An Binse um Achomhairc i dtaobh Cosaint Idirnáisiúnta
The International Protection Appeals Tribunal

Summary of Judgments of the Irish Superior Courts in 2020 relating to decisions of the International Protection Appeals Tribunal

Prepared by John Stanley,
Deputy Chairperson,
International Protection Appeals Tribunal
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Introduction

I am pleased to present the first volume of what will be an annual publication of a *'Summary of judgments of the Irish Superior Courts relating to decisions of the International Protection Appeals Tribunal'*.

This summary already forms part of the Tribunal's Annual Report for the years 2018, 2019 and 2020 and the Members of the Tribunal are provided with summaries of judgments of the Irish Superior Courts on a regular basis so that important lessons from those judgment can be learnt and utilised in order to further enhance the quality of the Tribunal's decision-making.

The ongoing monitoring of relevant judgments from the Irish Superior Courts and also of course from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) relating to international protection feeds both into the quality assurance process of the Tribunal under the lead of Deputy Chairperson John Stanley, who is the author of this summary, and into the ongoing training of Tribunal Members which is led by the Tribunal's Head of Training, Deputy Chairperson Cindy Carroll.

My thanks go to both Cindy Carroll and John Stanley for their excellent work and I hope that this summary will prove equally useful to legal practitioners and others interested in the area of international protection law as it is to the Tribunal in its decision making.

Hilkka Becker
Chairperson
International Protection Appeals Tribunal

"Knowledge rests

not upon truth alone,

but upon error also".

Carl Jung

Judgments of the Irish Superior Courts in 2020 relating to Decisions of the International Protection Appeals Tribunal

Below is a summary of the judgments of the Superior Courts in 2020 regarding Tribunal decisions. The Tribunal incorporates the guidance of the Superior Courts into Tribunal Members' training and resources.

The Tribunal is* Functus Officio *after Making a Decision

***ND (Albania) and Ors v IPAT and Anor* [2020] IEHC 451, Humphreys J., 22 September 2020**

The applicant challenged, inter alia, the decision of the Tribunal on the ground that the evidence at hearing was not given on oath or by affirmation. After the Tribunal issued a decision upholding the recommendation of the IPO, the applicant wrote to the Tribunal asking that it rehear the appeal, which request the Tribunal refused, saying it was *functus officio*. The applicant subsequently sought to quash the Tribunal's decision by judicial review. The Court rejected the application, but commented obiter on a number of matters relevant to the Tribunal.

In respect of the Tribunal's power to correct errors in its decisions, the Court stated (at para.22):

> '[A]s regards the applicants' request for a rehearing of their appeal, it is true that reg. 10 of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No. 116 of 2017) allows for correction of errors in IPAT decisions. However, that does not give any authority to set aside a decision in full and to hold a rehearing after the decision has been made; nor is there any other legal authority for such a course. The request to the IPAT to rehear the matter was totally misconceived.'

Medical Panel

***MR (Albania) v MJE and Ors* [2020] IEHC 402, Humphreys J., 17 August 2020**

The applicant in this case challenged the Minister's failure to set up a medical panel for the purposes of s.23 of the International Protection Act 2015.

Section 23 of the International Protection Act 2015 provides that:

> *(1) Where, in the performance by the Minister or an international protection officer of his or her functions under this Act in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Minister or international protection officer, as the case may be, may require the applicant to be examined, and a report in relation to the health of the applicant furnished, by a nominated registered medical practitioner chosen by the applicant.*
> *(2) Where, in the performance by the Tribunal of its functions under this Act in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Tribunal may require the applicant to be examined, and a report in relation to the health of the applicant furnished, by a nominated registered medical practitioner chosen by the applicant.*
> *(3) The Minister shall establish a panel of registered medical practitioners who, in the opinion of the Minister, possess the qualifications and experience necessary for the performance of the functions of a nominated registered medical practitioner under this section.*
> *(4) In this section, "nominated registered medical practitioner" means a registered medical practitioner who is a member of the panel established under subsection (3).*

The Court observed that s.23 of the 2015 Act was partly inspired by Article 12(3) of the Asylum Procedures Directive 2005/85/EC relating to medical examination where an applicant is unable to attend an interview, but noted, as in turn noted by Hughes & Hughes, *International Protection Act 2015: Annotated* (Dublin, Clarus Press, 2019) at p. 227, 'Section 23 is broader in its application … and is not limited to the personal interview.'

The Court noted that a misunderstanding of the scope of the section was clear from the correspondence of the Department of Justice, which countenanced the provision being used only for medical examinations where applicants do not attend for interviews or appeals, claiming to be ill.

The applicant sought various reliefs, including an order of mandamus requiring the establishment of the panel described in section 23(3). The Court was highly critical of the Minister for only clarifying late in the litigation that no such panel had been established.
In the judgment of the court (at para.38):

> '[T]he applicant has a clear and present entitlement to request to have the IPO consider the invocation of s. 23, and the clear intention of the legislation is that the IPO's consideration of whether to invoke s. 23 should be in the context of the prior existence of a s. 23 panel. The absence of such a panel is not a matter of no consequence. It means the request can't be considered in the correct context and it

means that a negative decision could not command confidence that the request had been properly considered.'

Rather, refusal of such a request could appear to be influenced, consciously or unconsciously, by the lack of any panel. The Court ordered that the Minister establish a panel under s.23 by 1 December 2020.

The Court commended Patrick Murray, Registrar, and Stephen Hayden, of the Tribunal, in respect of their clear analysis and clarity of the need for the panel to be established, stating (at para.19):

> 'I can only hope that my commendation of the professionalism of Mr Hayden and Mr Murray will be duly noted by their superiors and the Department's HR unit because only a limited number of people on the respondents' side of this imbroglio seem to have allowed themselves to point out difficult facts in the best tradition of public service, even if administratively inconvenient. If the clarity of their analysis had been properly taken on board, the Department could have been saved a great deal of problems, this case would never have happened and the rule of law would have been better served.'

The Court also commended Hilkka Becker, Chairperson of the Tribunal, for her 'penetrating' approach to the matter in her correspondence with the Department, in particular in respect of the necessary for the panel to first exist in order for s. 23 to operate.

Oral Hearings

***ND (Albania) and Ors v IPAT and Anor* [2020] IEHC 451, Humphreys J., 22 September 2020**

The applicant challenged, inter alia, the decision of the Tribunal on the ground that the evidence at hearing was not given on oath or by affirmation. After the Tribunal issued a decision upholding the recommendation of the IPO, the applicant wrote to the Tribunal asking that it rehear the appeal, which request the Tribunal refused, saying it was *functus officio*. The applicant subsequently sought to quash the Tribunal's decision by judicial review. The Court rejected the application, but commented obiter on a number of matters relevant to the Tribunal. In respect of the giving of an oath or making of an affirmation before the Tribunal, the Court stated (at para.23):

> '[A]s regards the administration of the oath, it is true that s. 42(8)(d) of the 2015 Act is phrased in enabling rather than mandatory terms, but for consistency and in order to ensure that evidence […] given to the tribunal is offered with due solemnity and seriousness, the administration of an oath in line with the religious beliefs of each witness should be the default position for the tribunal. Affirmation arises, not if a witness declines to give an oath, but only in limited circumstances where the oath is contrary to the [witness's] religious beliefs or if the witness has no religious beliefs. Taking evidence without an oath or affirmation should only be in the limited circumstances set out in the Chairperson's Guideline No: 2019/1 on Taking Evidence from Appellants and Other Witnesses, where this is in the interests of justice (para. 11.2). Those guidelines were issued under a statutory power in s. 63(2) of the 2015 Act; and in sub-section (6) of that section, the legislature identifies consistency as a specific statutory *desideratum* and providing that the chairperson can take actions for "*the avoidance of undue divergence in the transaction of business by members*".

The Court continued, providing guidance on the relationship between the oath and credibility (also at para.23):

> 'The tribunal is fully entitled to view refusal to take an oath where the conditions for affirmation are not satisfied as being in and of itself undermining of the credibility of the account offered, all other things being equal. That is only common sense. Someone who hesitates about swearing to the truth of something is giving you important information about the reliability of their account, all other things being equal.

In this regard, the Court added that '[s]crapping the oath makes academic sense, but would materially increase the amount of false evidence in practice. Would that it were not so, but it would be wishful thinking to ignore the reality. Overall the real objection to oaths is that apocryphally attributed to Garrett Fitzgerald: "I know it will work very well in practice, but tell me … how will it work in theory?" (Seamus Martin, "Saturday Column", The Irish Times, 6th July, 1985, citing an attribution by Anthony O'Reilly).

Benefit of the Doubt

***MR (Bangladesh) v IPAT & Anor* [2020] IEHC 41, Humphreys J., 29 January 2020**

The court in this judgment stated that the benefit of the doubt only applies if the applicant's general credibility is established. In the court's judgment, this is clear from s.28(7) of the

International Protection Act 2015 and the Qualification Directive, and is supported by *MZ (Pakistan) v IPAT* [2019] IEHC 125, and the UNCHR Handbook on Procedures and Criteria for Determining Refugee Status at paras 196, 203 and 204.

Credibility (Generally)

***DK (Ghana) v IPAT* [2020] IEHC 14, Humphreys J., 17 January 2020**

The applicant, a national of Ghana, challenged the Tribunal's decision on three bases. First, on the basis that the decision was irrational in that it accepted the applicant's subjective account, while finding there was no objective basis for it. The court rejected this finding no inconsistency. The court referred to *Fletcher v Commissioner of Public Works* [2003] IESC 13, [2000] 1 IR 465, where the Supreme Court said that stress and mental injury in relation to a fear of physical harm did not give rise to a cause of action where objectively the basis for the concern was not established.

Secondly, the applicant argued that the Tribunal had failed to take into account the secretive nature of the funeral practices in Ghana as a matter to be considered when weighing the applicant's claim that on the death of a tribal chief he would be subjected to a human sacrifice as part of the funeral rights. The court disagreed, observing that this point was part of the applicant's submissions to the Tribunal, and the decision stated that all matters submitted were considered. Thus, the applicant's argument had to be rejected in the absence of proof that the matter was not considered.

Thirdly, the applicant argued that the Tribunal had failed to give adequate reasons for its decision. The court rejected argument, finding that the following four reasons that were given by the Tribunal were adequate:

1. Indication of a lack of reference in the country material to the feared ritual killing as contended.
2. That country information stated that tribal leaders had 'dismissed' perceptions that such ritual killings took place.
3. That country information indicated that such incidents occurred 'several decades ago'.
4. That country information presented by the applicant was considered and it explained why it was unsupportive of the applicant's claims.

***MR (Bangladesh) v IPAT & Anor* [2020] IEHC 41, Humphreys J., 29 January 2020**

The court in this judgment analysed the *obiter dicta* of the Hogan J. in *RA v RAT* [2017] IECA 297 at para 62:

> '…given the alleged provenance of the documents and their obvious relevance to his claim, if true, it was incumbent in these circumstances on the Tribunal member to assess such documentary evidence – if necessary, by making findings as their authenticity and probative value – so that that very credibility could be assessed by reference to all the relevant available evidence.'

In the opinion of the High Court:

> 'The words "if necessary" here are crucial and must be taken as referring only to that very limited category of documents that are capable of definite forensic objective verification, entirely independently of the personal credibility of the individual producing them. If contrary to my reading, Hogan J.'s obiter comment has the meaning that the credibility of documents can or should be more generally separated from the credibility of a person producing the document, I would have to respectfully conclude that that cannot be correct, apart, as I say, from cases, exceptional to vanishing point in the asylum context, where the document can be independently forensically validated. Leaving aside such extremely unusual cases, the credibility of any other document cannot be separated from the credibility of the person producing it. It would be an impossibility, and therefore an absurdity, to require a decision maker to make a final assessment of the reliability of a document prior to considering the reliability of the person producing it.

***VH v IPAT* [2020] IEHC 134, Barrett J., 12 March 2020**

The applicant in this case, a national of Albania, claimed to have a well-founded fear of persecution in Albania arising from a land dispute involving his family, and, secondly, because of his Roma ethnicity.

The Tribunal, upholding the first instance decision against him, found that a Declaration purportedly from the head of his village stating that the relevant law in Albania was weak, a copy of which the applicant submitted in support of his claim, (1) 'was not submitted in its original form', (2) was obtained for the purposes of the applicant's international protection application, and (3) was 'an improbable declaration by a local Government official', and not credible.

In the judgment of the court, in the first place, the IPAT breached fair procedures and failed to give reasons in failing to indicate that there was any inquiry why a copy was provided, and in failing to indicate any reasons why the declaration was objectionable. (para.4)

Secondly, that the evidence was self-serving was not a basis for rejecting it (*Kimbudi v Minister of Employment* (1982) 40 NR 566 (FCA); *R(SS) v Secretary of State for the Home Department* [2017] UKUT 164 (IAC); and *MJ (Singh v Belgium: Tanveer Ahmed unaffected) Afghanistan v Secretary of State for the Home Department* [2013] UKUT 253 IAC, cited with approval). (para.5)

Thirdly: 'the IPAT did not point to any false information in the Declaration but to an unexplained sense of the part of the IPAT official that what is stated in the Declaration is something that is unlikely to be stated by a local (village) government official. There is no reasoning offered for this sense, so there is a failure to provide reasons. Additionally, insofar as the IPAT considers the Declaration not to be credible, in effect casting a burden on Mr VH to establish the genuineness of the Declaration, without any mention of this at the hearing of thereafter, thus giving him no opportunity to discharge such burden, and then relying on his failure to discharge the burden so case to assail his credibility, this seems to the court to involve a near-classic breach of fair procedures.' (para.6)

The Tribunal further held that the applicant was vague in his account of an attack on his life. The Tribunal recorded the account in question in the following manner:

> 'At interview, the Appellant stated that 'during my journey from work to home, I was stopped by four armed people in a car. They punched me badly. And they threatened me. They pressured me.' He said that he was punched 'in my face and my abdomen'. He was later asked to provide further details of the attack and he responded that 'during the communist regime in the '90s the [Name Stated] family was powerful'. The Appellant was asked a further three times for the details of the attack and he simply responded, 'we fought all the time', 'as I said they put a gun to my head' and 'I was threatened by them'.

In the judgment of the court, there was thus a deficiency in the Tribunal's finding of vagueness in that there was no indication, in the court's opinion, why the Tribunal found the above account of the attack to be so vague as to require further details, or even an indication as to what further details it might have expected to be forthcoming (JB (Torture and Ill treatment – Article 3) DR Congo [2003] UKIAT 12 cited with approval). (para.8)

The Tribunal held that 'Given the appellant's lack of legal title or personal involvement in the contested matters, the Tribunal does not find the Appellant's [account] to be credible'. In the judgment of the court, there was no logical nexus between any lack of legal title or personal involvement in a land dispute claimed to exist between two families, and the credibility of the account. Further, lack of legal title and personal involvement did not seem to the court to be

dispositive of the matter (the court suspected obiter that land disputes tend to arise because there is a dispute over legal title).

Finally, in respect of the Tribunal's finding that, notwithstanding it accepted on the basis of the country information that members of the Roma community may experience discrimination, the Appellant's testimony was not a credible account of past discrimination based on his Roma ethnicity, the Court considered this finding to be a bald, unreasoned, and thereby unlawful, rejection of credibility. (para.14)

***MS v IPAT & Anor* [2021] IEHC 30, Burns J., 15 December 2020**

The applicant claimed to have a well-founded fear of persecution in Albania because of threats from a criminal gang to whom his father owed money. He sought to quash the Tribunal's decision on the basis that the Tribunal erred in incorrectly determining the case on a single issue, i.e., that he did not know how much his father's debt was for, and/or was otherwise irrational.

The Tribunal had held that it was not satisfied that a demand for an unspecified sum of money was a plausible, coherent or detailed basis for a claim for international protection. The Tribunal set out further matters that undermined the claim, including (a) inconsistency re how the applicant's father could afford to send the applicant to college; (b) inconsistency re the family not being pursued for the debt; (c) the illogicality of the applicant only pursued for the debt years after it was incurred by his father; (d) why the family, other than the applicant, was safe in Albania now; and (e) speculativeness of the claimed connection between the alleged persecutors and the Albanian police.

The Court rejected the applicant's request for judicial review, finding that the Tribunal had not determined the appeal on a single issue, as claimed. Rather, the Tribunal considered a number of matters, as outlined above. In the view of the Court, the Tribunal found that the lack of specificity about the amount of the debt meant that it could not properly assess the significance of these matters.

Duty to Give Reasons for Credibility Findings

***VH v IPAT and Ors* [2020] IEHC 134, Barrett J., 12 March 2020**

Mr VH, an Albanian national, applied for international protection on the basis that if returned to Albania he would be subjected to persecution or serious harm arising from a land dispute involving his family.

The Tribunal had stated the following in its decision:

> "[W]hile the Appellant submitted a copy of a Declaration by...[Mr X], the purported head of village...in support of his claim, [1] it was not submitted in its original form and [2] is understood to have been obtained for the purposes of the Appellant's international protection application. [3] In particular, the Tribunal finds the statement 'the state law is still weak in Albania in order to guarantee the safety of its citizens', contained therein, to be an improbable declaration by a local Government official. For these reasons, the Tribunal finds this Declaration not to be credible."

In the judgment of the court, the Tribunal did not indicate that there was any inquiry as to why a copy of the Declaration was provided, or give any reasons why the Declaration was found to be objectionable. Thus the Tribunal breached fair procedures or failed to give reasons for its decision. The Court explain further that:

> 'the IPAT does not point to any false information in the Declaration but to an unexplained sense on the part of the IPAT official that what is stated in the Declaration is something that is unlikely to be stated by a local (village) government official. There is no reasoning offered for this sense, so there is a failure to provide reasons. Additionally, insofar as the IPAT considers the Declaration not to be credible, in effect casting a burden on Mr VH to establish the genuineness of the Declaration, without any mention of this at the hearing or thereafter, thus giving him no opportunity to discharge such burden, and then relying on his failure to discharge the burden so cast to assail his credibility, this seems to the court to involve a near-classic breach of fair procedures.'

In the judgment of the court, that evidence might be self-serving is not of itself a basis for rejecting that evidence (*Kimbudi v. Minister of Employment and Immigration* (1982) 40 NR 566 (FCA); *R. (S.S.) v. Secretary of State for the Home Department* [2017] UKUT 164 (IAC); *M.J. (Singh v. Belgium: Tanveer Ahmed unaffected) Afghanistan v. Secretary of State for the Home Department* [2013] UKUT 253 (IAC), at para. 33 considered).

The Tribunal, in its decision, had also stated as follows:

> 'The Appellant was vague in his account of a...2016 attack on his life, at both his oral hearing and at his section 35 interview. At interview, the Appellant stated that 'during my journey from work to home, I was stopped by four armed people in a car. They punched me badly. And they threatened me. They pressured me.' He said that he was punched 'in my face and my abdomen'. He was later asked to provide further details of the attack and he responded that 'during the communist regime in the '90s the...[Name Stated] family was powerful'. The Appellant was asked a further three times for the details of the attack and he simply responded, 'we fought all the time', 'as I said they put a gun to my head' and 'I was threatened by them''.

In the court's judgment, there was no indication why the Tribunal found the account of the attack to be so vague as to require further details or indication of what further details it might have expected (*J.B. (Torture and III treatment - Article 3) DR Congo* [2003] UKIAT 12, at para. 7, adopted).

The Tribunal also found the applicant's claim to lack credibility because of his lack of legal title or personal involvement in the contested matters. However, the court saw no connection between a lack of legal title or personal involvement in a land dispute and the credibility of an account of a particular attack. In the opinion of the court, lack of legal title or personal involvement are not determinative of whether a particular attack occurred.

The Tribunal also rejected the applicant's secondary claim to have a fear of persecution as a person of Roma ethnicity. In so doing, the Tribunal recounted the applicant's evidence of past ill treatment, before stating:

> 'The Tribunal accepts on the basis of the COI submitted, that members of the Roma community may experience discrimination in accessing services such as education, employment and housing. However, the Appellant and the Appellant's brother's testimony, are not credible accounts of past discrimination on the basis of their mixed Roma ethnicity.'

In the judgment of the court, this 'bald, unreasoned rejection of credibility' breached constitutional law, the 2015 Act, the Qualification Directive, case-law, and all guidance of relevance, including the UNHCR Handbook

***SKS v IPAT* [2020] IEHC 560, Burns J., 3 November 2020**

The applicant, a national of Bangladesh and a Hindu, applied for international protection on the basis of his claimed well-founded fear of persecution in Bangladesh for reasons related to

his religion and his membership of a particular social group. He claimed in particular that he was framed for a kidnapping, and faced imprisonment in connection with the matter. An IPO recommended that he not be declared a refugee, and the Tribunal affirmed that decision. The Tribunal found some aspects of his claim to be credible, but certain material aspects of his claim not to be credible, in particular that he was the subject of a kidnapping charge. The Tribunal's analysis (set out in some detail in the Court's judgment) gave certain reasons for its findings, including finding that certain letters, said to be from the applicant's lawyer in Bangladesh advising of the situation in relation to the alleged kidnapping charge, were not probative of the kidnapping charge because they were written long after the alleged kidnapping, and did not refer to certain matters, and overstated others.

The applicant argued that the Tribunal had failed to give adequate reasons for its conclusion that his claim was not credible. The Court outlined key judgments that engage with the essence of the duty to give reasons (*Connelly v An Bord Pleanala* [2018] IESC 31; *Mallak v MJ* [2017] IESC 6; *YY v MJ* [2017] IESC 61). Applying this law to the Tribunal's decision, the Court held that:

> 'While the decision of the [Tribunal] in this matter does not engage in an analysis of the oral evidence, but rather recites portions of it, it cannot be said that the reasons for the decision are not discernible. It is abundantly clear that the [Tribunal] simply did not find the Applicant's evidence credible and specifically the evidence which is recited in the decision. A more detailed analysis of the evidence would clearly be preferable but in terms of the ultimate question as to whether it is discernible why the [Tribunal] did not find the applicant credible, the answer is that it is so discernible: the applicant simply was not believed on *all* of the evidence which was set out in the [Tribunal's] decision.

With respect to the documentary evidence, which included letters said to be from the applicant's lawyer in Bangladesh advising of the situation in Bangladesh, the Court found that:

> 'The [Tribunal] engaged in a detailed assessment of the documentary evidence and provided a reasoned decision as to why such evidence was not probative of the Applicant's claim. It is also clear that the [Tribunal's] determination regarding the documentary evidence was then considered by it when assessing the Applicant's credibility on whether he had been falsely accused of kidnap […] and whether his family were targeted […].'

Finally, the Court provided the following guidance in respect of what was to be expected of the Tribunal in analysing personal documents for the purpose of a credibility analysis:

> ‘Just as with oral evidence, the fact that these letters exist, does not mean that the [Tribunal] must simply accept them. They are evidence in the case and as such they must be analysed by the [Tribunal] to determine whether they are credible, whether they can be relied upon, and what weight can attach to them. In carrying out that exercise, the [Tribunal], must of necessity determine what one would reasonably expect to find in a professional advisory letter of this nature. Clearly, in carrying out that task, a level of perfection cannot be required: instead the rest must be what is reasonable to expect such a letter to contain having regard to the nature of the professional advice being administered.’

‘Consistency’ as a Credibility Indicator

***MR (Bangladesh) v IPAT & Anor* [2020] IEHC 41, Humphreys J., 29 January 2020**

In this judgment the court noted the judgment of the court in *B v IPAT* [2019] IEHC 767, and noted that calling a medical report ‘expert opinion’ and saying there was no suggestion ‘it would be anything less than an entirely professional report from a known and reliable source’ (Ibid, para.2) does not add anything to the credibility of an applicant’s account, and that, as per *B v IPAT*, ‘[t]he point remains that a medical report can establish that an account could be true, but it does not establish who caused the injury or in what circumstances’.

The court cited with approval the comment of Ouseley J at para.17 of *HE (DRC)* [2004] UKIAT 321, that ‘rather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating the claim.’

The Tribunal’s decision stated that the appellant gave an inconsistent and confusing narrative, and one that lacked cogency in respect of the claimed material facts. The applicant contended that the Tribunal erred in law in importing a standard of proof of ‘cogency’. The court disagreed, seeing nothing irrational or unlawful in this regard.

The court stated further:

> ‘The fact that the applicant’s story is consistent with country of origin information does not support the story as such; it merely removes a negative. I might add that the same goes for consistency […] – telling a consistent story does not make it true, rather it removes an objection. Neither self-corroboration nor consistency with country information amounts to ‘support’ for a claim’ (para.25).

The court cited with approval the comment of Ouseley J at para.17 of *HE (DRC)* [2004] UKIAT 321, that 'rather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating the claim.'

Speculation

***LH (Algeria) v IPAT* [2020] IEHC 157, Humphreys J., 4 March 2020**

The applicant, an Algerian national, was accused of misappropriation by his employer, but did not contact his employer to protest his innocence. The Tribunal accepted that as credible that the applicant's employer engaged in unethical and fraudulent practices. In rejecting his international protection appeal, however, the Tribunal did not accept that the applicant would not have appreciated that his failure to contact his employer to protest his innocence would reinforce the impression of guilt.

The applicant complained that in circumstances where it was accepted as credible that his employer engaged in unethical and fraudulent practices, the Tribunal erred in making a negative credibility finding against him because of his failure to protest his innocence to his employer, the feared actor of persecution.

In rejecting this claim, the court stated that it is the role of the tribunal to assess *all* of the facts and circumstances of a claim, and that '[w]hether or not the applicant contacts the person from whom he says he fears harm, or whether or not he entertains that person's attempts to make contact, is a part of the facts and circumstances of the case and cannot be arbitrarily disregarded.'

The applicant also contended that the Tribunal erred in failing to appreciate the cultural context of the claim, or by engaging in conjecture or speculation in making credibility findings, in circumstances where he had provided a consistent narrative. In rejecting this claim the court stated that '[t]he fact that the applicant gave a consistent narrative does not make his story true. A story can be consistent but false', and that '[m]aking an adverse decision having assessed the evidence is not conjecture or speculation' (para.19), particularly where a decision explicitly considered country of origin information (para.20).

***RK v IPAT* [2020] IEHC 522, Burns J., 20 October 2020**

The applicant, a national of Albania, claimed to have a well-founded fear there because of a blood feud in the context of Kanun law, consequent on the fact that his father murdered a man with whom he had a land dispute. An IPO recommended against the applicant being declared to be a refugee, and the Tribunal upheld that decision on appeal, finding that while blood feuds exist in Albania, the applicant had not established the credibility of his account on the balance of probabilities in circumstances where he was vague and non-specific in respect of some of his evidence, and inconsistent in respect of some of his evidence.

Speculation and Conjecture

The applicant argued that the Tribunal impermissibly engaged in speculation and conjecture when determining various credibility issues against him. The court, applying the principles from the *locus classicus* case of *IR v MJE* [2015] 4 IR 144 (see esp. para. 10), in respect of the Tribunal's credibility analysis, rejected the various particular arguments in this regard advanced by the applicant.

The applicant had claimed to have resided clandestinely in a village called Fierz in Kosovo for 18 years. He was unable to give much information about Fierz, stating for example that he did not know if there was a river in the village because he had never seen the village in daylight and only came out at night. The applicant also was unable to provide details about the family with whom his family allegedly had a blood feud.

The Court disagreed that these, and other, findings were of the nature of conjecture or speculation. In the judgment of the Court, it was open to the Tribunal to make the findings it did. The findings were not conjecture or speculation, but 'based on a detailed analysis of the applicant's evidence […] with the [Tribunal Member] applying her common sense and knowledge of life to the evidence given.'

The Court provided, at para.23, the following guidance regarding the Tribunal's role as fact finding:

> 'A fact finder is not obliged to accept the evidence given. Rather, a fact finder must analyse and assess the evidence to determine whether she accepts the evidence and what weight she attaches to it. To conduct that exercise, a fact finder should apply their knowledge of life and common sense to the evidence. In asylum cases, because a fact finder is dealing with different cultures and norms, it is necessary to take account of the different cultures and conditions in the country in question when analysing the evidence. An assessment of what one might reasonably expect in a situation, having regard to the different culture and conditions in the country in

question, should be carried out so that a rational assessment of the evidence given can be engaged in.'

Assessing Credibility in 'Papers-Only' Appeals

***HI v MJE, AI v MJE* [2020] IECA 20, Court of Appeal, Whelan J., 5 February 2020**

The appeals in this matter arose from orders made by the High Court in *HI and Anor v MJE and Ors* [2018] IEHC 275, wherein the High Court refused applications for certiorari in respect of the Minister's decisions refusing subsidiary protection. The Minister's decisions were made under the regime that predated the current 'single procedure' regime under the International Protection Act 2015, and in particular under the European Communities (Eligibility for Protection) Regulations 2006 (SI No. 518 of 2006), before national law developed by way of the European Union (Subsidiary Protection) Regulations 2013 (SI No. 426 of 2013) as amended, which developments were necessitated by CJEU case law (specifically, Case C-604/12, *HN*, EU:C:2014:302, and Case C-429/15. *Danqua*, EU:C:2016:789).

The key issue for the Court of Appeal was whether the High Court erred in effectively concluding that the Minister correctly interpreter the country information with regard to the applicants' country of origin, Albania, and the capacity of its police authority to provide an appropriate response and protection.

An adverse decision on the same facts as presented by the applicants in their applications for subsidiary protection had been previously made in respect of the applicants' asylum applications by both the Refugee Applications Commissioner and, on appeal, the Refugee Appeals Tribunal, and in the applications for subsidiary protection in each case the applicants did not raise any substantial grounds challenging the conclusions on credibility in the decisions of the RAC or RAT.

The Court of Appeal considered it clear from the country information and material taken into account that it was reasonable for the Minister to conclude that it was not credible that such matters would give rise to a risk of serious harm on the facts advanced (para.101).

In the judgment of the court at para.105:

> 'Provided the Minister is satisfied that the findings of the RAT were reasonable the Minister is entitled to adopt the said findings and have regard to same. There is no obligations on the Minister to reconsider the same facts and events to decide whether

> they are plausible or credible in the absence of new or additional information or evidence or some other basis capable of demonstrating that the original findings were vitiated by fundamental error.'

The court concluded that, in the light of the authorities (*HM v MJELR* [2011] IEHC 16; *Barua v MJ* [2012] IEHC 456; *Meadows v MJELR* [2010] IESC 3, [2010] 2 IR 701, [2011] 2 ILRM 15; *Kouaype v MJELR* [2011] 2 IR 1)), and

> 'in the absence of unusual, special or changed circumstances or in the absence of there being evidence that the [Minister] did not consider the matters specified by s.5 [of the Refugee Act 1996 – re the prohibition of refoulement] in coming to his opinion […] it was not open to the High Court to go behind the [Minister's] reasoning and hence his conclusions were correct.' (para.107)

Thus, the High Court 'was correct in circumstances where there was clear evidence before the Minister in the form of COI which entitled him to make the decision, draw the inferences and reach the conclusions which he did.' (para.109)

Assessment of Facts: Personal Documents

***RK v IPAT* [2020] IEHC 522, Burns J., 20 October 2020**

The applicant, a national of Albania, claimed to have a well-founded fear there because of a blood feud in the context of Kanun law, consequent on the fact that his father murdered a man with whom he had a land dispute. An IPO recommended against the applicant being declared to be a refugee, and the Tribunal upheld that decision on appeal, finding that while blood feuds exist in Albania, the applicant had not established the credibility of his account on the balance of probabilities in circumstances where he was vague and non-specific in respect of some of his evidence, and inconsistent in respect of some of his evidence.

The Tribunal incorrectly stated that a Police Certificate proffered by the applicant in evidence post-dated when the applicant applied for refugee status.

Moreover, the Court found that the Tribunal had not put the applicant on notice that this and a second certificate were under review by the Tribunal, and that they raised a concern about the veracity of the claim that the applicant's father had carried out the killing that was alleged to have given rise to the blood feud.

In the view of the Court, the question that arose was whether the Tribunal's finding that it had not been established that the applicant's father committed the killing alleged to have instigated the blood feud, was a material concern that affected the outcome of the appeal. In the judgment of the Court, it was not such a concern because the date of the applicant's protection claim, about which she was in error, was not relied on by the Tribunal Member in her assessment of weight. Rather, the Tribunal determined that no weight should attach to the document in question in the light of the negative credibility findings that were open to her.

Thus, while the applicant was not on notice of the concern regarding whether his father carried out the alleged murder, the issue did not have a material effect on the outcome of the decision.

Assessment of Facts: Medico-Legal Reports

***MR (Bangladesh) v IPAT & Anor* [2020] IEHC 41, Humphreys J., 29 January 2020**

In this judgment the court noted the judgment of the court in *B v IPAT* [2019] IEHC 767, and noted that calling a medical report 'expert opinion' and saying there was no suggestion 'it would be anything less than an entirely professional report from a known and reliable source' (Ibid, para.2) does not add anything to the credibility of an applicant's account, and that, as per *B v IPAT*, '[t]he point remains that a medical report can establish that an account could be true, but it does not establish who caused the injury or in what circumstances'.

Future Risk and Accepted Facts

***ZNUD (Pakistan) v IPAT and Ors* [2020] IEHC 7, Humphreys J., 15 January 2020**

The applicant, a Pakistani national who claimed to be a member of the Model Town branch of the PAT party in Pakistan, sought to quash the Tribunal's decision on the basis that the Tribunal did not properly consider his prospective risk in the light of his factual circumstances and the country information. Noting, however, that the Tribunal accepted that the applicant was an ordinary member of the PAT party, but that it had not made a specific finding on which branch he was a member of, the court held that the application must fail as there was no general obligation on the Tribunal to analyse in detail an incidents that do not involve the

applicant. The court noted that the applicant could have challenged the decision on the basis that the Tribunal failed to make a factual finding re the branch of the party that the applicant was a member of, but did not.

***I v IPAT & Anor* [2020] IEHC 63, Barret J., 18 February 2020**

The applicant claimed international protection on two bases, i.e., (i) that she had worked as a prostitute in Nigeria since she was a minor and fears the reaction of her family if she is now returned there; and (ii) that she was trafficked to Ireland and fears the response of the traffickers if she is returned to Nigeria.

The Tribunal accepted that the applicant worked as a prostitute in Nigeria and that she was disowned by her family because of her work as a prostitute. It did not accept that her family had attacked her. Also, the Tribunal did not accept that the applicant was trafficked to Ireland, or that she faced any risk from traffickers if she were to be returned to Nigeria.

In the section on 'objective basis' in its decision, the Tribunal concluded as follows:

> 'Considering the Tribunal's conclusion, viz. that while the appellant had been disowned by her family at one time for working as a prostitute, she did not endure attacks from her family, and was now reconciled with her mother and her sister […] and considering the COI relevant to the analysis […] the Tribunal finds that there is not a reasonable chance that if she were to be returned to Nigeria she would face a well-founded fear of persecution on the basis of her membership of a particular social group. For example […], in the UK Home Office's Country Policy and Information Note, Nigeria: Trafficking of Women, Version 2.0, November 2016, para. 2.3.12 it states that, in general, even women are unlikely to be at risk of reprisal on return to Nigeria and the Tribunal has already concluded that the Appellant had not been trafficked.'

The applicant claimed that the Tribunal failed to consider properly the issue of her family as potential actors of persecution, and instead wrongly conflated the two claims, in respect of her family on the one hand, and the traffickers, on the other.

In the judgment of the court, at para.9:

> 'the forward-looking fear of family as actors of persecution, solely on the basis of Ms I's having acted as a prostitute, was not addressed by the IPAT. Yet, once the fact that Ms I had worked as a prostitute was accepted, the IPAT was required to [investigate] the case put forward regarding the family members as potential actors of persecution' (*PD v MJELR* [2015] IEHC 111 applied by analogy).

The court observed that the obligation to assess depends on whether sufficient facts have been accepted (*MLTT (Cameroon) v MJELR* [2012] IEHC 568 applied), and that in the instant case Ms I's history and characteristics (i.e., that she had been disowned by her extended family because of her work as a prostitute, including while she was a minor) were accepted, such that the assessment of whether her family would persecute her was not a hypothetical exercise (para.10).

Furthermore, the applicant had put forward specific country information relating to the risk of violence against women from family members, while the Tribunal merely referred to this country information and *unlawfully preferred other country information without providing adequate reasons for such preferment (DVTS v MJELR* [2008] 3 IR 476)

The court also found that the Tribunal's reasoning to the effect that because the applicant had 'worked as a prostitute and managed to sustain herself', including while a child, meant she would be in a better position to sustain herself and resettle in Nigeria should she return there, was egregiously offensive in, so the court understood, in implying that once returned the applicant could return to prostitution to sustain herself.

Note: This judgment demonstrates the importance of a decision being clear about what claim or claims are analysed in the context of future risk. Where there are multiple claims, they must be analysed fully.

Future Risk: Obligation to Consider Hypothetical Claim?

***FD and Anor* [2020] IEHC 545, Burns J., 29 October 2020**

The applicants in this case were a woman and her dependant daughter. They claimed, inter alia, a well-founded fear of persecution in Pakistan on the basis that the daughter, in refusing to marry an elderly business associate of her father's, had defied her father's wishes. The first applicant claimed she was estranged from her husband, the father of the second applicant.

The IPO refused the claim, and the Tribunal upheld that refusal on appeal. The Tribunal accepted some aspects of the claim, but did not accept as credible the claim that the father wished the second applicant to enter an arranged marriage, or that the first applicant and her husband were estranged.

The applicants first argued that the Tribunal had failed to have proper regard to certain country information. Observing that the country information in question had limited relevance to the specific claim made by the applicants, the Court held on this point that in

light of the statement by the Tribunal that all evidence and material submitted to it were considered, it was not appropriate for the Court to engage in a guessing game about what weight was attached to the country information evidence.

Secondly, the applicants argued that s.28(6) of the 2015 Act put an onus on the Tribunal to be satisfied that good reasons existed to consider that persecution would not be repeated and that it therefore was necessary to consider whether the husband would return to Pakistan. Section 28(6) states:

> 'The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or serious harm, is a serious indication of the Applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.'

The Court rejected this argument, observing that the applicants had not made the case that the husband would return to Pakistan. In a situation where the claim was not made, there was no requirement for the Tribunal to consider its possible effect.

The Court said that it was a personal choice for the applicant, and her husband how they ordered their affairs. In this regard, the Court commented that:

> 'Protection status is not afforded because a family have chosen to order their affairs in a particular way which results in a possible future risk to the family. Protection status is granted to a person where there is a necessity in their situation arising from circumstances external to the asylum seeker.'

Safe Country of Origin

***EV and Ors v IPAT* [2020] 556 JR, Burns J., 25 November 2020**

The applicants in this case were nationals of South Africa. The Minister designated South Africa to be a safe country of origin. The IPO, in recommending that the applicants not be declared to be refugees, made a finding that South Africa is a safe country of origin. Consequently, the appeal before the Tribunal proceeded without an oral hearing, unless the Tribunal was satisfied that it was in the interests of justice to hold an oral hearing.

The appeal proceeded without an oral hearing. In its decision, the Tribunal accepted certain aspects of the applicants' claims, but was satisfied that state protection was available to the

applicants, and in making that finding had regard to the fact that South Africa had been designated a safe country of origin.

The applicants argued that the designation of South Africa as a safe country of origin for the purposes of ss. 33 and 72 of the 2015 Act was ultra vires the Procedures Directive or otherwise unlawful. First, the applicants argued that the safe country concept was rooted in the Recast Procedures Directive and that, as Ireland had not opted into that Directive, the State was not entitled to avail of the relevant provisions. The Court rejected this argument, observing that the concept was derived from the original Procedures Directive, on which basis it had been given effect in Irish law in the legislation that existed prior to the 2015 Act, as well as in the 2015 Act.

Secondly, the applicants sought a declaration to the effect that in designating South Africa as a safe country of origin, the Minister was in breach of s.72(2) of the 2015 Act in that the Minister 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 South Africa in light of conditions there as disclosed by country information.

The Court, observing that, as the relief in question was declaratory in nature, the test for judicial review was one of arguability, granted the applicants leave for judicial review in this matter, in particular because of the following features:

1. Another applicant previously got leave to apply for judicial review seeking similar declaratory relief (*SUN v RAC*, High Court, Cooke J., 30 March 2012), albeit that the previous matter was disposed of due to determination of a preliminary matter.
2. There was significance to the applicants in the designation of South Africa as a safe country of origin in that an oral hearing was not conducted and the designation was relied on by the Tribunal in its finding re state protection.
3. It appeared that South Africa is not generally classified as a safe country of origin by member states, with only the UK and Slovakia designating it as such.
4. The available country information.

***IM v IPAT* [2020] IEHC 615, Burns J., 25 November 2020**

The applicant in this case was a national of Georgia. The Minister designated Georgia to be a safe country of origin. The IPO, in recommending that the applicant not be declared to be a refugee, made a finding that Georgia is a safe country of origin. Consequently, the appeal before the Tribunal proceeded without an oral hearing, unless the Tribunal was satisfied that it was in the interests of justice to hold an oral hearing.

The applicant requested an oral hearing, saying that this was needed for him to present certain medical evidence, and explain why it was being provided belatedly. The Tribunal was satisfied that the interests of justice did not necessitate an oral hearing on this basis, and the appeal proceeded without an oral hearing. The Tribunal affirmed the decision of the IPO.

The applicant argued that the designation of Georgia as a safe country of origin for the purposes of ss. 33 and 72 of the 2015 Act was ultra vires the Procedures Directive or otherwise unlawful. First, the applicant argued that the safe country concept was rooted in the Recast Procedures Directive and that as Ireland had not opted into that Directive the State was not entitled to avail of the relevant provisions. The Court rejected this argument, observing that the concept was derived from the original Procedures Directive, on which basis it had been given effect in Irish law in the legislation that existed prior to the 2015 Act, as well as in the 2015 Act.

Secondly, the applicant sought a declaration to the effect that in designating Georgia as a safe country of origin, the Minister was in breach of s.72(2) of the 2015 Act in that the Minister 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 there as disclosed by country information.

The Court, observing that as the relief in question was declaratory in nature the test for judicial review was one of arguability, refusing the applicant leave for judicial review in the matter, notwithstanding that another applicant previously got leave to apply for judicial review seeking similar declaratory relief (*SUN v RAC*, High Court, Cooke J., 30 March 2012), and notwithstanding the leave granted in *EV and Ors v IPAT*, Burns J., 25 November 2020, because the instant case was distinguishable from the EV case for the following reasons:

1. The applicant failed to establish any particular significance to him with respect to the designation of Georgia as a safe country of origin in circumstances where his reason for requesting an oral hearing was to explain medical reports and why they were late, and as the Court did not understand why an oral hearing was necessary for this purpose, and unlike *EV*, the Tribunal did not rely on the safe country designation in a state protection analysis.

2. Georgia is classified as a safe country of origin by eleven other EU Member States.

State Protection

***BA v IPA* [2020] IEHC 589, Burns J., 20 October 2020**

The applicant, a Nigerian national, claimed a well-founded fear of persecution in Nigeria in circumstances where she claimed a history of sexual violence against her, and that her ex-partner threatened that he would kill her. An IPO recommended that she not be declared a refugee, and the Tribunal upheld this decision on appeal.

The Tribunal, having accepted various material factual issues and claims of past harm, found 'that there is a reasonable chance that if she were to be returned to her country of origin she would face a well-founded fear of persecution from her ex-partner.' However, the Tribunal found that the applicant could avail of state protection. In this regard, the Tribunal summarised the country information before it, relating to state protection for women subjected to gender-based violence, as follows:

> '[N]o laws of nationwide applicability criminalise gender-based violence and only [specified states] had enacted domestic violence laws. [W]here such laws do exist they were often not effectively implemented in practice and there is widespread under reporting. [T]here is a reluctance amongst women to report abuse to the authorities. This is because the police are perceived as being reluctant to take violence against women seriously and pursue allegations.'

In the light of that summary, the Tribunal concluded that the 'Nigerian authorities are willing and able to provide protection from non-state agents, albeit that women face greater difficulties in seeking and obtaining protection than men particularly for gender based violence.'

In the judgment of the Court, it was difficult to see how the Tribunal was satisfied that the applicant could avail of state protection (s.31(2)(a)); that such protection was generally available (s.31(2)(b)), that the Nigerian state had taken reasonable steps to prevent serious harm from gender-based violence to women to include an effective legal system for the detection and prosecution of such gender-based violence (s.31(2)(b)(i) and s.31(4), and that the applicant had access to such protection (s.31(2)(b)(ii)).

Were those the Court's only concerns, the matter might have ended there, with the Court not wishing to transpose its view for the view of the Tribunal. However, the Tribunal's conclusion on state protection, i.e. the positive finding that the Nigerian authorities are willing to provide protection to women facing gender-based violence, was not reflective of its own summary of the relevant country information, which 'was negative regarding the existence of domestic

protection laws, negative regarding the implementation of such laws, where they exist; and negative of police investigation into allegations of domestic violence'. Thus the Tribunal's decision was found to be irrational and fell to be quashed.

The Court commented that the Tribunal should have considered its summary of the country information in terms of whether it constituted clear and convincing proof that state protection was available to the applicant.

Internal Protection Alternative

***S.T. (Zimbabwe) v IPAT and Ors* [2020] IEHC 5, Humphreys J., 13 January 2020**

The applicant, a Zimbabwean national claimed a well-founded fear of persecution from uncles who, she claimed, abducted, assaulted and raped her. The Tribunal accepted her account of abuse but held that there was an internal protection alternative available. The applicant challenged the Tribunal's decision essentially on the ground that the Tribunal's decision was irrational in its application of the internal protection alternative.

In rejecting the application for judicial review, the court listed the five steps it considered to be envisaged by Article 8 of the Qualification Directive (and therefore also s.32 of the 2015 Act) to be as follows:

1. Identification of a part of the country: That was done here, that part being Bulawayo.
2. Consideration of whether there was a well-founded fear of being persecuted there: Here the Tribunal did so. Its decision is not irrational even if it could have taken a more favourable view of the evidence from the applicant's point of view.
3. Consideration of whether it is reasonable for the applicant to stay in that part of the country: That was also considered and reasons were given. Again the decision is not irrational.
4. Consideration of country circumstances: The general circumstances in the country were considered and in particular in the part of the country concerned.
5. Consideration of applicant's circumstances: The personal circumstances of the applicant were also considered.

In circumstances where the Tribunal noted that the applicant's 'only concern' was that she might 'bump into a cousin someday who would relay details of her movements to other family members', the court considered there was no illegality to the decision re internal protection. The court also rejected outright an argument that the Tribunal failed to apply the provisions of the UNHCR Internal Flight Guidelines. In the judgment of the court, 'The UNHCR guidelines

are not law and even if they were not applied that does not give rise to grounds for judicial review.'

***NNM v IPAT* [2020] IEHC 590, Burns J., 18 November 2020**

The applicant, a citizen of South Africa, claimed that she left South Africa to avoid a forced marriage. The Tribunal accepted the applicant's credibility in this regard, and found too that there was not adequate state protection in South Africa for her. However, ultimately it refused her claim on the basis that internal protection was an option. In this regard, the Tribunal identified Cape Town as the location of the internal protection alternative. The Tribunal found considering factors such as the substantial distance between Cape Town and where her family lived, and the size of the city, the Appellant would not be at real risk of suffering serious harm there. Secondly, the Tribunal found that the applicant could safely and legally travel to Cape Town and gain admittance to the area.

In respect of whether it was reasonable for the applicant to settle in Cape Town, the Tribunal noted that the applicant had thirteen years of education and that Cape Town had one of the lowest rates of unemployment in South Africa, which factors in the view of the Tribunal indicated a likelihood of the applicant securing gainful employment there, obviating fears of falling into prostitution or exploitation.

In the judgment of the Court, however, the Tribunal had failed to consider that overall there was a very high rate of unemployment in South Africa. The Court commented that '[h]aving the lowest rate of unemployment is of little importance if the unemployment rate is in itself very high.' Further, in the Court's opinion, there was no assessment by the Tribunal of what supports would be in place for the applicant in Cape Town, particularly in circumstances where the country information before the Tribunal documented concerns regarding prostitution and exploitation there.

In light of the failure of the Tribunal to carry out this analysis, the Court held that the Tribunal had failed to carry out an analysis as required by *KD (Nigeria) v RAT* [2013] 1 IR 448, Harding Clark J. (see esp. paras 4 to 13). The Court stated that the principles in *KD* remain the governing principles with respect to the internal protection alternative test in s.32 of the 2015 Act, and that, per the *dicta* of *KD*, a 'high threshold' must be crossed before the Tribunal can be satisfied that internal relocation is a reasonable option for an applicant.
The Court quashed the paragraphs in the Tribunal's decision concerned with internal protection, but left intact the rest of the decision in light of its significant determinations, and remitted the matter back to the Tribunal.

Inadmissibility

***HZ (Iran) v IPAT* [2020] IEHC 146, Humphreys J., 17 February 2020**

The applicant in this case was an Iranian national who obtained refugee status in Greece. After obtaining status in Greece, he left that Member State, and travelled through other EU states before arriving in Ireland, where he again applied for asylum. An international protection officer (IPO) recommended that his application be deemed inadmissible, on the ground that he had refugee status in Greece, and the applicant appealed that decision to the Tribunal.

Section 21(2) of the International Protection Act 2015 provides that:

> 'An application for international protection is inadmissible where one or more than one of the following circumstances applies in relation to the person who is the subject of the application: (a) another Member State has granted refugee status or subsidiary protection status to the person ...'

Section 21(2) of the 2015 Act gives effect to Article 25 of the Procedures Directive. The court acknowledged that it was accepted that s.21(2) should be read in the light of the decision of the CJEU in Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim*, which provides that in a return or inadmissibility decision, the Member State's competent authority should have regard to Article 4 of the EU Charter of Fundamental Rights, which prohibits torture or inhuman and degrading treatment and thus prohibits treatment of that kind in another member state which "*must attain a particularly high level of severity*" in the limited number of cases where that may apply.

The court commented that Article 4 of the EU Charter cannot be infringed merely because of a decision declaring an application inadmissible, which possibility, in the judgment of the court, only arises at the expulsion stage. The court observed, however, that *Ibrahim* notes the right to asylum in Article 18 of the EU Charter can arise at the inadmissibility stage. In the opinion of the court, this 'explains the reference in Ibrahim to the consideration of conditions in the country in which asylum was granted as being something that can arise at the admissibility stage of the process rather than at the removal stage' (para.14).

The applicant contended that the Tribunal was irrational in finding that he fell short of establishing that his fundamental rights protected by EU law and the ECHR would be infringed if he was returned to Greece. The court recounted, and commented on, the applicant's particular difficulties, as follows:

'(i). the applicant does not speak Greek; the tribunal notes this claim at para. 4.10 and does not seem to take issue with it, but that is not a basis to hold that the applicant is facing torture or inhuman or degrading treatment;

(ii). the applicant has certain mental health issues; the tribunal accepted that he was on anti-depressants and was awaiting a psychiatric appointment, see para. 4.11, but again that is not a basis for holding that he is facing torture or inhuman or degrading treatment in Greece;

(iii). the applicant claims that he had no access to accommodation or healthcare and was living on the streets in the past; in that regard the tribunal noted that the applicant had failed to document his situation or his efforts to obtain accommodation […], and considered that the country information relied on by the applicant was of limited value in assessing current conditions in Greece given that the document from the PRO Asyl Foundation "*Protected only on paper: beneficiaries of international protection in Greece*" dated from 23rd July, 2017 - the tribunal by contrast relied on more up-to-date country material, particularly the Asylum Information Database (AIDA) country report, which showed certain progress on the social and economic facilities available to persons in the applicant's situation; and

(iv). the applicant complained that accommodation that could be available is overcrowded; that difficulty was to some extent acknowledged by the tribunal, but does not in and of itself amount to torture or inhuman or degrading treatment or punishment.'

The court held that it was open to the Tribunal in these circumstances to find that the allegation that the applicant faced torture or other treatment in breach of Article 4 of the EU Charter was not established. In the court's judgment, the applicant's case fell short of the threshold at which mutual trust between EU Member States break down and agreed with the respondent that 'to displace the presumption of mutual respect the threshold must be that of extreme material poverty, not even significant but extreme'.

The applicant also argued that the Tribunal erred in holding against him that he had not provided any evidence of his situation in Greece while he lived here, or of the opportunity to obtain accommodation, employment or welfare supports. The court rejected this argument, stating that 'it is not obviously impermissible to hold against an applicant the failure to provide *any* such documentary material' (para.26).

The applicant argued further that the Tribunal erred in failing to give the applicant an opportunity to provide oral evidence. The court, rejecting this argument, observed that this was not a case in which the applicant's credibility was rejected as such, that that the Tribunal

in any event 'went the extra mile' in terms of fair procedures by seeking considerable additional clarification from the applicant, and the applicant had not challenged (or referred to) s.21(7)(a) of the 2015 Act, which provides that the Tribunal shall make its decision on the matter in question without an oral hearing.

Finally, the applicant argued that the Tribunal erred in failing to seek assurances from the Greek authorities in respect of the conditions the applicant would face if returned there. The court, rejecting this argument, stated at para.33 that:

> 'It is inherent in the system of mutual confidence between members of the EU that member states do not seek assurances from each other or make enquiries regarding conditions, unless a significant threshold is first overcome. Had the applicant demonstrated a *prima facie* case that art. 4 rights would be breached, the question of undertakings or information might have arisen, but he did not do so. In written submissions the applicant says that this point follows from ECHR caselaw, but that is incorrect for the reasons already explained.'

Dublin Transfer: Systemic Deficiency in the UK post BREXIT?

***AHS v IPAT* [2020] IEHC 647, Burns J., 8 December 2020**

The United Kingdom, on the basis of a 'EURODAC hit' agreed to take back the applicant, a national of Iraq who made an application of international protection in the State in April 2019, under the Dublin III Regulation. In the light of the UK's agreement, an IPO issued the applicant with a transfer decision, and the Tribunal upheld this decision on appeal. In the context of his representations to the IPO, and his appeal to the Tribunal, as well as subsequent representations to the Minister, the applicant asked that the 'sovereign discretion' set out in article 17(1) of the Dublin III Regulation be applied so that Ireland would deal with his international protection application. The Tribunal declined to deal with the matter for want of jurisdiction. Subsequent to the bringing of the judicial review, the Minister undertook to make a decision in respect of article 17(1) by 16 December 2020.

The applicant sought various reliefs against both the Tribunal and the Minister. First, he sought an order of mandamus compelling the Minister to make a decision in respect of the article 17(1) request. The Court said that this relief was no longer available now that the Minister had undertaken to make a decision on the matter by 16 December 2020.

Secondly, the applicant sought the quashing of the Tribunal decision on the basis that the Tribunal failed to engage properly or rationally with article 3(2) of the Dublin III Regulation in

respect of the implications for the applicant of the withdrawal of the UK from the EU, and in the assessment of the claimed separation of the applicant from his family in Ireland. Article 3(2) of the Regulation provides, inter alia, that where it is impossible to transfer an applicant the member state primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that member state, resulting in a risk of inhuman or degrading treatment within the meaning of article 2 of the EU Charter, the determining member state shall continue to examine the criteria in Chapter III of the Dublin Regulation to establish whether another member state can be designated as responsible.

The applicant alleged, inter alia, that the Internal Market Bill reflected the UK's intention to break international law.

The analysis of the Tribunal in this regard (set out in some detail in the Court's judgment) was to the effect that there was no reason to presuppose that systemic deficiency in the UK's asylum system would arise from withdrawal from the EU.

In respect of family members in Ireland, two cousins of the applicant resided in the state (not as asylum applicants). The Court noted that the Tribunal's jurisdiction to consider family connections within the State is contained in article 7 of the Regulation, which had the effect that the Tribunal has jurisdiction to consider 'family members, relatives or any other family relations' resident in Ireland for the purposes of determining whether the criteria in articles 8, 10 and 16 of the Regulation apply.

In the judgment of the Court, on the basis of the evidence before the Tribunal, and having regard to the ruling in Case C-661/17 *MA* (esp. paragraphs 80 to 84), the decision of the Tribunal was entirely open to it to make. In the Court's judgment, the arguments in respect of systemic deficiency in the UK's system included 'wild conjecture'.

The Court said it was premature to consider the non-application of the Dublin III Regulation to the UK after the end of the transition period in circumstances where the Minister had undertaken to make a decision on article 17(1) by 16 December 2020, i.e., before the end of the transition period.

In respect of the family member argument, the relationship of a cousin was not covered under the definition of 'family members' at article 2(g) of the Regulation, such that article 10 of the Regulation did not apply. Article 8 related to a minor applicant, and so did not apply. And Article 16 did not apply as that is for where an applicant is dependent on the assistance of his or her child, sibling or parent (or them on him or her), because of pregnancy, a new born child, severe illness, severe disability or old age.

Dublin Transfer: Article 17(1) 'Sovereign Discretion'

***NVU and Ors v RAT and Ors* S:AP:IE:2019:000193, Supreme Court, 24 July 2020**

The judgment overturns the judgment of the Court of Appeal (see *NVU v Refugee Appeals Tribunal* [2019] IECA 183, Court of Appeal, 26 June 2019, above) and resolves the issue of whether the Tribunal has jurisdiction in respect of the discretion set out at Article 17(1) of the Dublin III Regulation.

It is clear from the judgment that the Tribunal does not have jurisdiction in respect of Article 17(1). As the Court stated, in respect of the Article 17(1) discretion, at para.36,

> *'There is no sign of any such delegation or of any basis on which that discretion could ever be exercised by anyone other than the Minister. Of their nature, administrative bodies exist to make decisions based on fact and quasi-judicial bodies are there to assess facts and to issue rulings within rigid boundaries of the powers so enjoyed through the setting of jurisdiction pursuant to statue. That does not embrace this discretion'*.

What the Dublin System Regulations devolved to the first instance decision maker and, on appeal, the Tribunal, are *'the functions as to determining, as Dublin III requires, which country is responsible for examining the application'* (para.33 of the judgment).

The Tribunal's remit in Dublin System appeals is to assess facts and make decisions affirming or setting aside transfer decisions at first instance in respect of whether the correct country responsible for examining the application has been identified, applying the hierarchy or criteria in Chapter III of the Dublin III Regulation subject to any legal derogation where necessary.

It will be for the Minister to decide any circumstances in which the wide discretion under Article 17(1) might operate to render a case appropriate to be processed in the State as a matter of sovereign discretion, notwithstanding another Member State being responsible, and to exercise that discretion in any particular case (see paras. 34 and following of the judgment).

***LK v IPAT* [2020] IEHC 626, Burns J., 4 December 2020**

The applicant in this case challenged the Tribunal's decision to uphold the IPO's Dublin transfer decision on two grounds. Firstly, that the Tribunal was incorrect in determining that the IPO's decision was unlawful when the first instance decision was in effect a decision of a

panel member, rather than an IPO, who did not have jurisdiction to make the decision. Secondly, that a portion of the Tribunal's decision, in that it ventilated matters related to whether Article 17(1) of the Dublin III Regulation should be applied in the applicant's case, was outside its jurisdiction and prejudicial to any future Article 17(1) decision by the Minister, and should be severed from the Tribunal's decision.

***The Tribunal's jurisdiction in Dublin cases**:*

In respect of the first ground, the applicant claim had two aspects. Firstly, that the Tribunal wrongly declined to deal with the issue of the panel member's jurisdiction on appeal. The applicant argued that he raised the matter before the Tribunal, and relied on regulation 6(1) of the Dublin System Regulations 2018 which states that '[a]n applicant may, in accordance with this Regulation, appeal to the Tribunal, in fact and in law, against a Transfer Decision.' The applicant also relied on the principle recited in the Dublin III Regulations that international protection applicants be speedily processed (recital 5).

The Court rejected this argument. In the judgment of the Court, while there was much to commend the applicant's argument, the options available to the Tribunal were limited in that it could only affirm or set aside a transfer decision, whereas the 2018 Regulations are not broad enough to cover a situation where the point of law is of such a nature that acceptance of it requires the matter to be remitted to the IPO for a lawful decision to be made.

The IPO's jurisdiction, and the role of panel members, in Dublin III cases

Secondly, the applicant submitted that the panel member did not have jurisdiction to make the decision. The Court rejected this argument. In the judgment of the Court, the 2018 Regulations provide for panel members to be engaged under a contract of services to provide assistance to an IPO in the performance by the IPO of his or her functions under the Dublin III Regulation. The Court observed that the 'report' of the panel member 'recites a history of relevant events; sets out some relevant law; comments on the submissions made by the Applicant; and, makes submissions in relation to the Applicant's submissions.' In the Court's view, this is at most 'a briefing document, bringing together in a report, the various steps, strands and considerations relevant to the decision which is to be made by the IPO, namely whether a Transfer Decision should be made.'

The Court stated that the applicant's assertion that the panel member 'recommended' to the IPO which member state should be responsible, and that the panel member 'recommended' whether Article 17(1) should be applied, were mischaracterisations of the factual situation. No delegation of the IPO's function occurred.

The Court added that if it was wrong in this regard, the 2018 Regulations nonetheless provide, albeit in a cumbersome manner, that the IPO may delegate his or her functions, as a determining member state, to a panel member.

Prejudicial comments re Article 17(1)?

In respect of the Article 17(1) consideration point, the applicant submitted that in a situation where the Tribunal did not have jurisdiction to exercise the Article 17(1) discretion, its comments on the matter were inappropriate. (The Tribunal had recited the then fraught situation re Article 17(1) in Irish law, and stated that it found in any event that the applicant would not succeed on an application under Article 17(1).)

The Court acknowledged that the Tribunal was in effect 'riding two horses' in this context so that it covered the Article 17(1) issue in the event that, if the then extant stay on the Court of Appeal decision in *NVU* were to be lifted, the Tribunal decision would have covered the Article 17(1) issue. In the Court's view, the Tribunal's comments in this regard now had no effect. While the comments in question were adverse to the applicant's article 17(1) application, it was, in the Court's opinion, inconceivable that the Minister would be swayed by them in circumstances where the Minister would have to approach the matter anew, and was a professional and experienced decision maker well used to making decisions in the asylum and immigration arena.

***MG v IPAT & Ors* [2020] IEHC 701, Burns J., 21 December 2020**

The applicant in this case sought to quash the Tribunal's decision to uphold a transfer order made by an IPO to the UK, as the member state responsible under Dublin III. The applicant also sought to compel the Minister to make an article 17(1) decision in the light of the claim in this regard to the Tribunal, and to compel the Minister to put in place a process and effective remedy to deal with article 17(1) claims.

Systemic deficiency in the UK?

The applicant claimed that the Tribunal had erred in irrationally determining that the applicant's prospective complaints of human rights infringements in the UK could be answered by recourse to the UK courts. In this regard, the applicant had claimed that the UK's policy of detention would be in breach of his Article 4 EU Charter rights in circumstances where he had PTSD and other mental health concerns. The Tribunal had stated in its decision that on the basis of information in an AIDA report and the applicant's personal circumstances (including medical evidence) there were no substantial grounds for believing that there are

systemic deficiencies in the UK reaching the Article 4 threshold. In the Court's judgment, these were findings open to the Tribunal to make.

Obligation for the Minister to make an Article 17(1) decision?

The applicant claimed that as he had made an Article 17(1) application to the Tribunal, the Minister was no obliged to make an Article 17(1) determination, and in this context sought an order of mandamus. The Court, rejecting this request, did not accept that the making of an Article 17(1) application to the Tribunal (however erroneous) equated with an application being made to the Minister.

Obligation for the Minister to put in place a process and effective remedy for Article 17(1) claims?

The applicant sought an order of mandamus compelling the Minister to put in place a system for applications pursuant to Article 17(1) of the Regulation, and to provide for an effective remedy in this regard. In rejecting these requests, the Court held that it was clear that neither EU nor Irish law requires a system relating to Article 17(1) (e.g., Case C-528/11 *Halaf*, paras 35-37; Case C-578/16 *CK*, paras 88 and 96), and that the applicant had failed to explain why judicial review is defective for the purpose of reviewing an erroneous Article 17(1) decision (Case C-661/17 *MA* considered, esp. para. 79).

Dublin Transfer: Automatic Stay in Litigation re Dublin Transfers?

***LK v IPAT* [2020] IEHC 616, Burns J., 25 November 2020**

The judgement arose from a case in the 'holding list' following the judgment in NVU v RAT [2020] IESC 46, which was concerned with the matter of who had power to consider the Article 17(1) 'sovereign discretion' set out in the Dublin III Regulation.

The judgment concerned the Minister's application to set aside the stay over the impugned transfer decision, which stay applied to the case, and all cases in the 'holding list' by virtue of para. 8(2) of High Court Practice Direction 81. Paragraph 8(2) of the Practice Direction provides:

> '[W]here the relief in respect of which leave is sought includes a challenge relating to a decision under the Dublin system, the court has directed by way of a global order that the filing of any such application acts as a stay on the decision proposed to be challenged, until the final determination of the proceedings on that application

including the substantive proceedings if leave is granted and any appeal therefrom unless the court subsequently otherwise orders.'

The Minister argued that the stay was no longer necessary, now that NVU had been determined, and that para. 8(2) of the Practice Direction was contrary to the spirit of the Dublin III Regulation.

In the Court's judgment, the State had already provided an effective remedy for Dublin transfer decisions by way of the Tribunal's jurisdiction, and had provided for a stay on a transfer decision during the currency of that appeal. Moreover, it was clear from EU law that the Dublin III Regulation does not require an effective remedy in respect of Article 17(1) of the Regulation (Case C-661/17 *MA*).

More critically, in the Court's judgment para. 8(2) of the Practice Direction was not necessitated by the Regulation, and ran contrary to the intention of the Regulation, i.e., rapid identification of the appropriate member state to deal with international protection applications and the speedy determination of such proceedings (recital 5 of the Dublin III Regulation, and para. 78 of Case C-661/17 *MA*).

Accordingly, the Court lifted the stay, and stated that henceforth para. 8(2) of the Practice Direction would be dis-applied in respect of Dublin III decisions.

The Court noted that the normal procedure whereby a stay can be sought on an individual basis is more effective and appropriate in relation to Dublin III decisions.

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