THE HIGH COURT

JUDICIAL REVIEW

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

[2020] IEH 615

Record No: 2020/653JR

BETWEEN:

IM

APPLICANTS

AND

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

RESPONDENTS

Judgment delivered by Ms Justice Tara Burns on 25th day of November 2020

General

1. The Applicants seek leave to apply by way of Judicial Review for the following principal reliefs:-

    a) An Order of *Certiorari* of the decision of the First Respondent dated 18 August 2020, made under Section 46(3)(a) of the International Protection Act 2015 (hereinafter referred to as the "Act of 2015") refusing to grant the Applicants either refugee or subsidiary protection declarations;

    b) A Declaration that ss.33 and 72 of the Act of 2015 combined are void as *ultra vires* and/or incompatible with Ireland's obligations under Council Directive 2005/85/EU of 1 December 2005 (hereinafter referred to as "the Procedures Directive") and/or the Common European Asylum System;

    c) A Declaration that the Second Respondent erred, contrary to s.72 of the Act of 2015, in the designation of Georgia as a safe country of origin.

Test for Leave regarding the decision of the First Respondent

2. Section 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, applies to these proceedings. Accordingly, the Applicants must satisfy the Court that there are substantial grounds for contending that the decision in their cases ought to be quashed.

3. A "substantial" ground must, in the words of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125, be '*arguable, weighty and must not be trivial or tenuous'. She added 'a ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial'*.

The Facts

4. The Applicant is from Gori in Georgia. He arrived in the State on 9 June 2019. He made a claim for international protection on 10 June 2019 on the basis that he would face persecution or serious harm as a result of an assault on him by an unnamed neighbour in 2009 and 2012. He also claimed protection due to his Ossetian ethnicity, which was derived from his father's side, who is now deceased. His mother is Georgian.

5. The IPO carried out the preliminary interview under s.13 of the Act of 2015 on 24 June 2019. The Applicant submitted his Questionnaire where he ticked 'nationality' for the Convention ground and a 'serious and individual threat to a civilian's life by reason of indiscriminate violence in a situation of international or internal armed conflict' for the subsidiary protection aspect of the claim.

6. The Applicant was interviewed under s.35 of the Act of 2015 on 18 December 2019. The IPO issued the s.39 Report on 22 January 2020 which recommended that the Applicant not be given either a declaration of refugee status or subsidiary protection. As part of its findings, the IPO relied on s.39(4)(e) of the Act of 2015 that the Applicant's country of origin is a safe country. The Applicant was informed of the decision by letter dated 27 January 2020.

7. The Applicant submitted a Notice of Appeal to the First Respondent on 3 February 2020 on the basis that the IPO had erred in the consideration of the Applicant's credibility regarding the alleged attack in 2009 and 2012. He requested an oral hearing but gave no reasons for the request.

8. One of the effects of a finding that Georgia is a safe country is that s. 43(b) of the Act of 2015 requires that the First Respondent consider the appeal without holding an oral hearing unless it is satisfied that it would not be in the interests of justice to so do.

9. The First Respondent wrote to the Applicant on 11 June 2020 requesting submissions as to why the interests of justice required an oral hearing. The Applicant replied on 16 June 2020. The primary reason for seeking an oral hearing was to put forward medical documentation, however this was not yet to hand. The Applicant requested some time to obtain the documents and then proposed to make submissions within four weeks of receipt of the documents. The Applicant requested an oral hearing so that he could have "*an opportunity to explain the documents, their relevance and the reason for late submission of same".*

10. On 6 July 2020, the Applicant furnished submissions again requesting an oral hearing, and advising that he was awaiting medical documentation. The Applicant requested that the Minister treat him as a person from a minority Ossetian ethnic group and to disapply the safe country of origin designation to him. The First Respondent acknowledged receipt on 7 July 2020 and gave the Applicant until 14 July in which to submit the documentation, failing which he was informed that the First Respondent would proceed to an assessment of the appeal. No further documentation was received by the First Respondent within that period. Accordingly, the First Respondent proceeded to assess the appeal.

11. The First Respondent was satisfied that the safe country of origin designation applied to the Applicant notwithstanding his claim of membership of an ethnic minority. It was not satisfied that the interest of justice required an oral hearing. It was satisfied that it could determine the issues, and properly assess the further documentation that was submitted by the Applicant on 30th July 2020 without recourse to an oral hearing.

12. The First Respondent proceeded to assess the Applicant's claim and ultimately affirmed the IPO recommendation that the Applicant should not be given a refugee declaration. The First Respondent also considered the claim for subsidiary protection in light of the accepted facts and found that the Applicant was not entitled to subsidiary protection.

Safe Country of Origin Designation

13. The Applicant submits that the designation by the Second Respondent of Georgia as "a safe country of origin" for the purposes of ss.33 and 72 of the Act of 2015 is *ultra vires* the Procedures Directive and/or is otherwise unlawful.

14. Section 33 of the Act of 2015 provides:-

> *"A country that has been designated under section 72 as a safe country of origin shall, for the purposes of the assessment of an application for international protection, be considered to be a safe country of origin in relation to a particular applicant only where—*
>
> *(a) the country is the country of origin of the applicant, and*
>
> *(b) the applicant has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her eligibility for international protection."*

15. Section 72 of the Act of 2015 provides:-

> *"(1) The Minister may by order designate a country as a safe country of origin.*
>
> *(2) The Minister may make an order under subsection (1) only if he or she is satisfied that, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.*
>
> *(3) In making the assessment referred to in subsection (2), the Minister shall take account of, among other things, the extent to which protection is provided against persecution or mistreatment by—*
>
> *(a) the relevant laws and regulations of the country and the manner in which they are applied,*
>
> *(b) observance of the rights and freedoms laid down in the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention on Human Rights,*

(c) respect for the non-refoulement principle in accordance with the Geneva Convention, and

(d) provision for a system of effective remedies against violations of those rights and freedoms.

(4) The Minister shall base his or her assessment referred to in subsection (2) on a range of sources of information including in particular information from

—

(a) other Member States,

(b) the European Asylum Support Office,

(c) the High Commissioner,

(d) the Council of Europe, and

(e) such other international organisations as the Minister considers appropriate".

16. Counsel for the Applicant submits that the power vested in the Second Respondent to designate a country as a safe country of origin for international protection applicants, derives from Article 37(1) and Annex 1 of EU Directive 2013/32 (hereinafter referred to as "the Procedures Directive Recast"). He submits that as Ireland has not adopted the Procedures Directive Recast, the State is not entitled to avail of the provisions of that Directive in order to apply the safe country of origin concept, as defined at Annex 1, to international protection applicants, which includes by definition at s.2 of the Act of 2015, a person declared to be a refugee or a person eligible for subsidiary protection.

17. Counsel for the Respondents submits that this argument is untenable. She submits that the safe country of origin concept was established by the Procedures Directive. This was then provided for in domestic law by s.7(g) of the Immigration Act 2003 which substituted s.12(4) of the Refugee Act 1996. This was further amended by the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51 of 2011) which gave effect to Annex II of the Procedures Directive. Both the 1996 Act and the European Communities (Asylum Procedures) Regulation 2011 were repealed by s.6 of the Act of 2015. However, the Act of 2015, re-enacted the safe country of origin concept prescribed by the Procedures Directive: s.33 of the Act of 2015 gives effect to Article 31 of the Procedures Directive; s.72(2) and (3) are directly derived from Annex II of the Procedures Directive; and s.72(4), (5), and (6) give effect to Article 30(4), (5) and (6) of the Procedures Directive. Thus, it is submitted, the concept of a safe country of origin and the designation of a safe country of origin is undoubtedly derived from the original 2005 Procedures Directive.

The History of "Safe Country of Origin" in EU Directives

Qualification Directive

18. EU Directive 2004/83 (hereinafter referred as "the Qualification Directive") is the original Qualification Directive, which sets down, *inter alia*, the concept of subsidiary protection. Ireland is bound by this Directive and gave effect to it by way of the European Communities (Eligibility for Subsidiary Protection) Regulations 2006 and the European Union (Subsidiary Protection) Regulations 2013. Both Regulations were repealed by s.6 of the Act of 2015.

19. Article 3 of the Qualification Directive provides that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with the Directive.

20. Article 15 of the Qualification Directive provides that serious harm consists of:-

"(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

21. The Qualification Directive was recast by EU Directive 2011/95, (hereinafter referred to as "the Qualification Directive Recast" which is stated to be '*on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted'.* The United Kingdom and Ireland have not taken part in this more recent Directive, as is recorded in Recital 50 of the Directive.

The Procedures Directive

22. The Procedures Directive sets out minimum standards for the granting and withdrawing of refugee status. An 'applicant' under the Procedures Directive is defined as a third country national or stateless person who has applied for asylum and is awaiting a decision.

23. Recital (22) states that:-

> *"Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted except where the present Directive provides otherwise…"*

24. Article 3(3) extends the scope of the Directive to situations:-

> *"Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given*

under the circumstances defined by Article 15 of Directive 2004/83/EC, they shall apply this Directive throughout their procedure."

25. Article 3(4) provides:-

> *"Moreover, Member State may decide to apply this Directive in procedures for deciding on applications for any kind of international protection."*

26. Article 5 provides that Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

27. Article 29 establishes the safe country of origin concept which is subject to Annex II. Article 30 provides that Member States may retain or introduce legislation that allows, in accordance with Annex II, for the designation of third countries, other than those appearing on the minimum common list, for the purpose of examining an application for asylum.

28. Article 31 provides:-

"1. A third country designated as a safe country of origin in accordance with either Article 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:

(a) he/she has the nationality of that country; or

(b) he/she is a stateless person and was formerly habitually resident in that country;

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.

2. Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 29.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept."

25. Annex II provides:-

> *"Designation of safe countries of origin for the purposes of Articles 29 and 30(1)*
>
> *A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no*

persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia*, of the extent to which protection is provided against persecution or mistreatment by:*

(a) the relevant laws and regulations of the country and the manner in which they are applied

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect of the non-refoulement principle according to the Geneva Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms."

Procedures Directive Recast

26. The Procedures Directive Recast is binding on those EU Member States who adopted the Directive and the Procedures Directive is repealed. However, Recital 58 cites that neither the UK nor Ireland are taking part in the Recast Procedures Directive.

27. The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection. The definition of an applicant is streamlined in the Recast Directive to include an applicant for asylum or subsidiary protection.

28. Annex I of the Procedures Directive Recast is in identical terms to Annex II of the original Procedures Directive cited above.

Are ss.33 and 72 of the Act of 2015 void as *ultra vires* or incompatible with Ireland's obligations under Council Directive 2005/85?

29. Counsel for the Applicant submits that s.72(2) of the Act of 2015, by which the Second Respondent may make an order designating a country as a "*safe country of origin*" for applicants for "*international protection*", is derived from Article 37(1) and Annex 1 of the Procedures Directive Recast, which requires Member States to engage, *inter alia*, in an assessment of the risk of "*serious harm*" as set out at Article 38(1)(b). It is submitted that as Ireland has not adopted the Recast Procedures Directive, neither Ireland nor the Second Named Respondent are entitled to avail of the provisions of that Directive to apply the "*safe country of origin*" concept as defined at Annex 1 of the Procedures Directive Recast to applicants for international protection.

30. As is clear from the history of the EU protection Directives, set out above, the safe country of origin concept was established by the Procedures Directive and is provided for in Articles 29-31 thereof.

31. The long title to the Act of 2015 states, *inter alia*, that it is to give further effect to the Qualification Directive *"on minimum standards for the qualification and status of third country nationals or stateless persons or refugees or as persons who otherwise need international protection and the content of protection granted*"; and to give further effect to the Procedures Directive "*on minimum standards on procedures in Member States for granting and withdrawing refugee status*".

32. As is clear from the analysis of domestic law above, Ireland continues to operate its protection system under the older regime provided for in the Procedures Directive and the Qualification Directive, while the other Member States (bar Denmark) have adopted the later Procedures Directive Recast and the Qualification Directive Recast. Ireland remains bound by the earlier original Directives and accordingly must operate an asylum system which reflects those Directives. The fact that Ireland did not adopt the recast Directives does not absolve Ireland from applying the earlier Directives in a situation where it has been agreed that it will not adopt these recast Directives but remains bound by the earlier Directives.

33. The fact that Ireland also applies this system to subsidiary protection applicants is not unlawful. Article 3(3) of the Procedures Directive states that where a Member State introduces a single procedure on the basis of the Geneva Convention and under Article 15 (subsidiary protection ground) of the Qualification Directive (which Ireland has done by the introduction of the Act of 2015), the Member State *"shall apply this Directive throughout their procedure"*. Accordingly, the concept of a safe country of origin applies equally to applications for refugee status as it does to subsidiary protection applications, in accordance with the Directives which Ireland is bound by. Further, recital 22 of the Procedures Directive expressly provides that Member States should examine the substance of all applications, including a claim for refugee status under the Qualification Direction "*or as persons who otherwise need international protection and the content of the protection granted*". This is a direct acknowledgement of the entitlement of a Member State to include subsidiary protection applicants.

34. In *Seredych v Minister for Justice* [2020] IESC 62, Baker J, delivering the judgment of the Supreme Court stated at paragraph 46:-

> *"The Directives [Procedures and Qualification] are part of the establishment of a common system for the determination of applications for international protection based on the Refugee Convention and apply to all applications for asylum made in the Member States.*
>
> *47. The process in Irish legislation is consistent with the Qualification Directive and the Procedures Directive both now recast, but which in their original form continue to*

apply in Ireland by reason of the State taking part in only some of the Schengen acquis."

35. On the basis of this analysis of European and domestic law, it is clear that the Applicant has an unarguable case with respect to his claim that ss.33 and 72 of the Act of 2015 are *ultra vires* the Procedures Directive and/or the Common European Asylum System. Accordingly, I am refusing the Applicant leave to apply by way of Judicial Review for the relief as set out at paragraph (d)(2) of his Statement of Grounds

The Second Respondent erred in designating Georgia as a "safe country of origin" pursuant to s.72(2) of the Act of 2105

36. In the alternative, the Applicant claims that the Second Respondent erred contrary to s.72(2) of the Act of 2015 in designating Georgia as a "*safe country of origin*". It is claimed that the Second Respondent could not reasonably have been satisfied that there was "*generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict"* in Georgia in light of conditions in Georgia as disclosed in Country of Origin information.

37. The Second Respondent is empowered under s.72 of the Act of 2015 to designate a country as a safe country of origin and did so in respect of Georgia by ministerial order on 16th April 2018. In making this determination, the Second Respondent was required to have regard to s. 72(3) and (4) of the Act of 2015. The Ministerial Order designating Georgia as a safe country of origin states that the Second Respondent was satisfied with respect to the matters set out in s.72 of the Act of 2015 in relation to Georgia. It is noted that Georgia has been designated as a safe country of origin in eleven other Member States.

38. The test to be satisfied by the Applicant with respect to the declaratory relief claimed in this regard is one of argue-ability.

39. The lawfulness of a designation of a safe country of origin can be subject to challenge. In *SUN v. Refugee Commissioner* (Unreported, High Court, Cooke J., 30th March 2012), a challenge was launched to the designation of South Africa as a safe country of origin. However, in light of other reliefs sought and the determination by Cooke J of a preliminary issue, the question of the lawfulness of the designation of South Africa as a safe country of origin did not proceed to determination.

40. This Court has granted leave to apply by way of Judicial Review for declaratory relief in relation to the designation of South Africa as a safe country of origin in a related case of *EGV v. IPAT and Ors* (Unreported, High Court, Burns J., 25th November 2020).

41. However, the significance to this Applicant of the designation of Georgia as a safe country of origin compared to the applicants in the *EGV* case is quite different. Section 43(b) of the Act of 2015 requires the First Respondent to consider an appeal to it, when the country of origin has been designated as a safe country, without holding an oral hearing, unless it is satisfied that it would not be in the interests of justice to so do. In the present

case, the reason for requesting an oral hearing was asserted to be so that the Applicant could explain medical reports to the First Respondent and explain the reason for their late submission. With respect to this issue, the Court does not understand how the Applicant could give evidence explaining an expert's report and does not understand how the interest of justice required an oral hearing to take place to explain the delay in obtaining this documentation. Furthermore, by the 14 July 2020, the medical reports still had not been forwarded to the First Respondent although it had been engaged in this issue with the Applicant's solicitors since 11 June, in circumstances where the appeal had been lodged on 3 February 2020. The First Respondent having notified the Applicant of its intention to determine whether to hold an oral hearing, decided against so doing. Clearly, the Applicant was given every opportunity over a lengthy period of time to engage with the issue as to whether an oral hearing should be held and he failed to do so. Further, in the *EGV* case, the fact that South Africa had been designated as a safe country of origin was a factor relied upon by the First Respondent in determining that state protection was available to the applicants therein.

42. In light of the factual scenario set out above, the Applicant has failed to establish any particular significance to him with respect to the designation by the Second Respondent of Georgia as a safe country of origin by the Second Respondent.

43. In light of that finding together with the fact that Georgia has been designated a safe country of origin by eleven other Member States, I am of the view that the Applicant has failed to establish an arguable ground with respect to the relief sought at paragraph (d)(3).

The First Respondent's determination

44. The decision of the First Respondent to refuse the Applicant protection status is challenged, on what could be characterised as more traditional grounds, namely: illegality, irrationality, failure to take in account material considerations, and failure to properly evaluate the evidence. These challenges relate to the First Respondent's determinations regarding the Applicant's credibility and its assessment of medical evidence. The Applicant has established substantial grounds with respect to this aspect of his claim and accordingly, I will grant him leave to apply by way of Judicial Review seeking the relief as set out at paragraph (d)(1) of his Statement of Grounds.

45. In summary, I am granting the Applicant leave to apply by way of Judicial Review seeking the relief as set out at paragraph (d)(1) of the Statement of Grounds on the grounds set out at paragraph (e)(2) and (3)

46. I will reserve the question of costs and adjourn the proceedings to 11 January 2021 for delivery of the opposition papers of the Respondents.