THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 623

[RECORD NO. 2023/597JR]

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

BETWEEN

M

APPLICANT

AND

CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE

RESPONDENTS

Judgment of Mr. Justice Mark Heslin delivered on the 1st day of November 2024

Introduction

1. The applicant seeks an order of *certiorari* quashing the recommendation of the first named respondent (otherwise "the IPO") which was made pursuant to s. 39 (3) of the International Protection Act, 2015 ("the 2015 Act") that the applicant should be given neither a refugee declaration, nor a subsidiary protection declaration, as notified to the applicant by letter of 27 March 2023 ("the recommendation"). The applicant also seeks an order quashing the memorandum of the s.35 interview. In addition, orders are sought to remit the matter to the first named respondent and direct a new 's. 35 interview'.

2. The applicant also seeks an order of *certiorari* quashing the decision of the second named respondent and/or the 's. 49 report' refusing to grant the applicant permission to remain, also notified by letter dated 27 March 2023 ("the decision"). The applicant seeks orders directing the

matter to be remitted to the second respondent for the leave to remain/s. 49 aspect to be reconsidered.

3. At para. 5 of section [d] of the applicant's Statement of Grounds *"an extension of time"* is sought. Leave was granted *"without prejudice to the determination at the substantive stage of any point which could have been contended for by the Respondent at the leave stage including any point in relation to time limits for the bringing of this application"* (emphasis added).

Background

4. The applicant is a national of Georgia who sought asylum in Ireland on 13 December 2021.

5. The applicant completed the international questionnaire in the Georgian language on 11 January 2022 ("the questionnaire").

6. On 18 October 2022, the applicant attended for his s. 35 interview. The applicant speaks little English and was provided with a Georgian interpreter.

7. It is common case that on 27 March 2023 the applicant received the following: -

(i) A copy of the s. 35 report which comprises a memorandum of his interview;

(ii) A 's. 39 report' comprising the IPO's examination of the applicant's file and setting out the reasons for the said recommendation;

(iii) A 's. 40 notice' advising the applicant that, having his considered his application, the IPO's recommendation to the Minister pursuant to s. 39 (3)(c) of the 2015 Act was that he should be given neither a refugee declaration, nor a subsidiary protection declaration.

8. The applicant makes various criticisms of the interview. At para. 4 of the applicant's statement of grounds he contends that *"The translation by the interpreter was inaccurate"*.

9. The legal grounds advanced by the applicant are:-

"1. The respondent erred in law and/or breached natural justice in failing to provide the applicant with lawful, appropriate or accurate services of interpretation and/or translation and in making reports/findings/recommendations pursuant to s. 39 of the International Protection Act, 2015 in circumstances where appropriate translation or interpretation had not been provided.

2. The respondent erred in law and, contrary to Article 13 of the Procedures Directive, have failed to provide appropriate translation or interpretation services and have failed to ensure that personal interviews are conducted under conditions which allow applicants to present their application."

10. Article 13 (3)(b) of Directive 2005/85/EC 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (the "Procedures

Directive") sets out requirements for a personal interview, to include the services of an interpreter. It provides: -

> *"…*
>
> *3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end Member States shall…*
>
> *(b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate."*

11. Article 14 (1) provides: -

> *"1. Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant…"*

12. Central to the applicant's case is the assertion that errors were made by the interpreter at the s. 35 interview which were never identified to him and, later in this judgment, I will refer to certain examples.

13. The respondents' statement of opposition contains *inter alia* the following pleas at para. 12:-

> *"b. notwithstanding the alleged issues identified by the Applicant, the Applicant confirmed he understood the interpreter and was satisfied with the conduct of the interview;*
>
> *c. the contents of the s. 35 interview was read back to the Applicant, and he agreed with same and raised no objection to it being recorded as representing an accurate record of the s. 35 interview."* (emphasis added)

14. The contents of the statement of opposition were verified by means of an affidavit sworn on 8 January 2024 by Ms. Lisa Sheils, assistant principal officer employed in the IPO, within the immigration service delivery function of the Department of Justice, who made the following averments at para. 3:

> *"I beg to refer to the pleadings had herein when produced. I make this affidavit for the purpose of opposing within judicial review proceedings and verifying the facts as set out in the statement of opposition. I confirm that I have read the statement of opposition and that so much of the statement of opposition as relates to my own acts and deeds is true, and so much of it as relates to the acts and deeds of any and every other person, I believe to be true."*

15. Ms. Sheils, who is a senior manager in the area of the IPO where the applicant's international protection claims were determined, also makes *inter alia* the following averments at para. 4:-

> *"I can state that standard practice for all applicant interviews conducted by the personnel of this Office is for each page of the Interview Notes to be read back* ***in full*** *to each applicant. Interpreters are instructed to interpreter* ***in full****, the full read back by the Caseworker who conducted the interview for the relevant applicant. From an examination of the Interview Notes exhibited at Exhibit MK3 to the applicant's affidavit, I can find no evidence to suggest that the applicant raised any complaint or issue regarding anything which was read back to him at the interview. On the contrary, and as appears from the exhibited Interview Notes, the applicant signed each page to confirm he was satisfied it was an accurate record of the interview."* (emphasis in affidavit).

16. It is a matter of fact that the applicant applied his signature to each and every page of the s.35 memorandum of interview to acknowledge that its contents were a fully accurate reflection of the interview.

17. It is also a matter of fact that, at the conclusion of the interview memorandum, the applicant applied his signature to the following::-

> *"Transcript Read to and Agreed by Applicant."*

18. It is also a matter of fact that the applicant gave the following answers to the following questions which appear in the s. 35 report:-

> *"Q. 88 – did you understand the interpreter today?*
> *A. – yes*
> *Q. 89 – are you happy with the conduct of the interview?*
> *A. – it wasn't bad. I was nervous. I was worried about things.*
> *Q. 90 – are you satisfied that the information recorded in this record is as stated by you?*
> *A. – yes"*

19. The foregoing can be seen from internal page 18 (of 21) of the s. 35 report, each page of which was signed by the applicant.

20. Page no. 1 of the s. 35 report (which bears the signature of the applicant at the foot of the page) begins as follows:-

> *"My name is* [E] *and I will ask you some questions today regarding your international protection claim. I am authorised by the Minister to interview applicants for international protection. This interview is being conducted as part of the examination of your application for international protection. The interview does not cover permission to remain. However, I will note down everything that I consider may be relevant to the Minister's decision in relation to permission to remain in the event that permission to remain were to apply to you.*

This is [M] *who will interpreter for us today. The interpreter will treat anything you say today as confidential. The interpreter will assist with communications, but has no role in the decision.*
Please speak in short segments to help the interpreter do their job.
Please let me know at any point if you have difficulties understanding each other.
I will be using a computer to record this interview.
I will read back what I have recorded so that you can check if the information/content is correct and have an opportunity to make any clarifications or amendments.
If you feel the need to take a break at any time during the interview please let me know…"
(emphasis added)

21. It is also a fact that the s. 35 report records *"read back"* during the interview. In particular, the final entry on internal pg. 11 of the s. 35 report states: *"Read back: 15:10 – 15:34 BREAK 15:36 – 15:52".* On its face, the foregoing suggests 24 minutes, followed by a 2 minute break, followed by 16 minutes respectively (i.e. a total of 40 minutes of 'read back', excluding a break). The foregoing entry appears immediately after the answer to Q. 54.

22. Furthermore, immediately after the answer to Q. 92, the s. 35 report records: *"Read back: 17:29 – 17:44".* This suggests a further 15 minutes of 'read back'.

23. Notwithstanding the foregoing, at para. 13 of the applicant's affidavit, he makes the following averments:-

"13. When I was to sign the interview, the interpreter told me in Georgian a summary of what I was signing. I signed the pages although they were in English and I did not understand what they said. I trusted and relied upon what the interpreter said to me."
(emphasis added)

Conflicts of fact

24. To the extent that it is submitted on behalf of the applicant that, in light of his averments, there are no factual disputes, I feel bound to reject this.

25. A consideration of the pleadings, affidavits, and exhibits disclose stark and significant conflicts of fact. These conflicts seem to me to arise from:

- the difference between (i) what the applicant confirmed, in writing, at his section 35 interview on 18 October, and (ii) what he now says; and
- the difference between (i) what the applicant now says and (ii) the respondent's position, as averred by Ms Shiels.

26. With respect to the averments by Ms Shiels, at paragraph 3 of her 8 January 2024 affidavit (i.e. "*…so much of the statement of opposition as relates to my own acts and deeds is true, and so much of it as relates to the acts and deeds of any and every other person, I believe to be true*") the applicant's counsel made a submission to the effect that "*what she believes to be true"* the

applicant *"does not agree with*". This underscores the reality that there are certainly fundamental conflicts of fact which, for reasons explained in this judgment, this court is in no position to resolve in what is a purely papers-based exercise.

27. These conflicts include, but are by no means limited to:

(i) whether only a *summary* of his interview was read back to the applicant or whether the *full* transcript of his s.35 interview was read back to him;

(ii) whether the s.35 report contains translation *errors*;

(iii) whether the s.35 report *omits* detail which was provided by the applicant.

(iv) whether the issues the applicant now raises with the s.35 report were or were not *known* to him when he applied his signature to each page of same;

Later in this judgment I will return to these conflicts of fact. Given that the applicant has had to seek an extension of time, it is appropriate to address that issue first.

28 day time limit

28. By virtue of s. 5 (1) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) ("the 2000 Act") the applicant was required to bring any challenge to the recommendation within 28 days beginning with the date of notification, unless this Court considers there to be *"good and sufficient reason"* for extending time.

77 days taken in this case

29. In the present case, the applicant did not move an *ex parte* leave application until 77 days following notification of the recommendation i.e. on 12 June 2023.

30. In other words, it is common case that the applicant is 49 days *late* in seeking to challenge the recommendation/decision.

Good and sufficient reason

31. Both sides cite the decision of Mr. Justice Barr in *G.K. v IPAT & Ors* [2022] IEHC 204. In *GK,* the applicant sought to set aside the decision of the IPAT which affirmed the first-instance recommendation of the IPO. The Tribunal's decision in *GK* was made following an oral hearing of an appeal which took place on 21 October 2020. The IPAT decision of 8 March 2021 issued to the applicant on 9 March 2021. The applicant's statement of grounds was filed on 27 May 2021. It was averred that the applicant had contacted his solicitor the day after he received the Tribunal's decision seeking to challenge it; and that counsel for the applicant had not been in a position to furnish pleadings until 26 May 2021. It was submitted that the delay had been caused by other commitments of counsel, who accepted responsibility for the delay and submitted that the applicant had not been at fault.

32. In *GK,* the learned judge set out the following analysis of the proper approach to be taken by this Court to the question of extending time:-

"51. The court must now assess whether there is good and sufficient reason to extend the time within which the applicant made his application. In that regard, the dicta of Costello J. in O'Donnell v. Dun Laoghaire Corporation [1991] ILRM 301 is of relevance:

> *"The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."*

"52. That judgment was subsequently quoted with approval in Dekra Eireann Teoranta v The Minister for the Environment and Local Government [2003] 2 IR 270 and M.O'S. v The Residential Institutions Redress Board & Ors. [2018] IESC 61. Those cases make clear that the court must consider whether the reasons provided by an applicant to explain and justify the extent of the delay, are sufficient to satisfy the court that it should exercise its discretion to extend time.

53. The court must also consider, as stated by Finlay Geoghegan J. in the M.O'S. case, "all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted." Particularly, in that regard, the court is conscious of the consequences for the applicant should his claim fail on grounds of delay. It is possible that in certain cases, an applicant may be returned to a country where his fundamental rights are not vindicated, which is obviously of great significance to him.

54. In engaging in this balancing exercise, the court ought also consider any fault of the applicant in the delay of proceedings. In Re Article 26 of the Constitution & section 5 & section 10 of the Illegal Immigrants (Trafficking Bill) 1999, Keane C.J. stated that:

> *"Moreover, the discretion of the court to extend the time to apply for leave where the applicant shows "good and sufficient reason" for so doing is wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or hers, or for other good and sufficient reason, to bring the application within the fourteen day period."*

33. What emerges from the foregoing is that proper considerations for this Court comprise of:-

(i) The length of the delay;

(ii) The reasons offered and the extent to which they both *explain* the delay and afford a justifiable *excuse* for it;

(iii) All relevant facts and circumstances; and

(iv) The interests of justice.

Time limit imposed by the Oireachtas

34. As Ms. Justice Phelan made clear in *I.T. v The Minister for Justice* [2023] IEHC 40:-

"Given that GK was a decision under a statutory time-period, it is also necessary to add as a consideration whether the time limit is imposed by statute or under the Rules of Court." (para. 57)

35. In the present case, the Oireachtas has chosen to lay down a specific time limit of 28 days.

Length of delay

36. The quantum of delay in this case is very similar to the delay in *GK.* Here, the applicant sought leave 77 days after receiving the relevant notice whereas in *GK* leave was sought 79 days after receipt of the relevant decision. As Barr J. observed at para. 56 in *GK "The delay is not merely a small number of days outside the 28-day window..."*.

37. Here, as in *GK,* the applicant's delay is over two and a half times the statutory 'window' allowed by the legislature for the making of an application to seek judicial review. When the length of the applicant's delay is viewed in relation to the time-limit itself, the applicant's delay is very significant in my view.

Reasons to explain and excuse delay

38. The applicant received the relevant notice on 27 March 2023, which was a Monday. Thus, the 28-day statutory period ran until Monday 24 April.

39. At para. 15 of his affidavit, the applicant avers that he attended at his solicitor's office on 21 April 2023, which was a Friday. This was 25 days into the 28-day period which would expire on the very next working day. The applicant does not claim that there was anything which prevented him from meeting his solicitor sooner.

40. What the applicant contends to be 'good and sufficient reason' begins at para. 18 of his affidavit, as follows:-

"18. I pray this honourable court for an extension of time within which to issue these proceedings. Upon receipt of the decision of IPO under cover of the 27th March 2023 (sic) *exhibited herein, I contacted my solicitor and advised I wished to appeal."* (emphasis added)

41. I pause here to say that the foregoing evidence allows for a finding of fact that on an *unspecified* date following receipt of the 27 March 2023 recommendation/decision, the applicant informed the latter that he *"wished to appeal"*. I will shortly come to the date of the applicant's notice of appeal. Before doing so, it is important to note that the applicant's entitlement to an appeal is a statutory *right*, of which he was given notice.

Right to appeal

42. The very first page of the 27 March 2023 letter from the IPO to the respondent stated *inter alia*:-

> *"YOUR RIGHT TO APPEAL*
> *In accordance with s. 41 (1) of the Act, you can appeal this recommendation to the International Protection Appeals Tribunal. The information leaflet for applicants for international protection in Ireland (appeals procedure) setting out the appeals process, as specified in part 6 of the Act, is also enclosed.*
> *The international protections officer's report prepared pursuant to s. 39 of the Act (IPO 13B) contains one or more of the additional findings listed under s. 39 (4) of the Act. Therefore, the time period in which you may appeal to the International Protection Appeals Tribunal against this recommendation is ten working days from the sending of this letter. Any such appeal will be dealt with by the tribunal without an oral hearing unless the tribunal considers that it is in the interests of justice to hold an oral hearing.*
> *Therefore, if you wish to appeal please complete the "International Protection Appeals Tribunal – notice of appeal" (enclosed at Schedule 1) and submit it within ten working days of the date of this letter to the following address…*
> *A representative of the Minister for Justice will issue a decision on your protection application in line with this recommendation if you do not lodge an appeal within the time specified above."* (emphasis added)

11 April appeal to the IPAT and request for oral hearing

43. Reflecting the instructions averred to in para.18 of the applicant's affidavit, his solicitors wrote to the IPAT, by letter dated 11 April 2023, stating *inter alia*: -

> *"We attach a Notice of Appeal on behalf of the above, which is submitted without prejudice to any challenge to the decisions of the IPO.*
> *The applicant requests an oral hearing in relation to this appeal and requires a Georgian interpreter for the appeal. The grounds for this request as set out in the grounds of appeal attached."* (emphasis added)

44. This letter was sent 10 days prior to the 'in person' meeting which subsequently took place on 21 April 2023, between the applicant, his solicitor, and an interpreter. However, the making of an appeal neither explains nor excuses the applicant's failure to meet the 28-day statutory time limit.

45. The grounds of appeal referred to by the applicant's solicitor comprise two typed pages of *"Grounds of appeal to IPAT and submissions"*, para. 2 of which states:-

> *"2. It is submitted that the applicant would be denied an effective remedy in relation to his claim for international protection if he is denied an oral hearing. The issues raised by the IPO can only appropriately be dealt with by way of oral evidence and submissions because of the reasons upon which his creditability was impugned. No prejudice to the*

tribunal can be envisaged by the denial of an oral hearing to our client, yet the potential of prejudice to the applicant is clear." (emphasis added)

46. The foregoing view – albeit expressed in the context of seeking an oral hearing of the applicant's appeal by the IPAT and without any reference to alleged translation deficiencies – seems to me to be equally applicable to the translation issues raised by the applicant in these proceedings.

Oral hearing of appeal scheduled for 11 September 2023

47. The applicant is entitled to a *de novo* appeal to IPAT and, in the manner examined, has served notice of appeal. The applicant's request for an oral hearing in relation to this appeal was granted and this oral hearing was scheduled to take place on 11 September 2023. The applicant does not suggest that he received other than adequate notice of same. The reason why this appeal has *not* yet taken place is because the applicant caused the present proceedings to be instituted and, on 8 September 2023, requested the IPAT to 'stay' his appeal.

48. Although the IPAT is required to have regard to the s.39 report which is based on the s.35 report of the interview (see s. 49 of the 2015 Act) the outcome of an appeal to the IPAT is entirely unknown. If the applicant is successful on appeal, the present proceedings will have been entirely pointless. If the applicant is unsuccessful, the basis for such findings as the IPAT may reach is entirely unknown. The IPAT is not obliged to place weight on the IPO's findings, still less on any findings which are said by the applicant to involve translation errors/omissions.

21 April 2023 meeting

49. Returning to what the applicant contends to be good and sufficient reason to extend time, the balance of para. 18 of his affidavit contains the following averments:-

"In order to take instructions and discuss the IPO decision it was necessary to meet at my solicitor's office (in person) and with interpreter (also in person). My solicitor organised this for the 21st April 2023. I am advised that my file was sent to junior counsel and pleadings were finalised on the 8th May 2023. Senior counsel came into the case and pleadings were then amended and finalised the 12th May 2023. After this they were sent on to Word Perfect Translations in order that this affidavit could be provided to me in Georgian, which further contributed to the delay." (emphasis added)

Steps

50. Without for a moment suggesting that the work necessary to commence judicial review proceedings is not significant, the foregoing seems to me to be no more than a narrative of 'steps' which every litigant who does not speak English would have to go through in order to mount a challenge of the type at issue, accompanied by the dates when each step occurred (but without any reason to suggest that these steps could not have been taken sooner).

51. With no disrespect intended, it is wholly unsurprising that a non-English speaker wishing to commence judicial review proceedings might well need to (i) meet with solicitors; (ii) retain junior and senior counsel to prepare pleadings; and (iii) avail of the services of an interpreter and/or translator.

52. The Oireachtas could hardly have been unaware that such steps would be likely, when the legislature decided upon the 28-day time limit. Thus, for this court to regard the taking of these steps as constituting 'good and sufficient reason' would be to undermine the very time limit decided upon by the Oireachtas.

53. The question for this court cannot be whether it was necessary for the applicant to take steps which can fairly be described as relatively commonplace and not out of the ordinary. The question must be whether there is a reason to explain and excuse why they were not taken 'in time' for the 28 day limit to be adhered to.

54. What is noticeably absent from the applicant's affidavit is any reason why the steps taken were not taken *earlier*; and any evidence that these steps could not have occurred *within* the statutory time limit.

3 April / 11 April

55. To take the following example, the evidence before this court includes the applicant's averment that: *"In order to take instructions and discuss the IPO decision it was necessary to meet at my solicitor's office (in person) and with interpreter (also in person)."* However, there is no evidence to explain why it took from 27 March until 21 April for such an 'in person' meeting to be arranged, particularly when it is clear from other evidence that instructions to appeal the IPO decision to the IPAT seem to have been given as early as 3 April 2021 (being date the applicant signed his notice of appeal) or, if I am wrong in that view, between 3 April and 11 April (when the appeal to the IPAT was served).

56. Similar comments apply to the contents of a relatively short affidavit which was sworn by the applicant's solicitor on 18 October 2023 *"in order to address the issue of delay, and the requirement for an extension of time in this case"* (*per* para. 4). That affidavit proceeds to state the following:-

> *"5. I say and believe that the applicant, Mr.* [M], *does not (and did not) speak or read English sufficiently to understanding his affidavit in English. It was therefore necessary to have such documents translated to Georgian, the applicant's first language, in order that he could understand what he was averring to.*
>
> *6. I say that as I understand the relevant dates are as follows:-*
>
> | | |
> |---|---|
> | *27th March 2023* | *Applicant receives decisions of the IPO.* |
> | *11th April 2023* | *Counsel is briefed in relation to the decisions of the IPO.* |

17th April 2023	*Request made to the IPO for a copy of the applicant's Questionnaire in the Georgian language.*
21st April 2023	*Applicant is read parts of the s. 35 interview by interpreter at my office and instructs there is a mis-recording of his account and that he was unaware of this at the time of signing of the memorandum. Applicant gives instructions to bring judicial review proceedings.*
25th April 2023	*Copy of the applicant's Georgian questionnaire is received from the IPO.*
8th May 2023	*Pleadings are finalised by junior counsel.*
12th May 2023	*Pleadings are amended and settled by senior counsel and are provided to my office.*
16th May 2023	*Papers are sent to Word Perfect to be translated.*
24th May 2023	*Translated papers were returned to my office by the translation company.*
29th May 2023	*The applicant swears the proceedings.*
30th May 2023	*Proceedings are filed in the central office, are emailed to the asylum register for the purposes of obtaining a date to stop the time and a date of the 9th June 2023 is given to stop time.*
9th June 2023	*The case is opened for time before Judge Meenan.*

7. I say that any delay was occasioned through no fault of the applicant, and I therefore pray this honourable court for an extension of time."

57. Without for a moment taking away from the applicant's difficulty with the English language (established by uncontested evidence before this court) but focusing on the delay issue, the applicant gave instructions to his solicitor, no later than 11 April 2023, to appeal the IPO's recommendation to IPAT and to seek an oral appeal (having signed the relevant notice of appeal on 3 April 2023). Whether the applicant and his solicitor availed of the services of an interpreter for the purpose of giving/acting upon the instructions to appeal to the IPAT is not addressed in the evidence. No evidence is put before this court, by the applicant or his solicitor, for why the 'in person' consultation between the applicant, his solicitor and an interpreter did not take place *until* 21 April 2023. There is no reason given to explain why it was not possible for the in person meeting to take place sooner, be that on 3 April; 11 April; or any date. There is certainly no evidence that something out of the ordinary caused any delay in arranging the in person meeting.

58. It will be recalled that, in *GK*, the explanation for the delay was other commitments of counsel, who accepted responsibility. In the manner examined earlier, it is clear that the foregoing explanation did not excuse the delay. However, the evidence in the present case does not even go as far. Unlike the position in *GK*, there is not even an explanation. By that I mean, neither the applicant nor his solicitors go further than referring to steps taken. They do not point

to anything said to explain the delay in taking any of those steps. Without for a moment purporting to given examples of explanations which might prove to be acceptable, it is not said, for example, that the applicant was ill and incapable of attending any 'in person' meeting between date 'a' and date 'b'; or that efforts were made between 'x' date and 'y' date to try and secure an interpreter but none was available until 'z' date; or that anything out of the ordinary occurred during the 28-day period in question.

Difficulties and diligence

59. In submissions on behalf of the applicant counsel laid emphasis on the Supreme Court's decision following the Article 26 reference in relation to the *Illegal Immigrants Trafficking Bill 1999* [2000] IESC 19 in particular the following passage (at 394):-

> *"The court is satisfied that the discretion of the High Court to extend the 14 day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights*." (emphasis added)

60. The word "*difficulties*" appears 3 times in this sentence. However, neither the applicant nor his solicitor have averred to *any* difficulties which were encountered between 27 March and 24 April or, for that matter, beyond the expiry of the statutory time limit, still less difficulties which are said to explain and excuse the failure to meet the time limit imposed by the Oireachtas.

61. In oral submissions, counsel for the applicant put matters as follows: "*We have set out all the different dates that different things happened".* With no disrespect intended, it seems to me that more is required of an applicant for the purpose of establishing good and sufficient reason to extend the statutory time limit.

62. I cannot interpret the Supreme Court's observations (with regard to what was then a time limit of half the current length) to mean that, any applicant with difficulties communicating in the English-language, such that he or she requires the services of an interpreter or translator to avail of legal advice and assistance, will have established 'good and sufficient reason' to extend time. Yet that is precisely the logic of the applicant's case for an extension. I cannot agree. I interpret the Supreme Court's dicta to mean there must be evidence of *difficulties* which speak directly to *why* it was not possible to comply with the time limit mandated by the Oireachtas. That evidence is absent in the present case. Furthermore, and without for a moment casting any blame, the evidence allows for a finding that the applicant, who at all material times had the benefit of legal assistance, has not shown what the Supreme Court described as "*reasonable diligence*" in seeking to bring himself within the statutory time limit.

63. As Barr J. observed at para. 56 of his judgment in *GK*, the applicant's "*…legal advisors must be taken to have known the relevant time periods within which to bring a challenge to the*

decision of the respondent." In other words, the applicant's legal advisors were aware, at all material times, that the 28 day period was 'running against' the applicant, from 27 March.

64. The applicant's solicitors knew this when (i) the applicant first contacted his solicitor after receiving the 27 March 2023 notification; (ii) when the applicant first gave instructions for an appeal to the IPAT; (iii) when the applicant signed his notice of appeal on 3 April; (iv) when the appeal was served on the IPAT on 11 April; and (v) when the applicant met with his solicitor, counsel, and interpreter on 21 April 2023.

65. As averred by his solicitor, on 21 April 2023, the "*Applicant gives instructions to bring judicial review proceedings".* This was still *within* the 28-day statutory period (specifically, 25 days into it). What time, on 21 April, the meeting took place and the foregoing instructions were given is not specified but there was certainly the remainder of Friday 21 April and up to the end of Monday 24 April to comply with the time limit.

66. Without directing criticism and without purporting to impose unrealistic standards, it seem appropriate to observe that this court has dealt, time and again, with situations where it is necessary to bring applications on a very urgent basis. Applications under Art. 40.4.2 of the Constitution or under the Court's Inherent Jurisdiction (involving fundamental rights, including liberty, bodily integrity and autonomy) are obvious examples. Such applications can, and not infrequently do, involve 'out of hours' sittings of the court, including weekends; the preparation of pleadings/affidavits within very 'tight' time constraints; and the exchange of affidavits 'overnight'. In other words, clients, solicitors, and counsel not infrequently work during weekends. Furthermore, interpreters are increasingly involved in proceedings, extradition cases being an obvious example and it is not uncommon for an interpreter to be present in court on a Saturday or Sunday in the context of, for example, an arrest under s. 13 of the European Arrest Warrant Act, 2003.

67. The foregoing is not to suggest that legal advice and assistance can always be provided in a matter of a few days. Nor is it to suggest that the services of an interpreter or translator can always be secured when required. In any given case, difficulties might arise. My point is that no difficulties whatsoever are averred to in the present case and, even though it would have required the applicant, his solicitor, counsel and an interpreter/translator to make their respective input on a most urgent and 'out of hours' basis, there is no evidence that anything prevented this from taking place in the admittedly very narrow window of the remaining 3 days of the statutory time period (i.e. 21 to 24 April 2023). Nor is there evidence of any difficulty which caused 25 days of the statutory period to be used up before the in person meeting on 21 April.

68. At para 55 of his judgment in *GK*, Mr Justice Barr stated: "*It must be said that the reason given to explain and justify the delay is considerably lacking in detail*". Focusing on the foregoing statement, counsel for the applicant submits that *GK* can be distinguished on the facts. Despite great skill deployed by the applicant's counsel, I cannot agree.

69. In the manner examined earlier, a list of steps and the date when each was taken has certainly been set out. However, no reason is proffered to explain, or excuse, the delay up to the taking of each step, or between each of the steps taken. Nor is it said that any specific reason(s) account for the statutory time limit being missed (by a similar margin as it was missed in *GK*).

70. On behalf of the applicant, submissions are made to the effect that (i) *"It would have been necessary for the solicitor to organise an interpreter and that was arranged";* and (ii) it was only at the 'in person' consultation that the applicant became aware of what he contends to be translation errors. I accept that entirely, but there is simply no evidence that these arrangements could not have been made prior to 21 April and in sufficient time to allow for the statutory time limit to be complied with.

71. Recalling the averments by the applicant's solicitor, and at the risk of a certain amount of repetition, the following observations can be made:-

(i) The applicant does not say when he contacted his solicitor after receiving the 27 March 2023 notifications;

(ii) Exhibit "MK4" to the applicant's affidavit sworn on 29 May 2023, comprises a notice of appeal to the IPAT, internal page 7 of which contains the applicant's signatures (confirming the answers set out in the form to be true and correct ; and authorising his legal representative to act on his behalf in all matters with the Tribunal as regards his appeal) followed by the date: "*3/4/23*";

(iii) If it was the case that the applicant first contacted his solicitor on 3 April 2023, no evidence is given on foot of which to base a finding that it was impossible for a meeting to be take place between the applicant; his solicitor; counsel; and an interpreter until 21 April, when such a meeting did take place;

(iv) 8 days expired between 3 April and 11 April, when "*Counsel is briefed in relation to the decisions of the IPO"* without any evidence of efforts to convene such an 'in person' meeting or any difficulty in that regard;

(v) Insofar as it is submitted that a copy of the applicant's questionnaire in the Georgian language was essential, no evidence is given for why it was not requested until 17 April 2023, particularly in light of the fact that the applicant signed a notice of appeal to the IPAT a fortnight earlier (3 April) and received the relevant recommendation/decision three weeks earlier (27 March) ;

(vi) It could not be the case that the need for this questionnaire only emerged as a result of the meeting between the applicant his solicitor and an interpreter on 21 April, given that the questionnaire was requested prior to that meeting;

(vii) The request for the questionnaire which was made on 17 April was dealt with within 8 days i.e. provided on 25 April and there is no evidence to suggest that, had it been requested far earlier, it would not have been provided within the statutory time limit;

(viii) No evidence is given as to when junior counsel was instructed to draft proceedings in relation to seeking judicial review;

(ix) No evidence is given in relation to what, if any, difficulty prevented draft proceeding from begin made available within the time limit;

(x) On the basis that further interpreter/translator services would be required once draft pleadings had been settled, no evidence is given of efforts to have same available before the expiry of the 28 day period.

Practical requirements

72. Paragraph 7 of the applicant's written submissions refers to *"The delay caused by the practical requirements of drafting pleadings, settling them, having translations prepared, having the matter listed for the purpose of opening the leave application…"* (emphasis added).

73. For the reasons I referred to earlier, I agree with the respondents' submissions that these *"practical requirements"* represent relatively standard matters arising where any applicant, even one for whom English is not his first language, wishes to challenge an administrative decision. As touched on earlier, they also seem to me to constitute relatively commonplace steps which the Legislature must have contemplated as being necessary for a would-be applicant to take when the Oireachtas decided that 28 days was the specific time limit.

74. If the matters averred to by the applicant and his solicitor in this case constituted 'good and sufficient reason' for the purposes of an extension of time, it would set at nought the specific 28-day time limit chosen by the Oireachtas.

75. The Legislature cannot have intended that the 28 days is 'flexible' with reference to the speed at which *commonplace* steps were taken, in any given case, by an applicant; his/her solicitors; counsel; interpreters and/or translators. Flexibility is only possible if 'good and sufficient reason' is established by means of evidence.

76. In the course of oral submission, counsel for the applicant stated: *"If there was a frailty with his solicitor or legal advisor, that is not something which automatically should be laid at the applicant's door".* Taking nothing away from the skill with which all submissions were made on the applicant's behalf, the difficulty I find with the foregoing is that nowhere in the evidence is it said that the reason for the delay, or any part of the delay, was any "*frailty*" on the part of a solicitor or counsel. Without intending any disrespect, it seems to me that this is a submission which invites the court to engage in impermissible speculation.

77. In my view, when presented with no more than a list of steps and the dates these steps were taken, this court cannot *infer* that difficulties must have arisen which resulted in delay, when no difficulty whatsoever is averred to have occurred, still less said to have caused the statutory deadline to be missed.

78. Where all necessary steps were not taken within the 28 day statutory time limit, the reason *why* must be evidenced. Without this evidence, this court cannot assess whether good and sufficient reason exists.

79. At para. 6 of the applicant's written submissions, emphasises is laid on the fact that the applicant did not meet with his solicitor and an interpreter until 21 April 2023 and, due to speaking only a little English *"…he was not aware of the issues complained of in his affidavit <u>until</u> the meeting of the 21 April 2023, when his legal advisor and interpreter explained to the applicant what the memorandum of the s. 35* (sic) *in fact recorded as having been said as having occurred."*

80. What is not explained by the applicant or his solicitor is why 25 days out of the 28-day statutory period were permitted to expire *before* this meeting and why, *if* it be the case (and I say "*if*" because it is not asserted in evidence) it proved impossible to prepare the judicial review application between 21 and 24 April (i.e. even taking on board the late start).

81. It is clear that on 21 April, i.e. *prior* to the expiry of the 28-day statutory period, the applicant gave instructions to seek judicial review. However, the evidence discloses nothing which explains, or excuses delay up to, or beyond, 21 April.

82. Furthermore, even if the statutory 28-day period only began to run on Friday 21 April 2023 (and this is certainly not the position) it would have expired (in this purely theoretical example) on Friday 19 May. However, to illustrate the length and significance of the delay in the present case, these proceedings were not 'opened' until almost a month *later* i.e. on 12 June 2023.

83. Recalling the averments made by the applicant's solicitor, it is a fact that by 12 May 2023 pleadings had been amended, settled by senior counsel, and provided to the solicitor's office. Despite this, a further *month* elapsed before the application was made to 'stop the clock'.

84. At the risk of more repetition, there is simply no evidence before this Court that there was any difficulty in securing the services (at any point prior to the expiry of the 28 day period, even at short notice) of junior counsel; senior counsel; an interpreter; or a translator.

85. Even if there was evidence before this court sufficient to explain and excuse delay up to, say, 12 May 2023 (when, as averred by the applicant's solicitor: "*Pleadings are amended and settled by senior counsel and are provided to my office"*) there is no evidence, for example, that it proved impossible to secure the services of an interpreter for a meeting on or immediately after 12 May, so that the interpreter could assist the applicant to understand every word of the statement of grounds, and the affidavit he ultimately swore.

86. None of the foregoing is said to criticize. It is simply to interrogate the evidence offered in circumstance where, the laying-down by the Oireachtas of such a specific time limit seems to me to obliges this Court to examine the evidence very carefully to see whether it discloses, in objective terms, a reason or reasons which both *explain* the delay and provide an *excuse* for it, as part of the exercise of ascertaining whether good and sufficient reason exists or not.

87. I have approached the application to extend time guided by the principles identified in the authorities which counsel for both parties have helpfully directed me to. The principles outlined in *GK* and in *IT* are particularly relevant.

88. My decision has also involved a consideration of the entire circumstances, including the fact that the respondents do not allege prejudice. However, the applicant's submission that *"there is no allegation of prejudice by the respondents resulting from the delay"* does not address the fact that the will of the Irish people, as expressed through legislation enacted by the Oireachtas, is that a strict 28-day time limit applies, which time limit this Court has no jurisdiction to extend *unless* it considers that there is good and sufficient reason.

89. My consideration has also included the constitutional right of access to the courts (emphasised at para. 11 of the applicant's written submissions). However, the statutory time limit in question is consistent with such a right of access. In *re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, the Supreme Court (when considering the 14-day period then in place) stated *inter alia*:-

> *"There is a well-established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible. (Brady v Donegal Co. Co.; Irish Asphalt Limited v An Bord Pleanála; and KSK Enterprises Limited v An Bord Pleanála [1994] 2 IR 128 at 135). Furthermore, it may be inferred from the Bill and the surrounding circumstances that the early establishment of the certainty of the decisions in question is necessary in the interests of the proper management and treatment of persons seeking asylum or refugee status in this country. The early implementation of decisions duly and properly taken would facilitate the better and proper administration of the system governing seekers of asylum for both those who are ultimately successful and ultimately unsuccessful."*

90. Later in the same judgment, the Supreme Court noted that objective reasons concerning the public interest in the certainty of administrative decisions and the effective management of international protection applications *"…may justify a stringent limitation of the period within which judicial review of such decisions may be sought, provided constitutional rights are respected."*

91. Bearing in mind the obligation on an applicant to seek leave to bring judicial review proceedings, and focusing on this Court's jurisdiction to extend time for good and sufficient reason, the Supreme Court noted that *"…by giving that very discretion to the Court to extend time, access to the Court is enhanced"*.

92. I am also satisfied that there is no breach of the EU law principle of *effectiveness* and purported reliance by the applicant on the decision in *Danqa v Minister for Justice and Equality* C-

429/15; EU: C: 2016: 789 does not entitle the applicant to an extension of time. The question for this Court to engage with is whether the applicant has shown good and sufficient reason.

93. Just as in *GK*, the applicant had access to legal representation at all material times. Barr J. began para. 56 of his decision in *GK* as follows: "*Although there are potential significant consequences for the applicant, he is bound by the actions of his agent*" (emphasis added). Even though the applicant in the present case does not assert that any delay by his solicitor or counsel caused the statutory time-limit to be missed, the principles set out in *GK* are no less relevant.

94. However, it should be noted that in the present case, the consequence of a refusal of judicial review is *not* at all as significant as in *GK.* The consequence is not a rejection of his international protection claim. He is simply required to take up the remedy of a statutory appeal in respect of which he has been granted the oral hearing which he requested. This court's refusal to extend the 28-day statutory period will still leave the applicant with a full statutory remedy i.e. an appeal to IPAT for which he has been granted the oral hearing he requested. The foregoing feeds into the interests of justice aspect of this Court's consideration of the matter.

Decision on the extension of time application summarised

95. The gravamen of the argument made with regard to delay is clear from para. 13 of the applicant's written submissions:-

> *"…there is good and sufficient reason for an extension of time, in particular in light of the constraints on the applicant and legal advisors averred to in the affidavits…"* (emphasis added).

96. Without intending any disrespect, it seems fair to say that, other than the 28-day period which constrains *all* would-be applicants for judicial review, the averments made by the applicant and his solicitor go no further than disclosing a chronology of commonplace steps or tasks which are likely to arise in many if not all applications for judicial review where the individual is legally advised and requires the assistance of an interpreter/translator.

97. What the averments do not disclose is anything out of the ordinary which prevented, what the applicant describes very accurately as the *"the practical requirements",* from being addressed *within* the statutory time period.

98. In short, it is contended on behalf of the applicant that this is an exceptional situation and that exceptionality has been demonstrated. With respect, I cannot agree. Bearing in mind that the relevant onus lies on the applicant, and having carefully considered the evidence, I am not satisfied that good and sufficient reason has been established to extend time. Hence, the application falls to be dismissed.

Alternative remedy

99. The foregoing is sufficient to dispose of this application. However, lest I be wrong in my findings, and bearing in mind that judicial review is a discretionary remedy, I propose to consider a further issue, namely, whether the applicant has an alternative remedy which he should be required to pursue.

***De novo* hearing**

100. It is fair to say that s. 46 of the 2015 Act requires that, before reaching a decision in respect of an appeal, the IPAT is *required* to consider all relevant material; oral evidence where an oral hearing takes place; representations made at the hearing; and all other matters considered relevant. In short, the 2015 Act provides for a full *de novo* hearing.

101. On behalf of the Supreme Court, Mr. Justice Charleton stated the following in *MARA v The Minister for Justice and Equality & Ors* [2014] IESC 71 (at para 12)

> *"..on appeal, there is a complete opportunity to present on behalf of the applicant in aid of this enquiry as a refugee status any new facts of arguments; to re-argue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full."*

102. Although commenting on the statutory appeal to the then Refugee Appeals Tribunal ("RAT") from a recommendation by the Refugee Applications Commissioner ("RAC") under the Refugee Act 1996, as amended ("the 1996 Act"), the Supreme Court's analysis applies equally to the nature and extent of the appeal which the applicant has available to him in the present case.

Very rare and limited circumstances

103. In *BNN v Minister for Justice, Equality and Law Reform & Anor* [2008] IEHC 308, Mr. Justice Hedigan examined how this Court should *"approach the question of alternative remedies"*. In *BNN*, the applicant had received a negative recommendation from the Office of the Refugee Applications Commissioner ("ORAC") and sought leave challenge that recommendation by way of judicial review. Having examined a range of authorities, the learned judge put matters as follows:-

> *"45. It is clear in the light of this series of recent decisions that <u>it is only in very rare and limited circumstances indeed that judicial review is available</u> in respect of an ORAC decision. The investigative procedure with which ORAC is tasked must be properly conducted but <u>the flaw in that procedure</u> that entitles an applicant to judicial review of an ORAC decision <u>must be so fundamental as to deprive ORAC of jurisdiction</u>. The Courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. <u>An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal</u> to the RAT. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the RAT."* (emphasis added)

104. The foregoing principles apply *mutatis mutandis* to the present case, which involves a recommendation by the IPO which is subject to a *de novo* appeal to the IPAT. The applicant in this case has not established that such a "*fundamental flaw*" occurred.

105. *T.F. -v- Minister for Justice* [2023] IECA 183 involved both different facts and a different statutory backdrop, however illustrates that there can be situations where this Court's discretion should not be exercised to refuse judicial review on the basis of an alternative remedy.

106. *TF* concerned a decision by the respondent to revoke the applicant's refugee status under section 52 of the 2015 act. The Court of Appeal found the decision to be flawed by reason of the respondent's failure to conduct an individualised assessment under section 52. At paragraph 97, of the judgment of Ms. Justice Butler, the learned judge stated:

> *"… Notwithstanding my view that in principle a statutory appeal of this nature constitutes an adequate alternative remedy which should be exhausted before an appellant proceeds to seek relief by way of judicial review, it seems that in the circumstances of this case requiring the appellant to prosecute the currently extant appeal would not really bring the substantive issues properly before the Circuit Court. In all the circumstances, and acknowledging that in principle and appeal of this nature can constitute an adequate alternative remedy, I am not minded to exercise my discretion so as to refuse the appellant the relief sought…"* (emphasis added)

107. However, on the evidence before this court, I am not satisfied that the applicant has demonstrated anything like a clear and compelling case that an injustice has been done which is incapable of being remedied on appeal.

108. I am not satisfied that the applicant has established the existence of a flaw in the procedure so fundamental as to deprive the first named respondent of jurisdiction.

109. Furthermore, and wholly unlike the position in *TF*, the applicant can bring before the IPAT all issues of which he complains, bearing in mind that, under s. 46 of the 2015 Act provides, the Tribunal may decide to "affirm" or "set aside" the IPO's recommendation.

110. Unlike this court, the IPAT appeal will focus on merits, and it seems to me that it is in such an appeal that the translation issues canvassed by the applicant can best be addressed.

111. I am fortified in this view by a consideration of the comprehensive judgment of Ms. Justice Phelan in *ESO -v- The IPO & Ors* [2023] IEHC 197. In *ESO*, the applicant applied to this court challenging a first-instance decision of the IPO to make a recommendation under s. 39(3) of the 2015 Act. Central to the applicant's complaint in *ESO* was an asserted failure to properly consider distinct elements of his claim. The applicant complained that his application for protection status

was based on membership and leadership of identified political groupings in Nigeria without separate findings being made in respect of each.

112. However, and of particular relevance to the present case, the applicant also raised translation issues. At para. 39 of her judgment in ESO, Ms. Justice Phelan stated:-

> *"While the Applicant reported a concern about translation, it is no part of the Applicant's case that he did not understand a question or that his answers were not fully translated and that matters contained in answers he gave have been omitted. Accordingly, it seems to me that the evidential basis for any substantive complaint in this regard has not been laid."*

113. I pause to say that, in the present case, unlike in *ESO*, the applicant makes a range of criticisms regarding translation. However, Phelan J. went on to state:

> *"In any event, an issue with translation is a matter which can be addressed during an oral hearing on appeal in which the Applicant will have the opportunity to ensure that any issue with regard to translation is addressed by correcting the record or elaborating on responses or otherwise as appropriate*". (emphasis added)

114. The foregoing can also be said in relation to the translation issues which the applicant has advanced in this case. An appeal by way of a *de novo* hearing before the IPAT which, as the applicant has long known, will be an oral hearing, affords him (to borrow from *ESO*) the "*opportunity to ensure that any issue with regard to translation is addressed by correcting the record or elaborating on responses or otherwise as appropriate".*

Worldport

115. Counsel for the respondents submit, correctly, that there has been no attempt by the applicant to distinguish *ESO* on *Worldport* principles (see in *Re Worldport Ireland Limited (in liquidation)* [2005] IEHC 189), the essential principle being that this Court should follow earlier High Court decisions unless there are substantial reasons for believing the earlier judgment to be wrong.

116. In response to the foregoing submission, counsel for the applicant contends that what Phelan J. stated in para 39 was *obiter* only. I am not convinced that this is so. It seems to me that *ESO* is sufficiently 'on point' that the respondent's submission with respect to *Worldport* has greater force. Although not the main grounds, translation issues were asserted in *ESO*. Although Phelan J. was of the view that those issues had not been sufficiently made out in evidence, she discounted that when she went on to say: "*In any event, an issue with translation is a matter which can be addressed during an oral hearing on appeal…"* (emphasis added).

117. However, lest it be wrong to do otherwise, I have not approached the 'alternative remedy' question on the basis that, because the applicant raises an issue with translation, it is not open to him to seek judicial review and he is compelled to pursue a statutory remedy.

118. Nevertheless, when considering what the evidence discloses (and bearing in mind the burden of proof on the applicant) due account must be taken of the guidance provided in *ESO.* At para. s. 65 – 66 of her judgment in *ESO*, Phelan J. stated:-

> *"65. It is recalled that other issues arising in relation to translation, the absence of an opportunity to respond to issues which were not notified to the Applicant and the weight to be attached to distinct elements of COI relevant to the claims and the test to be applied can also be fully addressed on an appeal, in a way that cannot be achieved in judicial review proceedings. These factors, in my view, make an appeal the more appropriate remedy. It is the more appropriate remedy because the IPAT can address the alleged defects identified to ground* [the] *within application by way of judicial review but can then also proceed to determine other issues which cannot be resolved in judicial review and can determine the appeal on its merits, which this Court could never do.*
>
> *66. As the system for managing refugee applications contains its own appeal mechanism and that appeal is fully capable of correcting each of the identified errors in this case, I am satisfied that the IPAT provides an adequate alternative and more appropriate remedy in this case in the light of the issues raised and their merit. I am also satisfied that there is no imperative of justice or fairness which would require relief by way of judicial review."* (emphasis added)

More appropriate remedy

119. In the present case it can also be said that that the translation issues raised by the applicant can be fully addressed on an appeal to the IPAT in a way that cannot be achieved in judicial review proceedings. The appeal to the IPAT is also the more appropriate remedy. Not only will the IPAT be able to address the alleged translation errors/omissions in a full *oral* rehearing (unlike the papers-only exercise which this court is engaged in) the IPAT can determine the appeal on its *merits* (something this court has no jurisdiction to do).

Factual disputes

120. Returning to an issue I touched on earlier in this judgment, it is plain that the pleadings in this case disclose factual disputes. For example, the applicant now contends that when he confirmed the accuracy of each page of his s.35 interview (by applying his signature) he did so without the full content having been read out to him in Georgian. To establish the foregoing, he would need to proffer evidence (on foot of which this court could be satisfied on the civil standard) that, as a matter of fact, only a summary of the interview was read to him. Based on the evidence tendered in these proceedings, this court is not - indeed cannot be - satisfied that this is so, underlying why an oral hearing before the IPAT is by far the more suitable alternative.

121. In truth, this court is in no position to resolve such a factual dispute, the fundamental significance of which is clear from *inter alia* the following written submissions on behalf of the respondents:-

*"3.3.11 The applicant **now** says that a mere summary of his evidence was read back to him. In particular, that prompts the question as to why the applicant was satisfied to sign each page (which clearly contains numbered questions and answers).*

3.3.12 If the Applicant had any element of dissatisfaction with the content of the interview as recorded, including that a mere summary of the interview was being read back to him for his agreement (which is not accepted to have occurred), then it was incumbent on the applicant to take the opportunity to raise this at interview. That opportunity was not contingent upon the applicant having any facility in the English language. The applicant would have known whether the memorandum was being read out to him, in Georgian, as a question-by-question and answer-by-answer account of the questions posed to him at interview or whether this was simply being summarised.

3.3.13 Safeguards such as the full 'read back' are designed to avoid precisely the situation which can arise where an applicant who confirms at the material [time] *that he understands the interpreter and is satisfied with the record of the interview, but subsequently receives a negative outcome and seeks to impugn the accuracy of that record retrospectively."* (emphasis in original)

122. It is perfectly clear that the s. 35 report is in a "Q" followed by "A" format. It is difficult to understand why someone would sign each page in that format if the explanation given to them was a summary only, i.e. not "Q" followed by "A". Although it is not possible for this court to decide that question of fact, it is common case that the applicant did *not* suggest, on 18 October 2022, that he was not being given information in the form of each numbered question "Q" and corresponding answer "A".

123. Unlike this Court, the IPAT will be able to conduct a full rehearing of all the applicant's evidence. The applicant's statutory appeal gives him the opportunity, with the assistance of a translator, to point out what he contends to be mistranslations or omissions in the s. 35 report. He will have every chance to correct what he contends to be errors in the s. 35 report. He will be able to inform the Tribunal, for example, that (contrary to what appears on internal page 11 of the s. 35 report) he was not asked the same question 3 times. He can also explain the circumstances in which he signed the bottom of page 11 (and every page of the s.35 report) and explain that, despite what appears on the face of the s.35 report, his signature does not constitute confirmation of the accuracy of the report's contents. The applicant does not suggest that, in relation to all alleged translation errors/omissions, the IPAT would not be in a position to hear evidence from all relevant witnesses (such as the applicant himself, the interviewer, and the interpreter who were there on 18 October 2022) to the extent they are called.

124. In short, judicial review seems to me to a wholly unsuitable mechanism for the resolution of disputes of fact which go to the heart of the applicant's claim. By contrast a *de novo* appeal to the IPAT provides an alternative and far more appropriate mechanism.

125. Insofar as the applicant seeks to rely on *Addis v Bundesrepublik Deutschland* (Case C-516/17), leaving aside that Directive 2013/32 (on Common Procedures for Granting and Withdrawing International Protection) is not relevant, the facts are wholly different. The applicant in *Addis* sought and was granted refugee status in Italy. He travelled to Germany and applied for refugee status there, under a different identity. On discovering his Italian refugee status, the German authority declared that, under national law, he did not have a right to asylum in Germany because he had entered from a safe 3rd country. The applicant appealed his deportation to Italy on the grounds that, before making its decision, the German authority did not interview him in-person regarding the substance or admissibility of his application, as required by articles 13 and 34 of Directive 2013/32.

126. Bearing in mind that (wholly unlike the present case) the applicant in *Addis* had never been interviewed, the Court of Justice focused on what was available to the applicant in question by way of appeal and the extent to which it was guaranteed. In this case, the applicant has an appeal by way of a full rehearing. His right to appeal is guaranteed by statute. His request for an oral hearing has been acceded to. He will undoubtedly have the services of a translator. He can make the case he wishes, with reference to documentation and oral evidence from such witnesses as may be relevant.

127. Earlier in this judgment, I referred to the Procedures Directive. In submissions, counsel for the applicant laid emphasis on Article 13, which states that "*Member States may provide that …(f) the competent authorities may record the applicant's oral statements, provided he /she has previously been informed thereof."* Insofar as the applicant criticises the fact that there is no recording of his section 35 interview, it is plain that Article 13 creates no mandatory obligation to record.

128. Insofar as the applicant places emphasis on the Supreme Court's decision in *Stefan v Minister for Justice & Ors* [2001] IESC 92, Ms. Justice Phelan addressed *Stefan* directly, stating the following at (para. 46): -

> *"46. In this case the Applicant has an entitlement to a full appeal, including an oral hearing, to the IPAT. There exists an elaborate statutory appeals process involving a de novo consideration of all issues. A serious question arises as to whether a discretionary remedy should be available by way of judicial review in the circumstances, even where a claim which might otherwise be amenable to judicial review is made out. The nature of the issues identified with a decision and the stage of the process at which the issues are identified is of fundamental importance in deciding whether it is appropriate to intervene by way of judicial review. While the issue identified in this case is one which has been amenable to judicial review in other cases cited, with the notable exception of the*

decisions in M.A.B. and Stefan, the case-law cited on behalf of the Applicant concerned second instance or appellate decisions. Accordingly, while the courts have been persuaded to intervene in judicial review in respect of issues pertaining to the characterisation of distinct elements of the claim or the assessment of credibility, such as those identified in this case, this does not mean that it is appropriate to do so where a case is amenable to appeal in a manner which is equally capable of curing the identified flaw(s)." (emphasis added)

129. It should also be noted that *Stefan* was decided well over two decades ago, in a very different legislative context, and against a factual backdrop materially different to the present case. *Stefan* was decided in 2001 in the absence of the statutory architecture which is now in place to enable an appeal to the IPAT under the 2015 Act. Central to the decision in *Stefan* was the fact that part of the applicant's reply to question 84 was incomplete in the English translation. The Supreme Court upheld the decision of Kelly J. (as he then was) that the decision was made in breach of fair procedures, given that evidence which was not immaterial was not before the decision-maker.

130. In *Stefan* it was possible for the court to make a finding of fact in circumstances where, to quote from the Supreme Court's judgment: *"As appears from exhibit B, the applicant replied to this question with approximately two and half pages of cursive script. The English translation is incomplete…"*.

131. The facts in the present case are very different. This case does not involve a situation where parts of a written document were omitted. Given the very different context in which the present dispute arises, a *de novo* statutory appeal is a far more suitable means of resolving fundamental disputes of fact and addressing the applicant's complaint.

132. *Stefan* was one of the rare exceptions when a first-instance decision was the subject of judicial review. However, an application of the principles outlined in *BNN* and *MARA* illustrates the appropriateness of requiring this applicant to pursue his statutory remedy of appeal.

133. On that issue, I note that at para. 59 of the applicant's written submissions, it is stated that *"at the time of filing pleadings, the applicant was not aware whether he would be permitted an oral hearing"*. The applicant's pleadings were first filed on 30 May 2023 (the applicant's grounding affidavit having been sworn on 29 May 2023). However, and as touched on earlier, the applicant has known for well over a year that his request for an oral hearing (contained in his solicitor's letter dated 11 April 2023) was, in fact, granted.

134. Having considered the entire evidence before this Court, I am bound to reject the submission that *"…the applicant in this case was denied an opportunity to be heard at first instance, resulting in his case not being reheard but heard for the first time upon appeal."* (para. 72 of the applicants written submissions). As regards the decision in *X -v- IPAT*, C-756/21, to

require the applicant to pursue his statutory remedy does not involve any breach of the principle of effectiveness. Nor, for the reasons set out in this judgment, has the applicant discharged the burden of showing that the recommendation/decision might have been different in the absence of what the applicant asserts to be illegality.

Decision regarding alternative remedy summarised

135. For the reasons set out above, I take the view that the applicant has not established that any injustice has been done which is incapable of being remedied by means of his appeal to the IPAT which will proceed by way of oral hearing. I am satisfied that the applicant has failed to exhaust a statutory remedy which is far more appropriate as a means to deal with his complaint. Thus, even if he had established good and sufficient reason to extend the 28-day time limit (and he has not) the applicant would not be entitled to relief.

136. Lest I be entirely wrong in my findings as regards both the extension of time and alternative remedy issues, I also propose to look at the substance of the case made by the applicant, as follows.

137. The essence of the applicant's case is that there are translation errors which constitute legal failings by the respondents. An example of alleged translation inaccuracies relates to Q47-49 of the s.35 report. In this section of the interview memorandum, the applicant was asked about his membership of the "United National Movement Party" (being the opposition to the ruling "Georgian Dream Movement"). The s.35 report contains the following:

> *"Q.47 – Previously in this interview you stated you were an official member of the party. What was involved to become a member?*
> *A. – I had a constant relationship with people and I was telling them how the National Movement was the best party to vote for. And how it was better than the Dream Movement. I was going door to door.*
> *Q.48 – This does not answer my question. How did you become a member in the party?*
> *A. – I liked what Saakashvilli was doing for our country and I joined the party. He took care of most of the things in Georgia like electricity, house, roads, I liked what he was doing for our country.*
> *Q.49 – You still haven't answered my question. How did you become a member, what was involved?*
> *A. – I just went there and I joined the party. That's what I did. It's like when you get a job you just go there and then they will give you a job.*
> *Q.50 – Do you have a membership card?*
> *A. – I have a letter in Georgia and if you want I can send it to you here. It's a photo. It's an official letter.*
> **[Applicant was informed that they have ten working days to provide this office with the letter]**
> *Q.51 – So again, do you have a membership card?*

A. – No, I have only a letter that says I'm an official member of the party. I didn't want to have a card because in Kutaisi everyone knows me. I only had a letter which stated I was a member of the United National Movement Party."

138. The applicant asserts that he was not asked the same question repeatedly and that this is not an accurate translation. The applicant makes the following averment at paragraph 8 of his grounding affidavit:

"8. I do not recall being asked the same question repeatedly at interview. When the interpreter asked me a question (in Georgian) I answered that question (in Georgian)".

139. At paragraph 15 of his grounding affidavit, the applicant avers *inter alia* that:

"*The memorandum of the interview also suggests, at question 57-58 and 47-49, that during the interview questions were repeated. This is incorrect. When I was asked a question I answered it. And I was not repeatedly asked the same question; the interpreters questions were different each time. I cannot recall the exact phrases used when asked the questions which are recorded in English as being repeated but I am certain I was not repeatedly asked the same question, and the questions were different each time. I was unaware that the memorandum of the s.35 interview suggested that I was repeatedly asked the same question. At the readback this was not notified to me, or stated in the summary of the interpreter before I signed the pages…"*

140. The s.35 report also contains the following:

"Q.53 – You stated previously that you were a district chairman for the UN party. How did you get given this role and what did it involve?

A.- I had a boss. He gave me the chairman in my district and I did that.

Q.54 – You stated that you got involved in the 2012 election. What was this election for?

A.- That election was for the government. Because the Dream movement came to the parliament.

Readback: 15:10 - 15:34 BREAK 15:36 – 15:52.

Q.55 – When did you become district chairman?

A.- I was a supervisor during the elections.

[The translator stated that she was confused with the applicant. Throughout the whole interview he stated that he was a chairman and now he stated that he is a supervisor. The translator reiterated that he used the term chairperson throughout the interview and now he is changing his story.]

I was a supervisor in my district only in election times.

Q.56 – You stated previously that you were a chairperson, not a supervisor and you never mentioned that you only did it during election times in either your interview to date or in your questionnaire. Do you care to comment on this discrepancy?

A. – I was a supervisor I wasn't a chairman only in election times. During that time, the Dream party faked the election."

141. At paragraph 15 of his grounding affidavit the applicant avers *inter alia* that *"I was unaware that the memorandum of the interview noted"* the foregoing in his answer to Q. 55. The applicant also avers:

> *"I was also unaware that the memorandum of the interview I was handed to sign said this. At readback I was not advised of this. When I received the memorandum of the S.35 interview, I noted many things which I am certain were not read back to me. I cannot remember exactly what I said in respect of every single question nor can I recall the phrasing of every question asked but as indicated above there are matters I am certain were not read back to me, and matters I distinctly and clearly recall".*

142. Insofar as it is submitted on behalf of the applicant that it was impermissible for the s.35 report to include the note which appears in bold at A.55, I feel bound to reject that submission. As counsel for the respondents point out, s.35, which deals with *"personal interview"* provides *inter alia:*

> *"(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 s.48 or 49, in the event that the section concerned were to apply to the applicant."*
>
> (emphasis added).

143. This court is extremely conscious that it has no role as decision-maker, and nothing in this judgment should be interpreted as suggesting otherwise. However an objective reading of the memorandum, including the note to which the applicant objects, is that it facilitated a question which afforded the applicant the opportunity to clarify his use of the terms *"supervisor"* and *"chairman".* In short, the entry noted a change in terminology and gave rise, by means of Q.56, to the applicant having the opportunity, consistent with fair procedures, to explain the change in terminology.

Adverse credibility findings - cumulative basis

144. It is common case that adverse credibility findings were reached on a cumulative basis in the present case.

145. A range of separate adverse credibility findings appear in the first named respondent's recommendation. However, many of these are entirely unrelated to any translation issue which the applicant has raised in these proceedings.

Overwhelmed

146. In relation to this aspect, the respondents rely, in particular, on the Court of Appeal's decision in *BW (Nigeria) v. RAT* [2017] IECA 296 wherein Mr. Justice Peart made clear (at para.67) that an erroneous adverse credibility finding:

> *"…within a decision as to credibility reached on a cumulative basis, … may not of itself be sufficient to justify setting aside the overall decision as to credibility. It may be that the flawed fact is simply overwhelmed by the other correct facts such that the decision remains tenably sustained when read in the round, and therefore ought not to be quashed."* (emphasis added)

147. The learned judge went on to cite from the decision of Cooke J. in *I.R v. Minister for Justice, Equality & Law Reform* [2009] IEHC 353 wherein (at para.8) it was held that:

> *"When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in this regard of the cumulative impression made upon the decision-maker …"*

148. In *BW* Peart J. went on to state (at para. 70):

> *"Every case must be considered on its own facts when assessing the materiality of any particular error. In the present case there are a number of reasons within the overall adverse credibility finding which I have considered to be flawed since they are based upon matters of concern to the decision maker, which the applicant was provided with no opportunity to address or otherwise comment upon, and which are material to the applicant's case and to her credibility. The greater the number of such reasons that are found to be flawed, the more likely it is that the foundations of the overall decision reached on a cumulative basis are undermined to the extent that it must be set aside.* (Emphasis added).

149. It is important to note that *B.W*. concerned a decision by the RAT (the precursor to the IPAT) following an appeal by the applicant in question which was dealt with as a 'papers-only' appeal. This is entirely unlike the present case where, not only has this applicant the entitlement to pursue a *de novo* hearing before the IPAT, it would be an oral hearing. In *B.W.* the Court of Appeal made clear that: "…*where an issue of concern emerges for the first time on a papers-only appeal in relation to a matter which the appellant has not already had a fair opportunity to address, … she is as a matter of fair procedures entitled to an opportunity to address it* (para. 42). In the present case, the appeal to the IPAT by way of a full oral rehearing will undoubtedly afford the applicant the opportunity to address what he now says are interpretation errors.

150. However, even if the applicant had met the burden of proving on the balance of probabilities that the interpretation issues he canvasses amount to translation *errors*, (and he has not) he makes no challenge whatsoever to a range of adverse credibility findings which are summarised in the following terms at para. 3.4.5 of the respondent's written submissions:

(a) The applicant's inability to name the UNM candidate in his local region in the 2021 election, notwithstanding that he claims to have been involved with UNM since 2010 and to have campaigned for UNM in the 2021 election (Q.73 of the s.35 report);
(b) The applicant's inability to provide details regarding the ideology of UNM (Q.26 of s.35 report);
(c) The applicant's provision of incorrect dates in recounting the history of UNM (Q.23; Q.40; Q.70 of s.35 report);
(d) The inconsistency as between the applicant's claim of not having gone to the police (and indeed having provided a positive explanation for not going to the police) (questionnaire s.5.1) but also having gone to the police after being released from hospital (and having witnessed the police 'rip [] up' his medical report) (Q.61 of s.35 report);
(e) The applicant's failure to mention in his Questionnaire his having been kidnapped (Questionnaire S.4.6])only to claim subsequently at interview that he was in fact kidnapped on multiple occasions (Q.23; Q.62; Q.63 of s.35 report).

151. As the respondents correctly submit, the applicant does not now suggest that he, in fact, offered the name of the UNM candidate in the 2021 elections, which evidence was somehow misunderstood or mistranslated by the interpreter. The applicant does not suggest that during his s.35 interview he gave an account of the ideology or history of UNM which suffered through inadequate translation. Nor does the applicant seek to explain away, as an alleged translation error, his internally contradictory accounts of hospital attendance or victimisation through kidnapping.

152. In short, the applicant does not plead that any of the above adverse credibility findings are a product of interpretation errors or failings.

Tenably sustained

153. Guided by the principles outlined by the Court of Appeal in *BW*, I take the view that, not only has the applicant failed to establish interpretation errors on the evidence which he has put before this court, any alleged inadequacy in translation is overwhelmed by the cumulative effect of a range of adverse credibility findings, the basis for which he makes no complaint, such that the recommendation and decision which the applicant seeks to impugn remain "*tenably sustained when read in the round, and therefore ought not to be quashed"* (see para. 69 of *BW*).

Conclusion

154. For the reasons set out in this judgment, despite the great skill with which submissions were made on his behalf, the applicant is not entitled to relief and his claim must be dismissed.

155. On 24 March 2020 the following statement issued in respect of the delivery of judgment electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days*

of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

156. My preliminary view is that, as the entirely successful party, the respondent is entitled to their costs. The parties are invited to liaise, forthwith, with a view to agreeing a draft final order, including as to costs, within 14 days. In the event of any dispute, short legal submissions should be furnished within a further 14 days.