Chairperson's Guideline No: 2018/1

Application of 'Compelling Reasons' in the consideration of refugee status appeals originally submitted to the Tribunal pursuant to s.16(1) of the Refugee Act 1996, prior to the commencement of the International Protection Act 2015

[1.] Introduction

[1.1.] The International Protection Act 2015 and the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 set out various matters relating to the conduct of appeals before the Tribunal. This Guideline is intended to supplement the Act and Regulations and not to supplant them. In case of conflict, the provisions of the Act or relevant Regulation shall take precedence over this Guideline.

[1.2] This Chairperson's Guideline is issued pursuant to s.63(2) of the Act and is informed by the Act, the Regulations, Council Directive 2004/83/EC 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, Council Directive 2005/83/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status

(December 2011). Consideration has also been given to relevant case law and academic commentary.

[1.3] The **context of this Guideline is the removal of the 'compelling reasons' ground**, which was previously contained in regulation 5(2) of the European Communities (Eligibility for Protection) Regulations 2006, **from the International Protection Act 2015**.

[1.4] Following amendment by the European Union (Subsidiary Protection) Regulations 2013, this provision applied to applications for **refugee status only** and provided that:

"The fact that a protection applicant has already been subject to persecution, or to direct threats of such persecution, shall be regarded as a serious indication of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated but ***compelling reasons arising out of previous persecution alone may nevertheless warrant a determination that the applicant is eligible for protection as a refugee"***.

[1.5] The transitional provisions of s.70(2) of the International Protection Act 2015 should be interpreted so as to allow consideration of compelling reasons by the Tribunal in the limited number of cases where an appeal against a recommendation from the Office of the Refugee Applications Commissioner (ORAC) that a person not be granted refugee status was pending before the Tribunal at the time of commencement of the 2015 Act.

[1.6] However, it must be borne in mind that, even where applicable in the limited number of cases now coming back to the Tribunal following consideration of the entitlement of an appellant to 'subsidiary protection' by an International Protection Officer, the **consideration of 'compelling reasons' is limited to circumstances in which past persecution has been so atrocious as to give rise to a grant of refugee status based on compelling reasons alone**. In this regard, guidance was provided by Cooke J. in *M.S.T.* wherein he (in the context of dealing with a claim for the grant of subsidiary protection on the basis of 'compelling reasons' arising out of serious harm) opined: *"It is possible (...) to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment".*[1]

[2.] Transitional provisions of the International Protection Act 2015

[2.1] The legislative context to the matter in question is s.70(2) of the 2015 Act. That sub-section provides inter alia that, *"where, before the date on which this subsection comes into operation, a person has made an appeal under section 16 of the Act of 1996 against a recommendation of the Refugee Applications Commissioner and, by that date, the appeal has not been decided, the person shall be deemed to have made an application for international protection under section 15 and the provisions of this Act shall*

[1] M.S.T. & anor -v- Minister for Justice Equality & Law Reform [2009] IEHC 529, 4th December 2009, at para.32.

apply accordingly, subject to the following modifications and any other necessary modifications (...)".[2]

[2.2] The date on which s.70(2) came into operation was the 31st of December 2016.

[2.3] The *"modifications"* referenced in this section include s.70(2)(d) of the 2015 Act, which applies where an International Protection Officer makes a recommendation that an applicant should not be given a refugee declaration and should be given a subsidiary protection declaration (s.39(3)(b)) or that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration (s.39(3)(c)).

[2.4] S.70(2)(d)(i) of the 2015 Act provides that, subject to sub-paragraph (ii), the person's appeal under section 16 of the Act of 1996, which was pending before the Tribunal at the time of commencement of the 2015 Act, shall be *"deemed to be an appeal made in accordance with section 41(1)(a)"* and the provisions of the 2015 Act apply.

[2.5] S.70(2)(d)(ii) provides that, where an appeal is lodged under s.41(1)(b) against a recommendation of the IPO that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration (pursuant to section 39(3)(c) of the 2015 Act), the person's previous appeal made under section 16 of the 1996 Act is deemed to be included in the appeal under the 2015 Act.

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[2] Emphasis added.

[3.] Effect of the transitional provisions

[3.1] On the natural and ordinary meaning of s.70(2), therefore, appeals pending under section 16 of the 1996 Act as at 31 December 2016 are transformed by operation of law into appeals pursuant to section 41(1) of the 2015 Act. This means that **the 2015 Act test applies in relation to applications for refugee status, which test does <u>not</u> include compelling reasons.**

[3.2] However, **for the limited number of applicants potentially falling into this category, if the 2015 Act test was to be applied by the Tribunal on appeal in such cases, this would have the effect of denying those applicants the possibility of relying on *"compelling reasons"* arguments.**

[3.3] For at least some of the appeals that were pending at the time of entry into force of the 2015 Act, the removal of the possibility of relying on compelling reasons could cause them significant prejudice.

[3.4] However, the general rule set out in s.70(2) is expressly subject to *"any other necessary modifications"*, as well as the s.70(2)(d)(ii) proviso that, where an International Protection Officer recommends that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration the prior section 16 appeal is *"deemed to be included"* in the 2015 Act appeal. **The concept of 'including' the Section 16 appeal within the 2015 appeal suggests that the substantive test applicable to that Section 16 appeal may reasonably be interpreted as remaining intact.**

[4.] S.27 of the Interpretation Act 2005

[4.1] In support of the Tribunal's consideration of compelling reasons in these limited number of cases, one might look as a matter of Irish law to s.27 of the Interpretation Act 2005, which provides that:

"(1) Where an enactment is repealed, the repeal does not – (...)

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred, (...),

(...), or

(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention".

[4.2] Similarly s.27(2) of the Interpretation Act 2005 provides:

"(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed".

[4.3] While the International Protection Appeals Tribunal is not a 'court' in the constitutional sense, it may reasonably be considered that the effect of s.27

of the Interpretation Act 2005 is that, insofar as any element of s. 70(2) is ambiguous and/or open to a range of potential interpretations, that element should be interpreted in a way that Tribunal proceedings raising rights, privileges, obligations and liabilities acquired, accrued or incurred under the 1996 Act should not be prejudiced or affected by the entry into force of the 2015 Act.

[4.4] The above approach also accords with the more general interpretative principle developed by the courts whereby, in a case where the interpretation of a provision is ambiguous, a presumption applies against any interpretation giving rise to an obvious injustice or anomaly. Thus in *Murphy v Corporation of Dublin*, Henchy J in the Supreme Court held that the Act at issue *"must, of course, be read in a way that will not produce unjust or administratively chaotic consequences, in so far as this can be done without doing violence to the spirit or letter of the Act"*.[3][4] Similarly, Humphreys J in *S.G. (Albania) v Minister for Justice and Equality* confirmed that: *"Section 27 was clearly meant to cover vested rights such as property rights or matters of that nature, or situations where it would be clearly unjust to preclude the person from completing a process under the repealed legislation. (...)"*.[5]

[3] *Murphy v The Right Honourable The Lord Mayor, Aldermen and Burgesses of the County Borough of Dublin* [1976] IR 143.

[4] Further support for the above can be found in the application of s.27 of the Interpretation Act 2005 by the Supreme Court in *Minister for Justice v Tobin* [2012] 4 IR 147 and in *O'Sullivan v. Superintendent Togher Garda Station* [2008] 4 I.R. 212.

[5] *S.G. (Albania) v Minister for Justice and Equality* (unreported, 23rd March 2018) at para.37.

[5.] The right to an effective remedy in European Union law

[5.1.] An alternative means of reaching a similar conclusion is to look to the Charter of Fundamental Rights of the European Union (hereinafter referred to as 'the CFR'), Article 39 of Directive 2005/85, and the general principles of effectiveness and non-discrimination in Union law.

[5.2] Article 47(2) of the CFR provides that, *"everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal previously established by law (...)"*.

[5.3] Article 39 of Directive 2005/85 applies Article 47 in the specific context of EU asylum law and guarantees a right to an effective remedy in asylum applications.

[5.4] It will be recalled that, as applications for refugee status fall (at least in part) within the scope of Union law, the condition for application of the Charter, as provided in Article 51 thereof, is satisfied. It will further be recalled that, in *H.I.D.*, the Court of Justice considered the effectiveness of the remedy provided in Irish law for asylum appeals, as concerns the assessment of the relevant facts, in the context of the *"administrative and judicial system (...) as a whole"*, and considered the *"Irish system"* as a whole to satisfy the requirement of independence inherent in the concept of a *"court or tribunal"* for the purposes of Article 39 of Directive 2005/85.[6] Recital 27 of Directive 2005/85 similarly confirms that the effectiveness of a remedy must be

[6] Case C175/11 HID, paragraphs 101 and 104.

assessed against the administrative and judicial system of Member States viewed as a whole.

[5.5] Nevertheless, as (albeit only one part of) the effective remedy provided by the Irish system, it is incumbent on the International Protection Appeals Tribunal to satisfy the requirements of Article 47 of the CFR. In particular, it is incumbent on the Tribunal to guarantee a fair hearing, which in turn forms part of the obligation to ensure protection of the rights guaranteed by Union law, including the right to refugee status,[7] in a manner that conforms with the principles of effectiveness and non-discrimination in European Union law.

[5.6] If 'compelling reasons' were argued and decided upon at first instance, by the ORAC, but that element of the finding could not be considered by the IPAT upon appeal, this would deprive the applicant of any effective remedy in that context.

[5.7] While there is no exhaustive definition of the meaning of *"effective"* in this context, it is settled case-law that the right to an effective remedy before a court or tribunal means that Member State law must not render the application of Union law *"impossible or excessively difficult"*, and that this must be analysed by reference to the role of the provision in the procedure before the national courts as a whole, taking into consideration, *"the basic principles of the domestic judicial system, such as protection of the rights of*

[7] See Case C-93/12 ET Agrokonsulting, Opinion of AG Bot.

defence, the principle of legal certainty and the proper conduct of procedure (...)".[8]

[5.8] In the event that Section 70(2) of the 2015 Act is interpreted as precluding considering of 'compelling reasons' by the Tribunal following a negative recommendation on that element at first instance, there is in reality no remedy against that part of ORAC's finding and the obligation to ensure an effective remedy is not satisfied. The notion of an effective remedy would be negated where, in exercising his/her right of appeal before the Tribunal, an applicant is no longer entitled to make his/her claim in full, including compelling reasons arguments.

[5.9] Similarly it might also reasonably be argued that any such interpretation of s.70(2) would unjustifiably discriminate between applicants who had their asylum appeals determined prior to the entry into force of the 2015 Act and those who did not, in circumstances where those applicants are all in the same position of having a negative conclusion against them at first instance on the 'compelling reasons' issue.

[5.10] Applying these principles here suggests that, in circumstances where there is ambiguity in the relevant language of s.70(2) on this issue, an interpretation compliant with Union law should be preferred, in accordance with the duty of consistent interpretation by which State bodies (including courts) must interpret national legislation insofar as possible in a manner consistent with the requirements of Union law.

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[8] Case C-312/93 *Peterbroeck*, para. 14; Case C-249/11 *Bykanov*, para. 75.

[5.11] This interpretation would also be supported by the principle of legal certainty, which is a binding general principle of Union law. In the context of EU acts, the Court of Justice has held that this principle *"aims to ensure that situations and legal relationships governed by EU law remain foreseeable. (...)"*.[9]

[5.12] Further, the Court has held that the principle of legal certainty requires that *"the case-law requires that legal rules be clear and precise, and that their consequences be foreseeable"*.[10]

[5.13] These requirements apply *"in particular where they may have negative consequences on individuals and undertakings"*.[11] In that regard, the principle of legal certainty may require transitional provisions to be extended or amended in a particular case.

[5.14] The principle of legitimate expectations as a matter of EU law may also be of relevance. As the Court has held, that principle applies where a person has justifiably entertained expectations on foot of precise assurances from an institution.[12] The principle will not apply *"if a prudent and alert economic operator could have foreseen the adoption of a measure likely to affect his interests"*.[13]

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[9] Case T-60/06 Italy v Commission, para.63.
[10] Case T-296/12 *The Health Food Manufacturers' Association*, para.86.
[11] Case C-347/06 *Brescia*, para. 69.
[12] See for instance Case C-67/09 *P Nuova Agricast*, para.71.
[13] Ibid.

[6.] Conclusion and Guideline

[6.1] In the present context, it might reasonably be argued that, following the prior ORAC recommendation at first instance on an applicant's refugee status application, which was completed prior to commencement of the Act, the applicant has a legitimate expectation that the test applied on appeal would not be a less favourable test than that applicable at first instance.

[6.2] Interpreting Article 47 CFR, the right to an effective remedy, in conjunction with this principle, and the principle of legal certainty, it might reasonably be argued that the right of appeal to the Tribunal cannot be considered to be effective in circumstances where the opportunity to challenge the decision-maker's finding on the compelling reasons ground is lost.

[6.3] For the reasons set out above, **the transitional provisions of section 70(2) should be interpreted so as to allow consideration of 'compelling reasons' by the Tribunal in the above-mentioned 'ring-fenced' refugee status appeals.**

Hilkka Becker

Hilkka Becker
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