Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

# How do we deliver quality justice? By answering the question Thoughts from the perspective of an Irish appellate judge

**Delivered by Ms Justice Aileen Donnelly at the IARMJ[1] European Chapter Biennial Conference on 8 September 2024[2]**

On being asked to give a presentation under the general heading of "Selected issues of administration of quality justice in asylum and migration cases", I thought about what the term 'quality justice' conjured up to me. The term 'quality justice' is quite amorphous and its meaning has been subject to rigorous debate, but what sprang to my mind was the ideal of getting cases 'right' in the most expeditious and proper manner possible. By proper manner I mean in accordance with fair procedures. And it appears to me that at its simplest, and I am conscious that I am addressing a most distinguished gathering of judges and I hope that what I say is not considered overly simplistic, that accuracy in fact finding and in identifying the real issue in the case is an essential part of the delivery of quality justice. While issues of law may arise, it is surprising how often dissatisfaction with the outcome arises because the issue identification and factual analysis is at best unclear and at worst incorrect.

I want to stress from the outset that what I say here is not intended to be a criticism of judges or decision-making bodies or decision-makers. I appreciate that decision-making and decision/judgment writing is no easy feat. I am constantly impressed by the standard of decision-making and judgment writing both in this jurisdiction and abroad. I know how difficult first-instance decision-making can be from my own five years spent in the High Court and I also recognise that decision-making in the field of asylum and migration has its own particularly difficulties.

[1] International Association of Refugee and Migration Judges.
[2] I am grateful for the assistance of Anna Miskelly in preparing this presentation to the European Chapter of the International Association of Refugee & Migration Judges.

Rather, from my perspective now as an appellate judge and, in particular, on the judicial review side of thing, I occasionally find that the importance of fact-finding and addressing the issue can sometimes be overlooked. I very much welcome the opportunity today to discuss this topic. Please accept that the perspective I offer is my own and not that of the Supreme Court. With that being said, I am going to discuss some recent decisions from the Irish courts that I think offer insight into this topic.

I will start however by quoting the now retired Supreme Court judge of New South Wales, Mr Justice Peter Young, in his article 'Fact-finding made easy' (2006) 80 ALJ 454 where he says that "the most basic task of most courts, tribunals and arbitrators is to find facts. There is little material on the subject as to how one goes about this task". I think there has been more focus on the precise issue of fact finding in judging since 2006, but what I also intend to address on is something slightly different but clearly related: the necessity to identify the very issue to which those facts must be addressed. I thought it worthwhile to look at certain recent cases in the Irish courts that have arisen from first-instance decision-making on asylum and migration issues.

It is of fundamental importance to the role of appellate courts or for a court on judicial review (as well as being important for the parties) that first-instance decision-makers (whether they be judicial, quasi-judicial or administrative) truly address the issue that they have been asked to decide. Failure by decision-makers to address the issue raised by the parties is a pressing concern in the administration of quality justice not only in the general sense but specifically in the context of asylum and migration cases. The giving of reasons is of course a vital part of transparent decision-making but, while linked, the necessity to give reasons is not what I am going to talk about here; it is the more basic but fundamental requirement to actually address the issue raised.

Reaching credibility decisions in asylum cases can be extremely complex. There is often a lack of supporting documentation for the applicant's claim and there is a reliance on a credibility assessment of the applicant themselves but also on the assessment of the general information about the situation in the country of origin to decide on in a case. Credibility issues often arise in the general migration

sphere, assessing whether there has been a marriage of convenience is an obvious example. Furthermore, and separately, conducting balancing assessments of personal and family rights in migration cases and applying Article 8 of the European Convention on Human Rights considerations can involve competing interests of great individual and societal importance. Wrong decisions can have major consequences. Wrongly returning a refugee or person in need of international protection may have grave consequences. Not granting a person a lawful migration status can affect personal and professional lives profoundly. Wrongly granting recognition or a lawful status to applicants may for a variety of reasons threaten confidence in, or perhaps even the stability of, the immigration system. Therefore, asylum and migration cases are often cases which involve high stakes and demand accurate fact-finding which is clearly directed towards the issue on which a decision is required to be made.

Now that I sit as a judge of the Supreme Court, and for four years prior to that as a Court of Appeal judge, my days of fact-finding are largely behind me and as succinctly put by my colleague Charleton J. in *Minister for Justice & Equality v. Palonka* [2022] IESC 6 at para 4, the Supreme Court "does not normally have the responsibility of finding facts". This responsibility is borne by the first-instance decision-maker and although it may not be our responsibility, appellate courts rely upon the accurate and rigorous fact-finding carried out by the first-instance decision-maker. There is a rich interplay between these findings of facts and a decision-maker's ability to adequately and comprehensively address the issue presented. When a case is brought before the Supreme Court in this jurisdiction, it presents an issue of law, one of which is of general and public importance. That issue can only arise and can only be decided against the backdrop of a settled factual matrix. It is vital that when an appellate court, especially a court of final appeal, is reviewing the decision of another, whether that be of a lower court or another decision-making body, that the appellate court is able to see that the issue for decision was clearly addressed by the first-instance decision-maker, that the relevant evidence was assessed and relevant findings of facts were made and that if a balancing test or act was required, how that was carried out. Simply put, it must be clear what did and-what did not go into a decision, how the decision was made and what the outcome of that decision was.

Despite being 'simply put' this is by no means a simple task. In the first place it is a task that must be done expeditiously and properly. In making a decision, a decision-maker must first identify the issue which they have to decide. It is then that the necessity to find the relevant facts comes into play. This demands accuracy in identifying both the issue to be decided and the facts on which the decision is made. Caution is required by a decision-maker if facts are to be omitted; were these relevant to the issue concerned? The decision may require a weighing of the importance of certain facts. This may require engaging in a balancing exercise or applying a balancing test to these facts. All of these tasks result in a decision which is precise in its identification of the issue which must be decided upon as well as the facts relevant to that issue, is unambiguous in its reasoning, is transparent in its testing or balancing, and is clear in its outcome. These are not ideal traits of a decision; they are fundamental requirements of a decision that can fall within the purview of quality justice.

### *Deciding the Issue/Deciding the Facts*

In order to demonstrate how difficulty with identifying issues and deciding facts is very much a current problem, I reviewed recent judgments from the Irish Courts which are published and available on our Courts Service website. A very recent case, delivered in July and uploaded in August, neatly demonstrates the importance of making sure that facts which address the issue at the heart of a decision are identified accurately at the outset; the recent High Court decision (Gearty J.) of *S.A. (Zimbabwe and South Africa v. The Chief International Protection Officer, The Minister for Justice and The International Protection Appeals Tribunal* [2024] IEHC 477). I am not sure if there will be an application for leave to appeal this decision and what I say is without prejudice to any appeal. The case concerned a decision made by the first-instance decision-maker that relied, according to the High Court's finding, upon incorrect facts. The applicant, who came to Ireland from South Africa, was refused refugee status and subsidiary protection on the basis that she was from South Africa and could return there safely. The applicant submitted that she had made the case to the decision-maker that she was in fact from Zimbabwe and that the decision to refuse her application was based on errors in respect to her identity.

The details of the case are complex and somewhat murky as applications for asylum often can be. There is no doubt however that the applicant gave two versions of where she was from. In her initial questionnaire she claimed she was from South Africa but later, her legal representation communicated to the International Protection Office ("IPO") that she had made an 'error' in her completed questionnaire and said she was from Zimbabwe. She claimed she answered it with reference to the country which she came from (South Africa) and not her country of origin (Zimbabwe). She was interviewed by the IPO and maintained she was from Zimbabwe. Various documentation was submitted in support of her claim, including documents purporting to be from Zimbabwe. It appears from the High Court judgment that the contents of some of those documents, crucial to her claim of Zimbabwean identity, were incorrectly described by the decision-maker. Ultimately the decision-maker held on the balance of probabilities that she had South African citizenship and was not entitled to refugee status. While the High Court was unsympathetic of the explanation as to why the applicant had said she was from South Africa, the High Court overturned the decision. The decision-maker concluded that if she was from Zimbabwe she would have been expected to say that because it was central to her claim. The High Court said:

> "This does not necessarily follow. When an applicant for international protection arrives, in possession of two sets of identity papers as occurred here, it is, undoubtedly, better for her claim if she offers a true account in the first instance. **It is still incumbent on the decision maker to assess what appear to be authentic documents, to consider explanations that are given and to give an accurate recitation of the underlying facts and documents.** This may be particularly important if corrections are made after an applicant obtains legal advice although, in this case, her solicitors appear to continue her explanation that she misunderstood the questions.

The High Court pointed out how the decision-maker had "made the finding of nationality on the combined basis of answers initially given by the Applicant and an incorrect recitation of the facts in relevant documents." The High Court said that its own conclusion "reflects the paramount importance of correct facts as a basis for a finding on nationality and the importance of country of origin

information". In the case the decision-maker had made errors in describing the contents of the identity documents that had been produced. Although the errors in the applicant's application were based in part on the misinformation given by the applicant, the High Court found that a finding as fundamental as this could not be addressed on appeal and she quashed the decision and remitted it for reconsideration.

And so, what can we take from this case? That in the first place the decision-maker should identify the material issue. Here it was whether she was entitled to international protection based upon the fact that she was Zimbabwean as she ultimately claimed. Ensuring that the factual matters which address those issues are correctly identified, recorded and addressed in the decision is decision-making at its simplest and most important. Errors as to central factual issues cannot be said to amount to quality justice.

The case of *SA* offers a clear and relatively straight forward example of where a relying on an incorrect fact prevents the decision-maker from addressing an issue effectively. However, a failure to address an issue can very easily become a very complex matter. As I mentioned earlier, the failure to address an issue may not only be in the identification of the relevant facts which go to the heart of an issue but also actually addressing and engaging with an issue that is capable of being addressed. I think that the decision of the Court of Appeal, *MM v. Chief International Protection Officer, The Minister for Justice and The International Protection Appeals Tribunal* [2022] IECA 226 clearly demonstrates the point. A major part of the decision in that case does not concern us (it is about the 'change of hands' between the officers who contributed to the report and conclusions). But as identified in the judgment the issue on which that applicant was successful was "whether the decision-maker failed to make a finding of fact on an important factual issue, namely whether the appellant was lesbian in her sexual orientation".

The applicant was from Zimbabwe and immediately on arrival in Ireland in 2017 had applied for international protection. As part of her application process, she was required to complete a questionnaire. In this application she stated a matter of things including that she was a Christian, a member of the Ndebele tribe, married, widowed and remarried by the age of thirteen and that she had a son

who remained in Zimbabwe. She relayed that she had experienced emotional abuse, domestic servitude and illegal abortion during her two marriages. She stated that she fled Zimbabwe because her husband became physically violent to her and made death threats to her due to her lesbian identity, after she was "involuntarily outed" by members of her community. She stated that she and her female partner fled Zimbabwe and went to South Africa and said that, if she were to return to Zimbabwe, she would be endangered.

The High Court (the judicial review judge) held that, while the IPO did not explicitly state that they did not accept the applicant's claim that she was lesbian in sexual orientation, it was implicit from the IPO's reasoning that they did not do accept the claim. The applicant maintained that even if she provided a full account of the events arising from her lesbian relationship with another woman which was deemed not credible, the mere fact that she was a lesbian in her sexual orientation, in itself, would have been sufficient grounds for granting her protection. The applicant said no such finding was made on that core issue.

The Court of Appeal (Ní Raifeartaigh J.), found that the applicant's application had included a paragraph which amounted to a general request to the decision-maker to take into account the appellant's sexual orientation. In her application form, she expressly stated that if she returned to Zimbabwe her life would be in danger and there was no guarantee for her safety nor were there any organisations which could have offered her protection. Although there was a close connection between the narrative of specific events and the applicant's claim, this amounted to what could be viewed as a standalone claim or an underlying claim that if the appellant was returned to Zimbabwe that she would be persecuted by reason of her sexual orientation *simpliciter*. This issue had to be addressed by the first-instance decision-maker.

From the perspective of fact-finding and in breaking down what ought to have occurred, the IPO would have had to have decided whether they accepted that the applicant was of lesbian sexual orientation. This would have needed to be addressed by reference to the evidence put forward by the applicant regarding her own personal circumstances. If the IPO accepted that the appellant was of such orientation, they needed to decide whether or not the appellant was likely to be

subjected to persecution for this reason if she were returned to her country of origin. This would have had to have been addressed in light of information regarding the country of origin more generally together with the evidence put forward by the applicant. Given the centrality of her sexual orientation to the applicant's application, the failure to specifically state that (and why) the applicant's claim that she was lesbian was not accepted, was more than a mere formality.

It had been agreed by all sides that the IPO had made no explicit finding on the applicant's sexual orientation. Ní Raifeartaigh J. did not accept that the decision-maker implicitly reached a conclusion that the applicant was not of lesbian sexual orientation. There was no clear and unambiguous finding in respect of a matter as important as the appellant's sexual orientation, and her personal safety in her country in light of that orientation, when it was at the very heart of her application. It would not be satisfactory for the applicant to be returned to her country of origin without there having been a clear finding on a matter of such importance.

As recognised by Ní Raifeartaigh J., and in the CJEU decision of Joined Cases C-148/13, C-149-13, and C-150-13 *A, B and C*, we cannot underestimate the challenges presented to a decision-maker in reaching a conclusion about an applicant's sexual orientation. It may be a most difficult and sensitive task in many cases. I most certainly agree with these comments and I think that some of the challenges presented are worth discussion and consideration. Applicants who are LGBTQ+ are subject to stereotyping and concerns over their credibility. What must be avoided are verifications of an applicant's sexual orientation carried out by competent bodies based on stereotype as to sexual orientation. The CJEU held in *A, B and C* that decisions based on stereotypes are not compatible with the requirement for an individual assessment of the applicant's claims. However, and as pointed out by Johannes Lukas Gartner in "(In)credibly Queer: Sexuality based Asylum in the European Union" Transatlantic Perspectives on Diplomacy and Diversity (Humanity in Action Press 2015), with an increase in the number of queer refugees there are increased issues surrounding credibility and stereotyping. As a result, applicants and refugees "are invited to present their selves in ways that are easily understandable to their adjudicators in order to increase the likelihood of succeeding with their claims." What must not occur therefore is applicants being

forced to internalise and perpetuate stereotypes in order for their claims to be deemed credible, but equally, it is vital that decision-makers will take on the challenge of deciding on the issue they are asked to decide: namely is the applicant at risk of being persecuted because of their sexual orientation, a question that will require sexual orientation to be addressed however difficult that may be.

That very point has recently been stated by the High Court (O'Donnell J.) in *FBC v. The International Protection Appeals Tribunal and the Minister for Justice* [2024] IEHC 343 "The assessment of the credibility of assertions about sexual orientation undoubtedly are sensitive and difficult; but they are assessments that have to be made". As this case may yet be appealed, I am again limited in what I can say about it and it is of course without prejudice to any appeal. In that case, the applicant's basic contention that he, a Ghanaian national, had been prosecuted and feared further prosecution because he was openly gay was substantially rejected during the international protection process. The rejections were made on the basis of findings that impugned the credibility of the applicant's accounts of persecution, and, more significantly, that impugned the credibility of his contention that he was gay. The applicant argued that the assessment of credibility by the Tribunal was defective because it relied improperly on stereotypes or assumptions upon conjecture, speculation and/or stereotypes.

O'Donnell J. noted that his role was to *review* the findings of the Tribunal. The High Court is not making the decision on whether there ought to be recognition of refugee status. He noted also that determinations as to the credibility of assertions that an applicant has a well-founded fear of persecution as a member of the LGBTQ community is a particularly difficult and sensitive issue. The High Court addressed in considerable detail the reasoning of the Tribunal on the credibility of the applicant's account of the sexual orientation was what was described as "a disconnect between the appellant's evidence about the general treatment of gay people in Ghana… and his evidence about how he himself behaved when he entered a gay relationship". Essentially, the applicant stated that since he commenced his relationship with another man in his hometown, he did not attempt to hide or conceal the relationship and had no concerns about being openly gay in his country of origin. This was in spite of the fact that information on the applicant's country of origin strongly suggested that it would have been both

highly unlikely and unusual that this would be the case in Ghana. As well as this, the answers provided by the applicant to the tribunal provided "a fundamental misunderstanding of sexual orientation". While the Tribunal acknowledged that people realise and come to accept their true sexual orientations in different ways and at different stages of their lives, the applicant's evidence about his life up to that point and the manner in which he transitioned from heterosexuality to homosexuality was "entirely bereft of any of the thoughts, feelings and emotions that are commonly experienced by SOGI applicants".

Similarly, the Tribunal formed the strong impression from engaging with him that the applicant had no personal knowledge or experience of homosexuality. In addition to the matters that were observed by the Tribunal and the inconsistencies and unusual or unexpected elements in his testimony, there was also a concern about his apparent relationship with a man in Ghana. In that regard, no photos or social media contacts or any documentary evidence was proffered. There was also no evidence before the Tribunal that during his time in Ireland the applicant had taken "even the most tentative steps towards exercising his freedom to live openly as a gay man or even to explore what that life might be like".

In assessing the decision of the Tribunal, the High Court could clearly see the findings made by the Tribunal proceeded from a careful consideration of the facts, and by giving the applicant extensive opportunities to explain his position. In all circumstances, the Court was unable to find that there was anything unreasonable or irrational about the approach to the credibility assessment and found that the decision of the Tribunal was lawful. From the point of view of the High Court, this was a first-instance decision which was precise in its identification of the facts, addressed the issue presented, was unambiguous in its reasoning and was clear in its outcome. If that is correct, those are the hallmarks of the delivery of quality justice but whether that is so may be decided on appeal.

***Competing Interests in Migration Decisions***

Given the time limit I will touch very briefly on the importance of first-instance decision-makers carefully setting out in their decision precisely why they have come to their conclusion when addressing the issue of competing interests in

decisions on migration and also the proportionality of certain migration decisions and interference with family or personal rights. When decision-makers are balancing factors, it is important that they identify the factors that they are placing in the balance and thereafter engage in the weighing exercise with respect to those factors that is required by virtue of their decision-making role.

There have been many cases coming before the Irish courts where part of the complaint has been that the extent of the balancing process or even if the balancing process has actually been carried out is not obvious. While many of these judicial reviews may not have been successful, they have often been driven by what appears, at first glance, to be a failure to engage in the exercise demanded. Those in receipt of decisions and the courts who are asked to review those decisions ought to be able to tell without too much digging what the basis for the decision actually has been.

I will refer to one recent case from the Supreme Court. In *EM v. Minister for Justice* [2024] IESC 3 the issue concerned the assessment of employment prospects when the Minister is consideration a Deportation Order. Under the relevant provisions the Minister "shall have regard to… inter alia.. to the employment prospects of the person (including self-employment)." As the Supreme Court (Dunne J.) observed: "The fundamental question in this respect is whether it was, in fact, an error to add in a sentence under the examination of file in respect of employment prospects, to the effect that the appellant did not have the permission of the Minister to reside or work in the State at this time, and that there is no obligation on the Minister to grant him permission to remain in the State "in order to facilitate his employment/self-employment in this State". In other words, the decision-maker repeated the factual and legal position with regard to the applicant, but did that affect the decision to make the deportation order? Dunne J. held that "to have regard to" was to consider and that there was no requirement for a so-called 'tick box' exercise of examining and setting out a conclusion under each heading.

Dunne J. referred to the confusion in putting in that sentence which in other cases had been on the facts interpreted as setting at nought employment prospects and said it was unhelpful to have it in the decision-making. It was a sentence which however was one which could fit into the balancing exercise the Minister had to

carry out when assessing the common good or considerations of national security and public policy. If so, it would be more logical to refer to it in that part of the decision which addressed that issue. In the particular circumstances of the *EM v Minister for Justice* decision it did not vitiate the decision.

What we can take from this decision is that if a decision permits a balancing test or an act of balancing, then the application of such a test of the act of balancing must be clearly carried out. This demands of a first-instance decision-maker that the facts and issues are properly identified and clearly weighed. This may require applying different weight to specific considerations depending on the facts at hand and the rights concerned.

***Conclusion***

Having gone into some detail on recent cases it is appropriate to pull back the focus for a moment and consider the issue at a high level and from a procedural perspective. We can see how a failure to carry out fact-finding (whether that be sufficiently or at all) can vary but nonetheless it negatively impacts the justice system in which we all operate. A person seeking asylum or refugee status or an applicant for some migration status is entitled to a quality decision that is made within a reasonable time frame. A failure to carry out effective fact-finding by a first-instance decision-maker may lead to a decision which may be either incorrect in its process or outcome. If a decision is appealed and it is clear that it was wrongly decided by the first-instance decision-maker then it may be reheard and decided again. This amounts to delay on the applicant's application and puts strain on the entire justice system. If a decision is appealed and it is unclear if an issue was or was not addressed, that such an issue was capable of being addressed and that if a balancing test or act was required, how that was carried out or the outcome of the decision, an appellate judge will dedicate time and effort to bring clarity to the decision. Again, this amounts to a delay for the applicant and a strain on those who work within the system as well as the system as a whole. These concerns are further agitated by the fact that if an appealed decision is quashed it triggers a new hearing. This cannot be said to be quality justice.

In conclusion, as I have already said fact-finding is largely behind me in my capacity as a Supreme Court judge. However, I think the sentiments of my colleague Collins J. (albeit in a different context) ring true here in that "a central function of [the administration of justice] is fact-finding and truth finding" (*The People (DPP) v. Smyth* [2024] IESC 22 at para 156). To administer justice and ensure quality justice is delivered, appellate judges rely on the hard work of first-instance decision-makers to get cases 'right' in the most expeditious and proper manner possible. This is achieved when, having identified the applicable law, a decision is precise in its identification of the facts, addresses the actual issue(s) presented, is unambiguous in its reasoning, is transparent in its testing or balancing, and is clear in its outcome. Only when a decision possesses these traits can it be said to be quality justice.