we got oral submissions that any degree of clarity has been introduced, but there is certainly no guarantee that that will not mutate further if the case goes to another forum. The grounds as pleaded do not refer to constitutional law, the ECHR as incorporated by the European Convention on Human Rights Act 2003, international law or any particular international instrument, common law or indeed EU law, which was the centrepiece of the applicant's oral submission. Nor is any specific EU law instrument referred to. The grounds refer to a U.K. case, but by definition U.K. caselaw does not amount to a legal ground for relief by way of judicial review in Ireland. The pleadings do not comply with O. 84 r. 20(3) and in my view it would be procedurally entirely inappropriate to grant relief based on such vague grounds. I should add that it would also be massively unfair to the respondents to have to deal with a potentially permanently mutating case which is, on these pleadings, entirely lacking in particulars.

**Third problem for the applicants - No legal basis for the test contended for**
9. Assuming *arguendo* that I am wrong about all of the foregoing, the applicants then have the fundamental problem that they have not made out any legal basis for the application of the test contended for. As might be suggested by the complete inadequacy of the pleadings, there was quite some difficulty at the hearing in getting a hold of what the legal basis for the alleged test in fact was. Mr. O'Shea's argument did not amount to a whole lot more than casting about internationally for different tests and urging the most favourable ones on the court. Indeed, the precise contours of what was being contended for seemed to be mutating as the argument developed at the hearing. Mr. Conlan Smyth submitted with a great deal of justification: "*I am trying to do battle with a jellyfish here.*"

10. The first heading of argument was that of EU law. However, it was entirely unclear as to which provision of EU law was being relied on other than a general assertion that more favourable standards were required by Europe. Certainly no specific provision was identified by Mr. O'Shea. Under this heading, the Charter, the procedures directive (2005/85/EC) and the qualification directive (directive 2004/83/EC) are not referred to in the written legal submissions in either case, and indeed the procedures directive and qualification directive are not referred to under any heading in those submissions. The Charter is not referred to in *U.O.* at all and is only referred to in *M.E.O.* in the context of reasons, not the issue of the burden of proof. The procedures directive and the Charter are not even included in the agreed book of authorities. The Charter was referred to in oral argument in the most passing manner but not developed in any way. Mr. O'Shea accepts that the issue of the appropriate standard of proof is not expressly dealt with in EU law, so his argument is entirely confined to the assertion that EU law impliedly imposes a requirement on all EU member states to adopt a more permissive standard of proof. A fundamental matter like this cannot be read into EU law as implicit. It falls under the heading of the well-established principle of national procedural autonomy, recognised as central feature of EU law: see e.g. Case C-429/15 *Danqua v. Minister for Justice and Equality* ECLI:EU:C:2016:789 (20th October, 2016). The fact that there is a degree of harmonisation in EU asylum and protection law does not mean that there is an implication of total harmonisation. Such a principle does not apply in any other EU law field. The fact that some other countries may do things differently, even European countries, is not relevant because that does not establish or even reach the question of whether such harmonisation is legally required. In any event, U.K. law, on which massive reliance was placed, may turn out not to be necessarily radically different: see *M.A. (Somalia) v. Secretary of State for the Home Department* [2010] UKSC 49 *per* Sir John Dyson, SCJ at para. 20.

11. At the time of the adoption of the qualification directive there were a large variety of different tests and language in the different member states and there is certainly no basis to say that there was any implicit intention to sweep away such approaches and replace them with a one-size-fits-all standard for all 28 member states. The CJEU at para. 64 of C-277/11 *M.M. v. Minister for Justice and Equality* (22nd November, 2012) says the assessment of facts and circumstances "*takes place in two separate stages*", those being the establishment of facts and circumstances that may constitute evidence that supports the application, and then a legal appraisal of the evidence as to whether the conditions for the grant of international protection are met. That is the extent to which the CJEU has intervened in this area. That does not amount to a dictation of the standard of proof - and certainly not in the manner canvassed by the applicant. The applicant's argument simply has nothing whatsoever going for it at the EU law level and indeed has something major going against it, which is art. 4(5) of the qualification directive regarding the benefit of the doubt. The fact that the standard of proof has been regulated to that extent expressly by the EU makes it extremely unlikely that one could infer any intention to modify it much more fundamentally by some sort of unstated implication.

12. Under the heading of international law, it is difficult to pin down what exactly the applicants were relying on, but Mr. O'Shea's argument made reference to the Geneva Convention, which he accepts is not law, but submits it is "*pretty close to it".* However, the Geneva Convention does not determine the issue. Indeed, as far as the UNHCR approach is concerned, the tribunal cannot be faulted as its methodology has been adopted in close consultation with the UNHCR.

13. Leaving aside all of the pleading difficulties, Mr. O'Shea also sought to make an ECHR point, but there is no ECHR right to asylum so there cannot be an ECHR rule on the standard of proof for asylum. It is true that there is a well-defined ECHR test for torture or inhuman and degrading treatment, namely substantial grounds for thinking that there would be a real risk of treatment contrary to art. 3 of the ECHR, but that test is confined to that specific provision which in any event only arises at the deportation stage not at the refusal of international protection stage.

14. As I say, insofar as there is any suggestion that the IPAT is out of line with international standards, it is clear from the affidavit of Ms. Hilkka Becker, chairperson of the tribunal, that the approach it adopts to past facts, balance of probabilities plus benefit of the doubt, is in line with UNHCR guidance.

15. Under the heading of domestic law, which was Mr. O'Shea's fall-back argument, the problem for the applicants is that it is not up to the court to make up the burden of proof as it goes along. That is a matter of general overarching law. Mr. O'Shea says that the test should be reasonable degree of likelihood rather than balance of probabilities because "*this is human rights law*", but that assertion does not stack up. The balance of probabilities, as the general civil standard in Irish law, can be modified by statute, and has been here in the form of s. 28(7) of the International Protection Act 2015 relating to the benefit of the doubt. The enactment of that provision makes it totally inappropriate for the court to start assuming a non-existent jurisdiction to change the standard burden of proof itself. It is not the case, as submitted by Mr. O'Shea, that "*O'Regan J. has come up with a particular standard".* The general civil standard pre-exists any given applicant raising this point. I therefore agree with and follow the conclusions of O'Regan J. in *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, 17th January, 2017), a judgment that was also followed in *N.N. v. Minister for Justice and Equality* [2017] IEHC 99 (Unreported, Keane J., 15th February, 2017) and *M.G. v. Refugee Appeals Tribunal* [2017] IEHC 94 (Unreported, High Court, 21st February, 2017). The doctrine in *Re Worldport Ltd.* [2005] IEHC 189 (Unreported, Clarke

J., 16th June, 2005) was designed for such a situation. The only thing new since *O.N.* is the judgment in *A.S. (Guinea) v. Secretary of State for the Home Department* [2018] EWCA Civ. 2234 but that does not break any new ground and merely restates previous law in the U.K. Mr. O'Shea's submission scrapes the barrel of novelty by also relying on *N.N.*, which was a decision that *followed O.N.*, albeit on a *Worldport* basis and certainly does not amount to any detailed advancement of reasons why *O.N.* is incorrect.

16. I pause to note under this heading that other countries seem to have a capacity to consider systemic points without the entire system grinding to a halt. In this country, as far as my information is concerned, unusually, if not possibly uniquely, all that seems to have to happen for an entire system to crash and burn is for a single applicant to dream up a point with a systemic ramifications. That is not immediately easy to reconcile with the judicial obligation set out in the constitutional declaration to uphold the Constitution and the laws. One might think that the practice and procedures that apply to normal *inter partes* litigation are being extended to systemic challenges for which they are ill-suited. For example, a challenge to the issue of the correct standard of proof has the potential to bring not only all tribunal hearings to a juddering halt but even all first instance decision-making by the IPO. It may be that a more workable approach to systemic challenges overall may have to be developed by the courts. As this case demonstrates, the potential success (defined in terms of creating procedural mayhem) of such challenges doesn't even depend on coming up with a new point; nor indeed does it require detailed, or perhaps any, thought having been given to the legal basis of the application, as amply illustrated here. When in due course the asylum bar comes to seek a formal grant of arms, one wonders if those responsible for the present challenge might suggest that the hallowed professional emblem of the shears and paste-pot be supplemented by a stalemated chess-board, being the ultimate goal of grid-lock, a heap of scattershot, being the means to that end, and the back of an envelope that suffices both for both the drafting and preparation of any individual case.

**Further points in *O.U.***
17. It is submitted that the application of the test has tainted all other aspects of the decision but that does not add anything to the point discussed above.

18. It is further submitted that the decision is "*largely based on speculation and surmise and irrational reasoning"*. That claim has not been made out. The tribunal member saw and heard the witnesses and was in the best position to assess credibility and find the facts. Even the applicant's own counsel admits at para. 24 of the written submissions that *"there appears prima facie to be considerable difficulty with the 'timelines' presented by the applicant and that some negative conclusions might be legitimately arrived at on account thereof".*

19. Four specific points were highlighted in submissions. At para. 4.10, complaint is made that the tribunal did not consider that the applicant's explanation that no suspicion was aroused by a sixteen to seventeen year-long same-sex relationship was credible. However, that finding was open to the tribunal having regard to all the material before it, including country information. At para. 4.23 of the decision, reference was made to the applicant's claim to be "*in hiding*" from police as being somewhat contradictory with his ability to leave the country unhindered, which suggested that he was not under investigation; and adverse inferences were drawn from such a contrast. Of course the applicant's visa would in the first instance be issued by the Irish authorities but presumably what the tribunal member had in mind was that unless one was in a common travel area, which certainly does not apply as between Nigeria and Europe, the applicant would have had to present himself to the Nigerian authorities at the point of exit, so it cannot be said that the finding was manifestly not open to the tribunal. In this situation, one has to bear in mind the point made by Birmingham J. in *G.O.B. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 229 (Unreported, High Court, 3rd June, 2008) that decision-makers are "*dealing with the country situation in different jurisdictions the whole time"*. While that was in the context of the Minister, the same point applies to the tribunal, Birmingham J. saying that "*neither he nor his officials are novices when it comes to assessing country situations*": see also *H.Y.O. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 297 [2018] 4 JIC 2411 (Unreported, High Court, 24th April, 2018). At para. 4.24, the tribunal is sceptical about a somewhat inconsistent account regarding the applicant staying with an individual called "*Uncle Joe*", otherwise referred to as "*the activist"*, combined with a claim that staying with this individual did not arouse suspicion. The applicant had previously referred to "*Uncle Joe*" as a "*gay activist*" but later denied that he was an activist. Again, it cannot be said that the approach adopted was not open to the tribunal on the evidence. Finally, there is a complaint against para. 4.26 of the decision to the effect that it is based on speculation and surmise and does not survive any serious consideration. The tribunal member notes a story that the applicant stayed in a hotel in Abuja for two months while awaiting a visa that took two to three weeks, and while "*Uncle Joe*" was raising money for the trip to Ireland. The tribunal member points out that such fund raising "*would have been diminished by paying for a hotel*". That is a perfectly reasonable finding. Legitimate inference does not amount to speculation or surmise. It is clear from the decision that there were many holes in the applicant's story. Even if ,which I do not accept, there was any problem with any individual finding, when set in the overall context of the multiple issues with the applicant's account any individual finding can hardly be regarded as central.

20. Insofar as ground B of the statement of grounds claims that an impermissible stereotype was applied contrary to the judgment of the CJEU in *A. v Staatssecretaris van Veiligheid en Justitie* Case C-148/13, C-149/13 and C-150/13, that complaint is not in any way made out and the decision of the tribunal cannot be regarded as being an impermissible stereotype.

21. Insofar as ground E claims that "*even if the applicant's story was lawfully rejected on credibility grounds (which is denied) that should have no impact on the core claim that he is homosexual"*, that is fundamentally mistaken. If the credibility of an applicant's account is rejected on one issue, that has a necessary read-across to other elements and may legitimately be taken into account. It is argued that "*the conclusion that he is not homosexual should not have been based on findings of a lack of credibility in relation to other matters".* That is a fundamentally misconceived analysis. The tribunal is entitled to have regard to, and draw inferences from, elements of an applicant's account on other issues; if such evidence cannot be accepted, that may have adverse implications in assessing any given further issue, assuming of course that the tribunal views all the evidence in the round, which this tribunal member did.

**Further points in *M.E.O.***
22. Again, the applicant complains that the standard of proof issue infected the decision as a whole. That does not add anything to the point already dealt with above. The suggestion is made that the tribunal should have engaged in a forward-looking test based on the applicant's own account. That suggestion is incorrect. The tribunal is only obliged to consider the forward looking risk in the light of the facts as found, not by reference to the facts rejected. As the respondents validly submit, "*such an exercise would always result in a finding in favour of an applicant from Nigeria who merely asserts, however implausibly the basis, that he is of a sexuality that is problematic in Nigeria*" (para. 45 of written submissions). That is a valid reality check highlighting, for good measure, the completely unworkable and inappropriate consequences of this in any event entirely misconceived submission.

**The duty to give reasons is a duty to give the main reasons only**
23. Complaint is made about the use of a phrase in para. 4.2 of the decision that "*the appellant's evidence will be weighed in the round and an overall conclusion reached. Various factors have a bearing on the Tribunal's assessment of credibility and some of these (non-exhaustive) are discussed below".* That is not in fact a statement that only some reasons are being given. It is a

statement that only some are being discussed, but generally there is no obligation to narratively discuss all of the applicant's points. In any event, the duty to give reasons is only a duty to give the main reasons, so a decision-maker is perfectly entitled to identify only the main reasons for that decision. As it is put in Fordham, *Judicial Review Handbook*, 6th ed. (Oxford, 2012) p. 667, reasons must relate to the "*principal important controversial issues*" the main issues in dispute: see caselaw cited there, particularly *Bolton Metropolitan Borough Council v. Secretary of State for the Environment* [1995] 3 PLR 37*, City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 WLR 1447, *Westminster City Council v. Great Portland Estates Plc* [1985] AC 661 and *R.(Wheeler) v. Assistant Commissioner of the Metropolitan Police* [2018] EWHC 439 (Admin). See also *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018) (para. 10). Reasons are to be understood in the context of the "*broad issues*", *per* Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 76, or the "*broad gist*" of the case: see *Faulkner v. Minister for Industry and Commerce* (Unreported, Supreme Court, 10th December, 1996) *per* O'Flaherty J., applied by Birmingham J. in P.*N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 215 (Unreported, High Court, 3rd July, 2008). See also *K.R. v. Refugee Appeals Tribunal* [2014] IEHC 625 (Unreported, McDermott J., 2nd November, 2014) *and M.S. (Albania) v. Refugee Appeals Tribunal* [2018] IEHC 395 (Unreported, High Court, 30th May, 2018) (para. 9), where the point is made that if the applicant's credibility is rejected generally, the decision-maker does not need to engage in micro-specific analysis further to that. Denham J., as she then was, in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 I.R. 795 also referred to the lack of a need for a "*micro specific format*" at p. 819 (see also *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018)). The applicant places a misconceived reliance on *Mallak v. Minister for Justice Equality and Law Reform* [2012] IESC 59 [2012] 3 I.R. 297. That was a case where no reasons whatsoever were provided and does not detract from the foregoing principle that only the main reasons need to be furnished.

24. Mr. O'Shea makes the point that the decision-maker did not specifically say that the reasons discussed were the main reasons, but rather said that they were a non-exhaustive list of reasons. The submission that that entitles the applicant to *certiorari* turns logic on its head. There is a presumption of validity for an administrative decision: see Mark de Blacam, *Judicial Review*, 3rd ed. (Dublin, 2017) p. 147 "*the presumption of validity which attaches to public acts generally … is necessary in the interests of good order and administration"*, citing In *Re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, Finlay P., 5th December 1977), *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, *The State (Divito) v. Arklow UDC* [1986] I.L.R.M. 123. An administrative decision should be read, where possible, in a way that renders it valid rather than invalid. Any fair reading of a decision which states that a non-exhaustive list of reasons is provided is that those are the main reasons motivating the decision. Perhaps in an absolutely perfect world the decision-maker would have said that the reasons were as follows, or that that the main reasons were as follows, but saying that a non-exhaustive list of the reasons to be discussed is set out must be read as meaning the same thing.

**Order**

25. Both applications are dismissed.