

THE HIGH COURT

[Record no. 2019/956 JR]

BETWEEN

S.S.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL  
AND THE MINISTER FOR JUSTICE

RESPONDENTS

**JUDGMENT of Mr. Justice Barr delivered electronically on the 22nd day of January, 2021.**

**1. Introduction**

1. In these proceedings the applicant seeks to set aside the decision of the International Protection Appeals Tribunal (hereinafter referred to as "*the Tribunal*") dated 25th November, 2019 recommending that her appeal against the refusal of the International Protection Officer to give her neither a refugee declaration or a subsidiary protection declaration pursuant to s.39 of the International Protection Act 2015, be refused.
2. In broad terms, the applicant alleges that the decision of the Tribunal is flawed due to the fact that the Tribunal appears to have used the wrong test when assessing whether there was a reasonable likelihood of the applicant being exposed to persecution or serious harm if returned to her country of origin. The applicant further alleges that the Tribunal failed in its obligation to give any, or any adequate, reasons for certain conclusions that it reached in the course of its decision, to include giving reasons for the following conclusions: that she had relocated from the United Kingdom to Ireland in or about 2013 for economic reasons; that she had failed to seek international protection at the first available opportunity when she was living in the UK; that she had not become a 'refugee sur place' by virtue of the fact that she had adopted a western lifestyle and mode of dress since leaving Pakistan and that the Tribunal had failed to give any reason why they had rejected the substantial country of origin information (hereinafter referred to as "*COI*") submitted by the applicant demonstrating extensive gender based discrimination and violence against women in Pakistan. Finally, it was submitted that the Tribunal had fallen into error in holding that the applicant was not at risk because she would not be more at risk than other people generally, if returned to Pakistan, or on the basis that she had not done any exceptional act to place her at risk of persecution or harm.
3. It was submitted that as a result of these errors and omissions, the Tribunal decision was legally unsound and should be struck down.
4. In response, it was submitted on behalf of the respondents that when read as a whole, it was clear from the decision that the Tribunal had adopted the correct test when assessing the future risk of harm if the applicant should be repatriated to Pakistan. It was submitted that the conclusions reached by the Tribunal in the course of its decision, were supported by the evidence that had been before the Tribunal and that the reasons for which the Tribunal had come to those conclusions were clearly evident from a reading of

the decision as a whole. Accordingly, it was denied that the decision was flawed in the manner alleged, or at all.

## **2. Background**

5. The applicant is a 36-year-old woman from Pakistan. She was born in Jhelum City, but grew up with her family in a village in rural Pakistan.
6. In 1994, the applicant's father who was the principal income earner for the family, became ill and was unable to work thereafter. The applicant's mother took up employment so that she could support the family, which was made up of the applicant, her parents, her three brothers and two sisters.
7. As a result of the applicant's mother taking up employment, the applicant's family was subjected to harassment and attacks from members of the extended family and from the applicant's uncles in particular, who did not approve of the fact that the applicant's mother was in employment. The Tribunal accepted that the particular attack had occurred in 1996 and further accepted that on the balance of probabilities the applicant's family had suffered "*constant harassment and violent attacks*" at the hands of their relatives in the village as a consequence of the applicant's mother taking employment against the family tradition. The Tribunal further accepted that due to the fear of further attacks from their relatives, the applicant and her family relocated to Jhelum City in 1999.
8. The applicant attended secondary school Jhelum. She obtained a Bachelor of Commerce Degree from Pakistan Institute of Commerce in Jhelum City. She also obtained a Master's Degree in Economics from a private academy in the city.
9. The applicant's mother decided to sponsor the applicant to go to the UK to further her education, so that she could in turn help the family financially and so that she could "*keep an eye*" on the applicant's younger sister. The applicant obtained a study visa for the UK, which was valid from 15th October, 2010 to 19th March, 2012. She travelled to the UK on 13th November, 2010. She obtained a post-graduate diploma in business management from Wilson College in London in 2012. Her student visa expired on 19th March, 2012. However, the applicant was subsequently granted leave to remain as a T4 general student in March 2012, to enable her study at London School of Business and Finance, where she was studying for an ACCA qualification. Her leave to remain in the UK was due to expire on 10th April, 2015. However, due to the ill-health of her mother she was unable to continue to sponsor the applicant's study in the UK and her leave to remain was curtailed to expire on 16th April, 2014.
10. However, prior to that in April 2013, the applicant had left the UK and came to Ireland to look after her younger sister, who was resident here with her husband. The applicant's sister had developed severe mental health issues, which included a number of suicide attempts. In addition to her sister's difficulties, her brother-in-law had been involved in a road traffic accident, which had caused him to suffer injuries, including psychiatric sequelae in the form of depression, for which he required medical treatment. The applicant stated that while she had initially intended to stay in Ireland only for a short

period before resuming her studies in the UK, due to the serious ill-health of her sister and the mental health difficulties of her brother-in-law, she had remained in the country to care for her sister.

11. The applicant returned to Jhelum City to visit her mother in 2013 for a period of three weeks, prior to her mother undergoing surgery. The Tribunal accepted the documentary evidence that had been submitted by the applicant, as showing that her mother's medical condition prevented her from working and therefore she was no longer able to support the applicant's study in the UK. The Tribunal further accepted the medical evidence put forward in relation to the mental health difficulties suffered by the applicant's sister and her husband. They accepted that such evidence was corroborative of her assertion that she had been providing support and care for her sister and brother-in-law since arriving in Ireland.
12. The applicant's father died in February 2018. The applicant's mother was no longer able to work. She and the applicant's sister returned to the village in December 2018, where they shared a single room. The applicant stated that they had moved back to the village because they could no longer afford the rent on their accommodation in Jhelum.
13. The applicant had furnished documentation showing that she had a history of depression and anxiety, for which she had received psychiatric treatment in this country, in the form of counselling. The Tribunal accepted that the applicant had experienced mental ill-health in the past.
14. The applicant stated that she had attempted to continue with her studies for the ACCA qualification in Ireland, but had been unable to do so due to lack of financial resources. She had worked as a part-time shop assistant in a shop in London between 2010 and 2013. In Ireland, she worked as a shop assistant between September 2018 and January 2019. She is currently employed as a general operative in a factory. The applicant also has some business activity on the internet.

### **3. The IPAT Decision**

15. In its decision dated 25th November, 2019, the Tribunal accepted that the applicant's family had been attacked in 1996 by members of the extended family and in particular, by some of the applicant's uncles, due to the fact that her mother had taken up employment. They further accepted that due to constant attacks and harassment, the family had relocated to Jhelum City in 1999. The Tribunal accepted the applicant's account of going to London to pursue her studies and of coming to Ireland in April 2013. However, it did not accept that her prime motivation in coming to Ireland and for remaining here, was due to a desire to look after her sister and brother-in-law. The Tribunal came to the conclusion that her prime motivation was the fact that her permission to remain in the UK had been curtailed to 2014 due to the fact that her mother could no longer support her education in that country and that therefore her decision to move to Ireland and to remain here was primarily motivated by economic factors.

16. The Tribunal did not accept that the applicant would be more at risk than any other women in Pakistan if she were to be repatriated there. It did not accept that she would not have the protection of her brothers if she were to return to Jhelum City, as they were resident in that city. Furthermore, it held that the fact that she had visited her mother in 2013 showed that she did not have a genuine fear of persecution or harm if she returned to that area of Pakistan. The Tribunal further held that the applicant's conduct in failing to seek international protection when she was in the UK and her delay in doing so in this country until she submitted her application on 2nd November, 2016, undermined her credibility that she had a genuine fear of suffering persecution or harm if returned to Pakistan.
17. The Tribunal accepted that forced marriage is a restriction of bodily autonomy and therefore can amount to persecution because the person forced into marriage loses the right to choose whom she spends her life with. However, the Tribunal did not believe the applicant's claim that her uncle had arranged a marriage proposal for either her or her sister, nor did it accept the medical evidence proffered by the applicant, which purported to show that her sister had suffered a broken ankle at the hands of her uncle for her alleged refusal to accept the marriage proposal. The Tribunal noted that the x-ray did not determine when or how the fracture of the ankle had been caused.
18. In relation to the applicant's claim that she feared being a target for gender based violence on account of having adopted a western lifestyle, it found that there were no substantial grounds for believing that if returned to Pakistan, the applicant would face a real risk of torture or inhuman or degrading treatment or punishment in her country of origin. The Tribunal further found that while there was evidence of indiscriminate violence and internal armed conflict within Pakistan, it was not of such a level as to cause the plaintiff to suffer a serious and individual threat to her life in a situation of international or internal armed conflict within the meaning of s.2(1)(c) of the 2015 Act. For all these reasons, the Tribunal held that the applicant was not entitled to international protection. It therefore affirmed the recommendation made by the International Protection Officer pursuant to s.39 that the applicant should be given neither a refugee declaration, nor a subsidiary protection declaration.

#### **4. The Applicant's Submissions**

19. The applicant's main ground of attack on the Tribunal decision was to the effect that the Tribunal had adopted the incorrect test when assessing the likelihood of the applicant being exposed to persecution or serious harm if repatriated to Pakistan. It was submitted that in the UK the test for past persecution and for the risk of future persecution was the same, being a test of whether there was a 'reasonable likelihood' of the applicant suffering persecution or harm if returned to their country of origin: see *Secretary of State for the Home Department v. Sivakumaran* [1988] Imm. A.R.147; *Kaja v. Secretary of State for the Home Department* HX/7-673/93 (11038) and *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All E.R. 449.
20. It was submitted that in Ireland there were different tests for determining past persecution or the risk of future persecution. The existence of past or present

persecution was to be determined on the balance of probabilities standard, whereas the test for future persecution or harm was to be assessed under the lower test of "reasonable likelihood": see *O.N. v. R.A.T.* [2017] IEHC 13; *Da Silveira v. R.A.T.* [2004] IEHC 436 and *M.A.M.A. v. R.A.T.* [2011] IEHC 147.

21. It was submitted that in this case the Tribunal had conflated the two tests in reaching the conclusion that it had done to the effect that the applicant would not face a sufficient risk of persecution or serious harm if returned to Pakistan, such as to entitle her to international protection. The applicant rested that submission on the conclusion of the Tribunal set out at para. 6.18:-

*"For the reasons set out above, the Tribunal concludes that having regard to the following findings [sic] it is considered that on the balance of probabilities, there is no reasonable degree of likelihood that the appellant will face problems if she returns to Pakistan. Accordingly, the Tribunal finds that the appellant has not established a well-founded fear of persecution as required by s.2 of the IPA Act 2015."*

22. As a subsidiary part of the same submission, the applicant submitted that the Tribunal had failed to give any reasons as to why it had rejected the substantial COI submitted on behalf of the applicant, which was to the effect that single women in general, women who adopted a western lifestyle and women who refused to go along with an arranged marriage, all faced a substantial threat of violence, sometimes amounting to extreme violence and even death, in Pakistan. It was submitted that while the weight to be attached to any COI was always a matter for the Tribunal, the general obligation to provide reasons for its decision meant that if it was going to reject a substantial body of credible COI, which had been put forward on behalf of an appellant, it was incumbent on the Tribunal to give reasons why it was so doing. In this regard counsel referred to the decisions in *Meadows v. Minister for Justice and Equality* [2010] IESC 3; *R.O. v. Minister for Justice and Equality* [2012] IEHC 573; *Memishi v. R.A.T.* (Unreported) High Court, 25th June 2003; *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 and *T.A.R. v. Minister for Justice, Equality and Defence* [2014] IEHC 385.
23. Thirdly, it was submitted that the Tribunal had not given adequate consideration to the fact that the applicant could be deemed to have become a 'refugee sur place' due to her adopting a western lifestyle and mode of dress, such as to put her at risk of persecution or serious harm if returned to Pakistan, or alternatively, if any such consideration had been given to the issue by the Tribunal, they had not given adequate reasons for their finding that she would not face a reasonable likelihood of persecution or serious harm if returned to Pakistan due to these matters. It was submitted that as the applicant had adopted western mode of dress and lifestyle generally, she had become a person who would have a genuine fear of being persecuted or of suffering serious harm due, to this adopted lifestyle and it was submitted that this was sufficient to bring her within the provisions of s.29 of the 2015 Act. It was submitted that the Tribunal had failed to give

any, or any proper consideration to this issue, nor had they given any reasons for their finding that she would not suffer persecution or harm if repatriated.

24. It was further submitted that the Tribunal had reached inconsistent findings, when it found that she had not suffered past persecution, while in the same decision it found that her family had been subjected to constant attacks and harassment over a three-year period between 1996 and 1999, on account of the fact that her mother had taken up employment. It was submitted that that constituted persecution of the applicant and her family and, as such, was a matter which came within s.28(6) of the 2015 Act and was something which ought to be put into the balance when considering the risk of future persecution or harm if the applicant were returned to Pakistan. It was submitted that the Tribunal had failed to consider the future risk of persecution in the light of its findings on the past events.
25. It was submitted that the Tribunal had erred in making a finding that the applicant had relocated from the UK to Ireland in April 2013 and had remained in this country for purely economic reasons. It was submitted that that finding was not supported by the evidence, which was to the effect that in 2013 she had been lawfully in the United Kingdom continuing with her studies, which she hoped would lead to her obtaining the ACCA qualification, which in turn would have enabled her to secure employment and remain in that country. It was submitted that the Tribunal's finding was inconsistent with its finding that the applicant's sister and brother-in-law had suffered mental health difficulties and that she had cared for them down to the present time. It was submitted that the Tribunal had failed to give any reasons as to why it came to the conclusion that she had moved to Ireland and remained here for economic reasons.
26. It was further submitted that the Tribunal had failed to give any, or any adequate reasons for its finding that the applicant's credibility was adversely affected by reason of her failure to apply for international protection while in the UK. It was submitted that while she was in that country she was there legally on foot of a study visa and therefore there was no reason why she would have to seek international protection in order to remain in that country. Accordingly, it was submitted that the Tribunal's finding in this regard was irrational and without reasons.
27. Finally, it was submitted that the Tribunal had fallen into error in holding that the applicant was not at risk of persecution or serious harm because she would not be more at risk than other women generally if returned to Pakistan and because she had not engaged in any particular act which would expose her to such risk of persecution or harm. It was submitted that the purpose of international protection was to protect people from serious harm and it was not necessary that an applicant should prove that they were more at risk of such harm than any other group of people generally in the country of origin.

## **5. The Respondent's Submissions**

28. Mr. McDowell BL on behalf of the respondents submitted that the test in Irish law was a two-tier test in that past persecution had to be established on the balance of probabilities,

whereas the risk of future persecution existed if it were established that there was a 'reasonable likelihood' of future persecution or harm. This was a lower standard of proof than that of the balance of probabilities. This had been established clearly in the decision of O'Regan J. in *O.N. v. R.A.T.*.

29. While it was accepted that there was reference to these two tests in the findings contained at para. 6.18 of the Tribunal decision, it was submitted that one could not look at that paragraph alone, but had to look at the entirety of the findings of the Tribunal in the preceding paragraphs and in particular at those in paras. 6.11 – 6.15, which, it was submitted, had made it clear that the Tribunal had adopted a very low threshold when considering whether there was a future risk of persecution or harm in the circumstances of this case. In particular, at para. 6.15 the Tribunal had found that there was "*nothing to suggest that the appellant will experience persecution at the hands of her relatives if she remains in Jhelum City. Indeed, the appellant went there in 2013 and there was no incident. Overall, the evidence and available COI suggest that the appellant can safely remain in Jhelum City where she has family ties*". It was submitted that that showed that the evidence and COI did not demonstrate even a low threshold of risk if the applicant were returned to that part of Pakistan.
30. It was submitted that in using the words "*nothing to suggest*" showed that the Tribunal was not satisfied that there was any evidence of a risk to her health or life if she were returned to Jhelum City.
31. It was submitted that the court should not take a technical, formalistic or academic approach to analysing what standard of proof was employed by a decision maker in assessing future risk of persecution; instead, a court should look at the decision as a whole and determine whether the decision maker in fact complied with the substance of the relevant legal framework.
32. It was submitted that in this case the applicant was contending for a close, strict and unrealistic reading of the Tribunal decision, which purported to find an error in the decision due to the alleged conflation of two different standards of proof, which totally ignored the fact that the Tribunal had found that there was "*nothing*" to support the applicant's fear of future persecution. Accordingly, she could not be seen as having reached the threshold required at Irish law.
33. The respondent further submitted that even if one read the impugned decision in the unrealistic manner contended for by the applicant, the test which had been applied by the Tribunal was in fact a lower one than that which was required by law, and as such, was more favourable to the applicant's position. It was submitted that if the applicant was unable to establish a reasonable likelihood of future persecution "*on the balance of probabilities*", it necessarily followed that she was not capable of establishing a reasonable likelihood of future persecution at all. If one employed the percentage probability sometimes referred to in reported decisions (51% in the case of the balance of probabilities, 30% in the case of 'reasonable likelihood'), then, on the applicant's reading of the decision, the decision maker was not satisfied that there was a 51% probability

that there was a 30% risk of future persecution. The error alleged by the applicant was that the decision maker should have required a 100% probability that there was a 30% risk of future persecution. It was submitted that that would clearly have been a higher hurdle for the applicant to have met.

34. In summary, counsel stated that his main submission was that the Tribunal had applied the correct test to past and future persecution, because she had said that there was "*nothing*" to suggest any future persecution.
35. In relation to the applicant's submission that she would face persecution or serious harm due to the fact that she had adopted western lifestyle and dress, it was pointed out that in her questionnaire and in her interview, she made it clear that her primary fear was of having to enter into an arranged or forced marriage. It was only towards the latter part of the interview that her lawyer made an interjection at Q.55 which brought in the issue of the applicant adopting western dress.
36. It was clear that her primary motivation at the interview stage for seeking international protection, was her fear of violence if she would not go ahead with an arranged marriage.
37. It was submitted that the applicant was also making the case that while it was acceptable for women from more affluent backgrounds to wear western style dress, that was not something that she would be able to do as she came from a poorer background. The Tribunal at para. 5.26 had not accepted the applicant's submission in that regard. The Tribunal found that the applicant had not established a clear threat of persecution in Pakistan on account of her espoused western lifestyle and as a poor person.
38. The Tribunal noted that she had not personally experienced past persecution in Jhelum on those grounds and that there was nothing to suggest that she would experience persecution on those grounds if she returned to that part of the country. The Tribunal found that the fact that Muslim women in Pakistan were expected to wear the Hijab, or dress to conform with the norm, did not by itself mean that someone who has adopted a western lifestyle will be persecuted. Rather, the applicant must point to her personal experience, or to specific instances of systematic harassment of poor persons who have adopted western lifestyles to meet this requirement.
39. Furthermore, the Tribunal had not accepted the applicant's assertion that she would be without male protection if she were relocated to Jhelum City, as her brothers were resident there. It did not accept her assertion that the brothers had indicated that they would not be in a position to protect her due to financial reasons. It was submitted that in these circumstances, the conclusion reached by the Tribunal at para. 5.31, that there was no reason to suggest that the applicant would be at risk of gender based violence in Jhelum simply for having adopted western ways and its finding that male support was available for the applicant in Jhelum, were findings that were open to the Tribunal on the evidence before it.



40. It was submitted that in reaching its decision in relation to the absence of a risk of future persecution for the applicant if repatriated to Pakistan, the Tribunal had complied with its obligation to give reasons for its decision. Counsel referred to the decision in *R.O. v. Minister for Justice and Equality* [2012] IEHC 573 and also relied on the decision of Humphreys J. in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 and in particular to para. 37, which stated as follows:-
- "37. *Having regard to the foregoing, I would respectfully suggest that the questions set out by Mac Eochaidh J. in R.O., at para. 30, be replaced by an alternative form of question for the court to apply, namely: Whether the applicant has discharged the burden of proof to show that the reasons offered for the rejection of the claim are so absent, so unintelligible, so trivial, so tainted by factual error or so irrational, in circumstances where any untenable element of the decision cannot be severed, as to warrant the quashing of the overall decision in all of the circumstances.*"
41. Counsel submitted that when the decision in this case was read as a whole, it could not be said that the reasons that had been given by the Tribunal fell foul of the test set out by Humphreys J. above. Counsel further submitted that it was necessary to have regard to the decision as a whole. In order for a decision to be set aside the error must be clear and must go to the heart of the decision and must fundamentally undermine it: see *G.T. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 287.
42. In relation to the issue concerning the COI submitted on behalf of the applicant, it was submitted that it was well established that it was a matter for the Tribunal to decide what weight should be attached to any particular piece of COI. Furthermore, it was settled at law that where the Tribunal stated that it had had regard to all COI submitted to it, the onus lay on the party challenging that decision to establish that the decision maker had not in fact had regard to the relevant material as he or she had stated: see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418. It was submitted that there was no evidence in this case that the COI which had been submitted on behalf of the applicant had not been taken into account by the Tribunal. It was for the Tribunal to decide what weight, if any, should attach to the COI and it was submitted that the court should not interfere with the Tribunal's decision in this regard.
43. Finally, in relation to the finding that the applicant had relocated to Ireland and had remained here primarily for economic reasons, it was submitted that having regard to the matters set out at paras. 5.32 – 5.35, the Tribunal had set out cogent and detailed reasons why it had found that the applicant was in fact an economic migrant. While the applicant may not like the decision that was reached by the Tribunal on this aspect, it was submitted that that decision was not irrational, or without reasons.
44. In reaching that conclusion, the Tribunal had been entitled to have regard to the fact that the applicant had not sought international protection while in the UK, nor had she done so in the 3.5 years approximately, after she had relocated to Ireland. It was submitted that

the Tribunal was entitled to have regard to her delay in seeking international protection as undermining her credibility in relation to her need for such protection.

45. It was submitted that read as a whole, the Tribunal decision in this case was comprehensive, rational and fair. It was submitted that there was no basis on which the decision could be set aside.

## **6. Conclusions**

46. While a large number of conclusions and findings of the Tribunal were challenged on various grounds in this application, it seems to the court that the following are the key issues in this case:-

- (i) Did the Tribunal fall into error in applying the wrong test when considering the risk of future persecution or serious harm if the applicant were repatriated to Pakistan?
- (ii) Did the Tribunal fail to give reasons for rejecting the substantial COI submitted on behalf of the applicant when reaching that conclusion?
- (iii) Did the Tribunal give adequate consideration to the fact that the applicant could be deemed to have become a 'refugee sur place' due to her adopting western lifestyle and dress, such as to put her at risk of serious harm if returned to Pakistan, and, if so, did the Tribunal give adequate reasons for their decision that she would not face a reasonable likelihood of persecution or serious harm in the future?
- (iv) Did the Tribunal give adequate reasons for its finding that the plaintiff relocated from the UK to Ireland for economic reasons?
- (v) Did the Tribunal give adequate reasons for its finding that the applicant had delayed in seeking international protection because she had not sought same while she was in the UK or soon after her arrival in Ireland?
- (vi) Did the Tribunal fall into error in holding that the applicant was not at risk of future persecution or harm because she was not more at risk than other people generally in Pakistan, or because she had not done any exceptional act such as to put her at risk of persecution or harm?

### **(i) Whether the correct test was applied to the future risk of persecution or harm**

47. The law in the United Kingdom is reasonably well settled that when looking at past and present persecution and the likelihood of future persecution, the decision maker should apply a lower standard than the normal civil standard of proof on the balance of probabilities. The correct standard is whether there is a 'reasonable likelihood' of a person suffering persecution or serious harm if repatriated. In the *Sivakumaran* case Keith LJ stated:-

*"In my opinion the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a convention reason if returned to his own country."*

48. The decision in *Sivakumaran* was adopted and applied by the Immigration Appeal Tribunal in the UK in the *Kaja* case, which decision was in turn adopted and approved by the Court of Appeal in the *Karanakaran* case.

49. A complicating factor was introduced when it was suggested that in relation to the risk of future persecution, the 'reasonable likelihood' of a person facing persecution had to be established on the balance of probabilities. However, that proposition was rejected in the *Kaja* case, where the joint decision of the Chairman and Vice Chairman stated as follows:-

*"In Hussain (10455) a Tribunal differently constituted to those in Baiq and to Mukendi seems initially to have taken the same approach as Mukendi but then appears to suggest that the reasonable likelihood of persecution must also be established to the balance of probabilities. With respect, it seems to us that the balance of probabilities or 'more likely than not' and 'a reasonable likelihood' each reflect a degree of certitude – we cannot think it practical to require either of those degrees to be established to yet a further degree."*

50. In this jurisdiction, the question of the applicable standard of proof for past persecution was examined in detail by O'Regan J. in what has been described as a "test case" in *O.N. v. R.A.T.*. In that decision the learned judge looked at the authorities from the UK, Canada, the CJEU and the ECHR, and came to the conclusion that the unitary approach adopted in the UK, i.e. that both past and future persecution be determined on a reasonable likelihood basis, was not the approach that should be adopted in this jurisdiction. She held that for past and present persecution the standard of proof in this jurisdiction was on the balance of probabilities. Having set out the general principles which arose from a consideration of the case law examined in the course of the judgment at para. 62, the learned judge came to the following conclusion at para. 63:-

*"63. In light of the foregoing principles and having regard to the fact that the balance of probabilities is the civil standard of proof in this jurisdiction, I am satisfied that the principle of equivalence and the principle of effectiveness are both safeguarded by the application of the standard of proof – being the balance of probabilities – coupled with, where appropriate the benefit of the doubt. Until such time as this State might introduce more favourable standards as contemplated by Article 3 of the 2004 Directive, this is the appropriate standard to apply i.e. the balance of probabilities, coupled with, where appropriate, the benefit of the doubt."*

51. The *O.N.* case did not deal with the standard of proof applicable when considering the risk of future persecution or harm. However, in the course of her judgment in that case, O'Regan J. noted that in the *Da Silveira* and *M.A.M.A.* cases, it had been held in the High Court that for future persecution the applicable standard was whether there was a 'reasonable likelihood' of persecution or harm.

52. The conclusions of O'Regan J. in the *O.N.* case were adopted by Keane J. in *N.N. v. Minister for Justice and Equality* [2017] IEHC 99 at para. 40. The court is satisfied that

the law in this jurisdiction at present is that past persecution has to be established on the balance of probabilities. That does not mean that the burden rests on the applicant alone, because as consideration of an asylum application is a collaborative process, the State respondent also puts forward evidence, perhaps in the form of COI, which might support the applicant's contentions in relation to past persecution; having considered all the evidence, the decision maker must be satisfied on the balance of probabilities that the applicant was subject to the past persecution as alleged by him or her.

53. In relation to the risk of future persecution or serious harm if repatriated, in considering that issue, the decision maker only has to be satisfied that there is a reasonable likelihood that the applicant would face persecution or serious harm if repatriated.
54. In phrasing its conclusion in the way that it did in para. 6.18, it is not clear whether the Tribunal applied the balance of probabilities test to the question of whether the applicant would suffer persecution or serious harm if returned to Pakistan, or was applying the balance of probabilities test to the issue of whether there would be a reasonable likelihood of her suffering persecution or serious harm if repatriated.
55. The nuances here are quite subtle. In *Sivakumaran* it was held that in order for an applicant to be granted protection, it was only necessary for it to be "demonstrated" that there was a reasonable likelihood of them suffering persecution or serious harm. The word "demonstrated" denotes proof to some level of the "reasonable likelihood". In other words, if reasonable likelihood were to be taken as being a lesser degree of probability than the balance of probabilities, which is 51%; then reasonable likelihood could be identified as being say 30%, but the question arises to what degree must the reasonable likelihood, or 30%, be established? If it is argued that that has to be established on the balance of probabilities, that falls into the trap which was disapproved of in the *Kaja* case, which decision was in turn approved of in *Karanakaran*.
56. I find the reasoning and dicta in *Kaja* on this aspect compelling. It seems to me that it makes the analysis of this issue overly complex, if one talks of establishing the existence of a "reasonable likelihood of persecution", which itself is less than a probability, but at the same time holding that that must be established on the balance of probabilities before protection can be given. I think that to adopt that test, would only lead to decision makers tying themselves in linguistic knots. It is better that the test remains simply that the decision maker should afford protection to an applicant if on a consideration of all the evidence, both oral and documentary, including COI, he or she is satisfied that there is a reasonable likelihood that if returned to their country of origin, the applicant will be exposed to persecution or serious harm.
57. For that reason, I find that the introduction of the words "balance of probabilities" into the conclusion reached by the Tribunal at para. 6.18, was in error. It only served to cloud the issue whether the correct test was applied by the Tribunal when reaching its conclusion on the issue of future persecution or serious harm. As that conclusion was fundamental to the decision of the Tribunal, it is imperative that on reading the decision one can be sure that the correct legal test was applied. In this case, one cannot be sure that the

correct test was applied by the Tribunal when considering the issue of future persecution. Accordingly, the decision of the Tribunal has to be quashed on this ground and the matter remitted to another Tribunal for fresh consideration.

**(ii) Alleged failure to give reasons for rejecting COI**

58. In support of her claim that because she has adopted western dress and lifestyle since coming to the United Kingdom and Ireland, she would be subjected to a risk of persecution or harm at the hands of her relatives and others in Pakistan due to their strongly held views that women should behave and dress in a certain way, the applicant submitted a substantial amount of COI on her appeal to the Tribunal. The essence of her case was that, while better-off women could dress as they pleased in Pakistan without exposing themselves to a risk of harm, for women from a poorer background, there was a real risk of harm for adopting such modes of dress and lifestyle.
59. The applicant accepted that it was a matter for the Tribunal what weight to give to particular pieces of COI. However, it was submitted that where the applicant had provided substantial COI in support of her contention that she would be exposed to a risk if repatriated, it was necessary for the Tribunal to give reasons why such COI was being rejected. It was submitted that that was part of the general obligation which lay on the Tribunal to give reasons for its decision.
60. The court is satisfied that the applicant's argument in this regard is correct. While it is a matter for the Tribunal what weight, if any, to give to specific COI, where substantial COI of a *prima facie* credible nature was submitted on behalf of an applicant, there is a duty on the Tribunal to give reasons for rejecting such COI in reaching a conclusion in its decision. The Tribunal is entitled to reject COI if it is out of date, or if it is from an unreliable source, or if it is not relevant to the issue before the Tribunal. The Tribunal can always act on the general thrust of the COI taken as a whole. However, where an applicant has submitted relevant COI of a credible nature, the court is satisfied that the duty that rests on the Tribunal to give reasons for its decision, includes a duty to explain why they were rejecting that COI.
61. In this case, the applicant had submitted extensive COI showing that women in Pakistan could face a risk of persecution or serious harm, or even death, at the hands of people, and in particular at the hands of family and relatives, who held hard line views on what behaviour and dress was expected of women.
62. Without reciting the COI *in extenso*, the applicant had submitted COI from the UK Home Office on the issue of women fearing gender based harm/violence in Pakistan, which stated that it was "*next to impossible*" for a single woman to live alone in Pakistan due to prejudice against women and economic dependence. The report noted a study carried out by the International Labour Organisation which had concluded that "*in a patriarchal society like Pakistan, stereotypical societal norms are, in general, not favourable towards women who work and live alone in another city*".

63. The applicant also submitted a report by the Research Directorate of the Canadian Immigration and Refugee Board which had found that it was very hard for a single woman to live alone, both in urban and rural areas. It depended on age, class, education and urban or rural setting. Young unmarried or divorced women in all classes in urban areas found it difficult to live alone. The applicant also submitted a report from the UK Home Office from September 2018, which supported the proposition that women who adopted western dress were perceived as being Christian and these women in turn were perceived as being of loose morals and behaviour. The applicant also referred to a report provided by the Overseas Development Institute in March 2017, which stated that even women who had an education, were at risk of experiencing violence due to the fact that their having an education was frowned upon by certain sections of society. The applicant also provided a UK Home Office report from 2016 which stated that Pakistan was ranked as the third most dangerous place in the world for women and one of the most unequal. Violence against women was widespread, be it domestic violence, sexual abuse and harassment, acid attacks, forced marriages, forced conversion and honour killings.
64. The court is satisfied that the duty to give reasons for its decision, includes an obligation on the Tribunal to say why COI submitted on behalf of the applicant was not accepted. That was not done in this case. The decision must be quashed on that ground as well.

**(iii) The issue as to whether the applicant was a 'refugee sur place'**

65. The third issue concerned whether the Tribunal gave adequate consideration to the fact that the applicant claimed to have become a refugee sur place due to her adopting western dress and lifestyle. In this regard s. 29 of the 2015 Act is relevant. It provides as follows:-

*"29. (1) For the purposes of this Act, a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left his or her country of origin.*

*(2) A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he or she left his or her country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.*

*(3) Without prejudice to the Geneva Convention, an applicant who is the subject of an application made with the consent of the Minister given under section 22 shall not normally be—*

*(a) the subject of a recommendation by the international protection officer under section 39 that he or she is a person in respect of whom a refugee declaration should be given, or*

(b) *the subject of a decision by the Tribunal under section 46 to recommend that he or she is a person in respect of whom a refugee declaration should be given,*

*if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving his or her country of origin."*

66. It was necessary for the Tribunal to address the issue of whether the applicant had become a "refugee sur place" in the context of s. 29 of the 2015 Act. They may hold that the applicant falls foul of the provision of s. 29 (3). However, that issue was not dealt with in its decision.
67. Alternatively, it may be that the Tribunal will come to the conclusion that the COI does not support the contention that women from poorer backgrounds cannot dress as they please. The issue is whether in the plaintiff's circumstances, where the Tribunal has accepted that her family had been subjected to attacks and harassment for three years between 1996 and 1999 on account of the applicant's mother going out to work, which harassment occurred to such an extent that the family had to relocate within Pakistan; there was not a reasonable likelihood that the applicant would be subject to persecution or harm if repatriated, particularly if she has adopted western lifestyle and dress since leaving her country of origin.
68. The decision of the Tribunal does not address the risk posed to the applicant who, although well educated, is from a poorer background. If she is repatriated, given the attitudes and behaviour of her relatives in the past, the adoption of western dress and behaviour by the applicant is a new aspect which was not present while the family were being attacked in the period 1996 to 1999 and must be specifically addressed in the context of her wider family and their attitudes and her social class, if she is returned to Pakistan.
69. This issue must also be considered in the context of the COI that had been submitted on behalf of the applicant. The court is not satisfied that sufficient reasons were given by the Tribunal for the conclusions that it had reached in this regard.
- (iv) The applicant's relocation from the United Kingdom to Ireland in April 2013**
70. The court accepts the applicant's submission that the Tribunal did not give adequate reasons for finding that she relocated from the United Kingdom to Ireland for economic reasons. At that time, she was lawfully pursuing her second course of studies in the UK, with a view to obtaining an ACCA qualification, which would hopefully have enabled her to obtain employment in that country.
71. In such circumstances, it is difficult to see on what basis the Tribunal came to the conclusion that she left the United Kingdom and came to Ireland for economic reasons. The applicant had submitted documentary evidence that her sister had made multiple suicide attempts and that her brother-in-law had been involved in a road traffic accident which had given rise to his suffering depression. She stated that she had come over to

care for her sister and brother-in-law. The Tribunal accepted that the plaintiff's sister and brother-in-law had the mental health difficulties alleged and that the applicant had cared for her sister in the intervening period.

72. When the Tribunal came to the conclusion that the applicant's explanation for leaving the United Kingdom, so as to care for her sister, was not true, and that her motivation in abandoning her studies and relocating to Ireland was economic in nature, even though it meant abandoning her studies and her hope of qualification as a certified accountant, it was incumbent on the Tribunal to give its reasons for reaching that conclusion. It did not set out any reasons why it was economically more favourable for the applicant to abandon her studies in London and relocate to this country, where she did not have the financial capacity to pursue her accountancy studies. The Tribunal has not provided adequate reasons for its conclusion in this regard.

**(v) The applicant's delay in seeking international protection.**

73. The Tribunal found that the applicant had delayed in seeking international protection and in particular, had not sought such protection immediately upon her arrival in the UK. That conclusion seems to miss the point that the applicant did not need international protection to remain in the UK in the years 2010 – 2014, as she had a valid visa which allowed her to study in that country. Accordingly, as she was legally present in the UK, it is difficult to see how she could be criticised for not seeking international protection at that time.

74. However, after she had relocated to Ireland and when she lost the right to study in the UK in 2014 because her mother could no longer sponsor her, it was open to the Tribunal to come to the conclusion that she had delayed in seeking international protection in Ireland. She was in Ireland from April 2013. She only sought international protection here in November 2016.

75. While the Tribunal's decision may be criticised in relation to the lack of reasons for its conclusion that she ought to have sought international protection while in the UK, its conclusion in respect of her failure to do so immediately upon her arrival in Ireland, or at the least from the time when she lost her right to study in the UK in 2014 and her delay in seeking protection until 2016, is a finding that was open to the Tribunal on the evidence. The court does not find substance in this ground of challenge to the decision.

**(vi) The finding that the applicant must establish that she would be at more risk than others if returned to Pakistan**

76. The court accepts the argument adduced on behalf of the applicant on this ground. The Tribunal found that the applicant would not be more at risk of persecution or harm than other women if returned to Pakistan. That is not the correct test. It is not necessary for an applicant to show that they are more at risk than others in order to obtain protection. It is sufficient if they can establish that there is a reasonable likelihood that they would be at risk of harm if repatriated. An example of that would be where a person had fled a warzone, or an area of civil unrest. They may not be at any more risk than other people in the area if returned, but it would be sufficient for them to establish that there would be



a reasonable likelihood of them experiencing harm if they were returned to their country of origin.

77. Similarly, it is not necessary for a person to be engaged in any particular act in order for them to be entitled to protection. As the Tribunal seems to have considered that the presence of either of these criteria was required before an entitlement to protection could arise, the Tribunal was in error in that regard and the decision must be struck down on that ground as well.

**7. Decision**

78. For the reasons outlined herein, the court quashes the decision of the first named respondent, dated 25th November, 2019 and will remit the matter to a new Tribunal for fresh consideration.