THE HIGH COURT JUDICIAL REVIEW

[2022] IEHC 613

[Record No.: 2021/947 JR]

BETWEEN

E.S.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 4th day of November, 2022

INTRODUCTION

- 1. In these proceedings the Applicant challenges the refusal of the International Protection Appeals Tribunal (hereinafter "the Tribunal") to recognise his right to subsidiary protection (it being accepted that a Convention nexus was not demonstrated such as would support an entitlement to refugee status), on the basis of findings that while the Applicant had suffered past persecution in his native South Africa, State protection was available.
- 2. The Decision made by the Tribunal (hereinafter "the Decision") pursuant to the provisions of the International Protection Act, 2015 (hereinafter "the 2015 Act") is challenged as being legally flawed by reason of a failure to apply the correct legal test, a failure to properly reason the decision, and a lack of rationality.

BACKGROUND

- 3. The Applicant is a South African national who arrived in the State on 6th of September, 2018. He made a claim for protection on the basis that if he returned to South Africa, he would face persecution and/or serious harm due to the fact that he is a white man. In support of his application he describes a number of different instances where he or members of his family had been attacked and/or robbed over an approximate ten-year period including incidents involving injury due to the discharge of firearms. Some of these incidents were reported to the police and others were not. In the case of incidents which had been reported, the Applicant considers the police response ineffective. Immediately prior to his departure for Ireland, the Applicant claims to have been pulled over by police who subsequently abused and robbed him. He contends that crime is out of control in South Africa and he fears that he will be killed, as others have been, if forced to return.
- 4. The Applicant was refused international protection at first instance, which decision was upheld in the impugned Decision on appeal. In the first instance decision, reference was made to the fact that South Africa has been designated a safe country of origin and it was concluded that he had not submitted any serious grounds for considering that it was not a safe country of origin in his particular circumstances in terms of his eligibility for refugee status. It was concluded that he had not established a well-founded fear of perssecution nor substantial grounds for believing that he would face a real risk of suffering serious harm if returned to South Africa.
- 5. A different position was taken on appeal to the Tribunal in that it is common case that the Applicant would have been granted international protection (in the form of subsidiary protection) on the basis of the risk of him suffering similar harm in future to that which he has already experienced or been directly threatened with, save for the conclusion of the Tribunal that State protection was available. The challenge in this case is directed to the approach taken by the Tribunal in determining that State protection was available.

PROCEDURAL HISTORY

6. The Applicant was granted an extension of time at the leave stage. No objection on time grounds was maintained by the Respondents at hearing. This case previously came before O'Regan J. on the 28th of June, 2022 for hearing when, following a preliminary pleading

objection to matters raised in the Applicant's legal submissions dated he 7th of March, 2022, O'Regan J. adjourned the matter to allow the Applicant to apply to amend the statement of grounds. By direction of of Meenan J. of the 19th of July, 2022 an amended Statement of Grounds and a further Affidavit as well as amended submissions were filed. It appears that no restriction was placed by Meenan J. on the terms of the amendment allowed.

- Objection was taken during the course of the hearing before me to an argument made on behalf of the Applicant that the concept of State protection provided for under s. 31 did not apply in respect of "State actors". It was accepted that while leave had been granted to challenge the decision on the basis of a failure to properly apply the legal test under s. 31(2) and 31(4) of the 2015 Act, this did not encompass as a ground of complaint that reliance on State protection at all, as provided under s. 31, was flawed as it did not apply to State actors. It is claimed that more specific pleading was required to advance such a case
- 8. I agree that the first appearance of an argument that the Tribunal was wrong to apply the concept of State protection at all insofar as the actions of State actors (the police) were concerned was in the amended written submissions. In their amended written submissions, the Applicants refer to Hailbronner and Thym, 'EU Immigration and Asylum Law' (3rd edn, Beck/Hart/Nomos, 2022) which they submit appears to read the State protection concept as relevant only to protection from non-State actors and not to State actors specifically where they say at paragraph 4 of p.1267 that:

"If persecution or other serious unjustified harm stems from the state then such fear is well-founded because de facto there is no viable avenue of protection available in the country of origin. If it stems from non-state agents then any such fear is only well-founded if the state is unwilling or effectively unable to provide protection against such risk of harm."

9. The Applicants contend that this distinction suggests that the concept of State protection is inappropriate where a risk of harm from the police has been found to exist. It is further submitted that this interpretation accords with the correct interpretation of s. 31 of the 2015 Act - interpreted in the light of s. 30, wherein it appears that State protection is relevant only to non-State actors within the meaning of s. 30(c) but not State-actors as referred to in s. 30(a),

because the reference to "protection against persecution or serious harm," is referred to only in s. 30(c) and not in s. 30(a). Section 31 then appears relevant, it is submitted, only to non-State actors as described in s. 30(c) specifically and not all actors referred to in s. 30 as a whole. This is a very fundamental argument of some obvious importance and even novelty. It was acknowledged on behalf of the Applicant that the Applicant's pleading does not go so far as to suggest that s. 31 cannot be applied at all to State actors of harm and they are not urging this position in this case. It is noted that no reference whatsoever to s. 30 of the 2015 Act appears in the Statement of Grounds.

I am quite satisfied that specific pleading is required to advance the argument that the State protection concept does not apply at all in respect of State actors of harm and that leave has not been granted to make this case notwithstanding that the Applicants were afforded an opportunity by Meenan J. to amend their Statement of Grounds as they saw fit. Accordingly, this question is not properly open for determination in this case and remains for determination in a case in which it properly arises. I express no view on the argument as canvassed in the submissions. The alternative argument, which was pursued at hearing on behalf of the Applicant, is that the case as pleaded permits it to be to contended that there is a particularly high standard of justification required before concluding that State protection is available as against State actors of harm.

PRELIMINARY APPLICATION

11. A late application to adjourn the proceedings generally with liberty to re-enter was made on behalf of the Respondents on the morning of the hearing. This application was made on the basis that the Applicant had been granted temporary permission to remain in the State for a two-year period effective from September, 2022. In the letter advising of the grant of permission the Applicant was advised:

"please note that if you are continuing with your application for international protection, you will remain an applicant for the purposes of the International Protection Act 2015 and, as such, you must not leave or attempt to leave the Sate without the Minister's permission."

- 12. The application was resisted on behalf of the Applicant on the basis that there is a difference between a temporary permission and a recognised protection status. My attention was drawn to the decision of Cooke J. in *D.D.A. v. Minister for Justice & Ors.* [2012] IEHC 308 and MacEochaidh J. in *I.E. & Ors. v. Refugee Appeals Tribunal & Ors* [2014] IEHC 409 where findings were made supporting an entitlement to pursue refugee status notwithstanding the grant of a temporary permission.
- 13. Before deciding the application, I afforded the Applicant's legal team an opportunity to take instructions on this late development in circumstances where it was indicated to me that the legal team had not been aware of the grant of temporary permission. Having taken instructions, they confirmed the Applicant's wish to continue with his proceedings and to object to an adjournment on the basis that nowithstanding the grant of temporary permission, he remained anxious to pursue his protection claim.
- 14. I am satisfied that there is not an equivalence between temporary leave to remain and international protection status. I refused the Respondent's application to adjourn generally on the basis that the Applicant was entitled, at his election, to maintain his claim for protection status and to pursue it by prosecuting these proceedings..
- 15. The hearing then proceeded with argument in relation to the substantive issues arising.

STATUTORY FRAMEWORK

- **16.** In these proceedings, the Court is invited to consider the application of sections 28(6), 31 and 33 of the 2015 Act in the decision of the Tribunal.
- **17.** Subsection 28(6) sets out as follows:
 - "(6) The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such 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."

18. To consider the proper application of the State protection concept as a good reason for concluding that persecution or serious harm will not be repeated, regard is also had to s. 30 of the 2015 Act which provides:

"For the purposes of this Act, actors of persecution or serious harm include—

- (a) a state,
- (b) parties or organisations controlling a state or a substantial part of the territory of a state, and
- (c) non-state actors, if it can be demonstrated that the actors referred to in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm."
- **19.** The applicable test for State protection is set out in s. 31 of the 2015 Act as follows:
 - "31(1) For the purposes of this Act, protection against persecution or serious harm can only be provided by—
 - (a) a state, or
 - (b) parties or organisations, including international organisations, controlling a state or a substantial part of the territory of a state,

provided that they are willing and able to offer protection in accordance with subsection (2).

- (2) Protection against persecution or serious harm—
 - (a) must be effective and of a non-temporary nature, and
 - (b) shall be regarded as being generally provided where—
 - (i) the actors referred to in paragraphs (a) and (b) of subsection (1) take reasonable steps to prevent the persecution or suffering of serious harm, and (ii) the applicant has access to such protection.

. . .

- (4) The steps referred to in subsection (2)(b)(i) shall include the operating of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm."
- 20. Sections 30 and 31 read together are drafted in a manner which reflects the language of Article 7 of the EU Asylum Qualification Directive 2004/83EC as recast in 2011 by Directive 2011/95 EU (albeit that Ireland adopted the 2004 Directive, but not the 2011 recast Directive). It is clear from the recast Directive that State protection can only be provided by the State or parties or organisations provided they are willing and able to offer protection which is effective and non-temporary.
- **21.** Section 33 of the 2015 Act provides as follows:

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

22. In this case, s. 33 of the 2015 Act was relied upon in the first instance IPO recommendation but not the impugned Decision.

IMUGNED DECISION

23. The extent of past harm suffered by the Applicant is set out at paragraph 2 of the Decision. The Decision at paragraph 2 includes an outline of the Applicant's complaints with regard to the crime situation in South Africa and occasions when he and members of family were victims of crime including robbery at gun-point, attempted hi-jackings and shooting. The Decision reflects that some incidents were reported to the police with an investigation opened, others were not. The Decision records the Applicant's complaint to have been robbed by the police, in that regard, two separate, specific incidents are recorded. The Decision also records the Applicant's complaint of discrimination against white people in South Africa. It is recorded

that the Applicant does not wish to go back to South Africa because the crime situation is out of control and he fears that he will be killed. Significant documentation submitted in support of the appeal is listed as having been fully considered.

- 24. In the assessment of the facts and circumstances, reference is made in the Decision to s. 28 of the 2015 Act as having been applied to the Tribunal's consideration of the facts and circumstances of the claim at para. 4.1 of the Decision but without referring to any particular part of that section.
- **25.** With respect to the credibility of incidents of past harm suffered by the Applicant, the Tribunal concluded at paragraphs [4.3] and [4.10] that material facts in respect of past harm include that:
 - "1. The Appellant was robbed three times at gun point.
 - 2. The Appellant was randomly searched and robbed by the police."
- 26. The Tribunal expressly accepts that, on the balance of probabilities, the Applicant was the victim of a number of serious crimes in South Africa. The acceptance of these findings are several times reiterated throughout the Decision (see also para. 5.1) and it is found that this treatment could constitute persecution if a Convention nexus were established. The Decision includes extensive reference to country of origin information (hereinafter "COI") which demonstrates both a high level of corruption in South Africa but also steps to investigate and prosecute such crimes, referring to the South African Human Rights Commission (hereinafter the "SAHRC") as "moderately effective".
- 27. With regard to State protection, the Decision identifies with reference to s. 31(2) of the 2015 Act that it must assess if there is, in fact, effective and non-temporary protection available to the Applicant in South Africa, whether the authorities take reasonable steps to prevent persecution or serious harms and whether the Applicant has access to such protection [para. 5.22]. It is noted in this regard that in some instances the Applicant contacted police but did not follow up [para. 5.23], on other occasions he failed to report instances at all [para. 5.24] and on a further occasion he reported an instance of robbery with police attending at the scene

to investigate but he formed a belief that the police had then robbed from him [para. 5.25], a belief he did not in turn report to the SAHRC, believing that there was "no point". This robbery and the fact of a police investigation was reported in the newspaper on the basis of an interview the Applicant himself gave without any suggestion reported the Applicant was unhappy with the police treatment of the matter. The Decision notes [para. 5.26] that the Applicant referred to another incident where he was pulled over by an errant police man and robbed as contributing to his belief that he could not be protected by the State from crime.

- **28.** The Decision proceeds to consider the Applicant's experiences in the light of COI which is referred to in some detail. The Tribunal accepts at [para. 5.27] that:
 - "...It is clear from even a cursory look at the objective COI that crime rates are extremely high in South Africa, that many members of the police are corrupt, and that oversight of the SAP [South African Police] is far from perfect. It is also accepted that the Appellant has been the victim of a number of these disturbing crimes himself."
- **29.** In respect of the police, the Tribunal finds at [para. 5.28] that:

"The Tribunal ... fully accepts that there are many corrupt policemen in South Africa, who themselves commit crimes."

30. The Decision accordingly notes that the COI paints a picture of a country with a high degree of corruption within the police but that not all policemen were corrupt and there are measures in place to deal with such corruption such as SAHRC, Constitutional protections, convictions of State officials for corruption and investigations in relation to the actions of the police [para.5.29]. Having considered the Applicant's evidence which showed a police response in some instances and a failure on his part to follow up or report others instances, the Tribunal finds that a lack of State protection in relation to the Applicant's fears is not evidenced. The Decision records that the obligation to provide State protection is to provide "effective protection" not "perfect protection" and that while COI suggests a high level of police corruption in South Africa, there are bodies in place to monitor and investigate corrupt police officers and there is evidence to suggest that members of the SAP are prosecuted in this respect [para. 5.32].

- 31. The Decision considers whether a "nexus" has been shown to a Convention ground and concludes that there is no evidence that the treatment of the Applicant was racially motivated and hence no Convention nexus demonstrated. This finding is not challenged in the within proceedings. In the absence of a Convention nexus and in view of the finding that State protection was available, the Tribunal found that the Applicant did not fall within the definition of refugee status.
- **32.** The Decision then proceeds to assess the subsidiary protection claim. Under the heading "Torture or Inhuman or Degrading Treatment or Punishment of a Person in His Country of Origin", the Tribunal found at [8.5],

"While it may be the case that the Appellant would be exposed to criminal activities on his return, as he has in the past, and this could amount to inhuman or degrading treatment or punishment. This is without prejudice to an examination as to whether or not there is effective State protection in this respect. It has already been found that there is effective State protection in South Africa in respect of the Appellant's fears in respect of criminal activities and therefore, this ground does not apply."

- 33. It is not disputed by the Respondent that this constitutes a finding of past harm which could amount to inhuman or degrading treatment or punishment. However, on the basis of the finding already made that there is effective State protection, an entitlement to protection was not found to arise.
- **34.** Of note in view of the claimed failure of the Respondent to apply the correct test, no reference was made to the rebuttable presumption in s. 28(6) or to s. 31(4) which requires an effective legal system in the Decision of the Tribunal.

DISCUSSION AND DECISION

35. I approach this application on the basis that it is now established that the requirements of Art. 39 of the Procedures Directive mean that the supervisory jurisdiction of the High Court in judicial review proceedings must ensure that the reasons which led the Tribunal to reject the application for asylum as unfounded are to be the subject of a thorough review by the national

court as found in *R.A. v. International Protection Appeals Tribunal* [2017] IECA 297 (see Hogan J.'s judgment in the Court of Appeal overturning the decision of the High Court at para. 63)).

36. I propose to deal firstly with the question of whether the correct legal test has been applied having regard to the terms of ss. 28(6), 31 and 33 of the 2015 Act, before then proceeding to deal with the case made that the Decision is inadequately reasoned and/or irrational.

Whether Presumption of Future Persecution properly Applied

- 37. A right to international protection is not premised on establishing past persecution or harm as the fear of persecution or risk of harm may be of future persecution or risk. Where a person has established past harm, however, that person enjoys a stronger position in respect of the analysis of future risk by virtue of the provisions of s. 28(6) of the 2015 Act. As set out above, s. 28(6) provides that where there has been a finding of persecution or serious harm, such as was made by the Tribunal in this case, this 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. In this case the question of future risk is at issue in the context of a State protection analysis under s. 31 of the 2015 Act.
- 38. I have been referred to the discussion by Hailbronner and Thym, 'EU Immigration and Asylum Law' (3rd edn, Beck/Hart/Nomos, 2022) at page 1257 to 1259 of 4(4) of the 2011 Qualification Directive (not opted into by Ireland but identical to 4(4) of the 2004 Qualification Directive). They say, *inter alia*, at page 1257:
 - "...Such past events give rise to a refutable presumption that the applicant qualifies for refugee or subsidiary protection assuming that the original situation remains the same...".
- **39.** Furthermore, at 1258 they say,

"...The member State must present good reasons on an individual basis showing that the persecution or harm will not be repeated..."

- **40.** I had occasion to consider the s. 28(6) in *N.U. v IPAT & Anor* [2022] IEHC 87. At paragraphs 39 and 40 of my judgment, I referred to previous decisions of the High Court on 28(6), specifically *I.L. v. IPAT & Anor* [2021] IEHC 106 (Burns J.) and *N.S. (South Africa) v. Refugee Appeals Tribunal* [2018] IEHC 243 (Humphreys J.).
- **41.** In *I.L.*, Burns J. referred to s. 28(6) as creating a "*rebuttable presumption*" which the Tribunal is obliged to address in its decision so that it is:

"unambiguous from the First Respondent's decision that such a significant evidential presumption was considered by the First Respondent and the good reasons which rebutted the presumption should be stated."

- 42. I do not read this as a requirement to specifically refer to a rebuttable presumption in the decision so long as the decision is couched in terms which reflect that the decision maker is aware of a significant evidential benefit which supports a finding of future fear of or risk of persecution or harm unless good reasons are identified to explain why the past event is not a valid indicator of future risk.
- **43.** In *N.S.*, Humphreys J. stated:

"If it is accepted that there was past persecution, the decision-maker needs to consider positively whether there is good reason to consider that there would be no future risk."

- 44. In the light of these earlier authorities and having considered sections 28(6), 31 and 33 of the 2015 Act, I set out the connection between section 28(6) and the State protection concept in N.U. in the following terms:
 - "20. By reason of s. 28(6) of the 2015 Act, in assessing the extent of a future risk ("real") and in that context the availability of state protection, the Tribunal is directed to treat as a serious indicator of risk that an applicant has already been subjected to

persecution or harm. This provision has been described as creating "a rebuttable presumption" that where events constituting persecution have been established (see IL v. IPAT & Anor. [2021] IEHC 106), this in turn establishes a serious indication that the applicant's subjective fear of suffering serious harm, if returned, is well founded unless there were good reasons to consider that such serious harm would not be repeated."

- **45.** In *N.U.*, at para. 40 of the decision, I concluded as follows:
 - "...I accept the applicant's submission that having found a fear of persecution to be established, there was an obligation on the first respondent to engage in an analysis of this rebuttable presumption under s. 28(6) and to explain the reasons why the Tribunal was satisfied that there was good reason that there would be no future risk, if this is indeed the Tribunal's Decision. No such analysis is carried out by the Tribunal in deciding that state protection would be available."
- 46. It is the Applicant's case that as the Tribunal does not reference this presumption at any point in the impugned Decision this is evidence of a failure to properly apply the presumption. The failure to refer to s. 28(6), it has been submitted, is reason in itself for the Decision under review to be quashed based on *N.S.*, *I.L.* and *N.U.* It is contended that there is no evidential basis to support a conclusion that the Tribunal applied s. 28(6) as it was required to do. Particular reliance is placed on the fact that there is no reference to s. 28(6) in the Decision nor is any reference made to a presumption nor to the expression "good reasons" as it is submitted is required. The point is further made that the language of the section is not reflected in the Tribunal Decision.
- 47. It is submitted on behalf of the Respondents that the Tribunal engages with the presumption within s. 28(6) of the 2015 Act, without referencing it, by recognising that the Applicant has been the victim of past persecution at various places in the Decision and at paragraph [8.5] of the Decision by acknowledging, expressly subject to an assessment of the availability of State protection, that if the Applicant were to return to his native South Africa, he would be exposed to a risk of criminal activities on his return, as he has been in the past, and this could amount to inhuman or degrading treatment or punishment.

- 48. I found in *N.U.* that, while preferable, it is not necessary to identify the applicable statutory provisions in a decision so long as it is possible for a court to be satisfied from the terms of the decision that the correct legal test has been applied. The failure to identify the statutory provision increases the burden on the Court to be vigilant to ensure that the Tribunal has identified and applied the correct test because it requires careful consideration of the substance of the decision to ascertain what test was applied in substance.
- 49. It was accepted by the Tribunal in this case that the Applicant had suffered harm and was at risk of future harm. It is clear that a finding that State protection was available, rather than a failure to establish a future risk of harm, underpinned the Decision to refuse both refugee and subsidiary protection status. It is also clear from the statutory scheme that a risk of harm does not give rise to a right to subsidiary protection, where it is properly concluded that State protection is available.
- 50. I am satisfied that in this case the terms of the impugned Decision are such that it is clear that the presumption under s. 28(6) of the 2015 Act was applied by the Tribunal. I consider that it was referenced implicitly at paragraph [8.5] of the Decision when it was acknowledged, subject only to an assessment of the availability of State protection, that if returned to South Africa, the Applicant would be exposed to criminal activities, as he has been in the past, and this could amount to inhuman or degrading treatment or punishment. In this way the availability of State protection and not the risk of harm is identified as determinative.
- 51. Where the Tribunal accepts that there is a future risk of harm based on previous occurrences, there can be no basis for contending that the Applicant has been deprived of the benefit of s. 28(6) of the 2015 Act. Ultimately this established risk (whether presumptively established and not rebutted or established on the basis of the material) is found to not give rise to a right to protection because State protection is available. The application does not fail because it is concluded, despite the rebuttable presumption under s. 28(6), that the Applicant has not demonstrated a risk of harm. Instead, it fails because it is concluded that State protection is available.

- **52.** While the Applicant separately challenges the findings that effective State protection is available having regard to the reasoning advanced and the rationality of those findings, I conclude that for the purpose of deciding whether the Tribunal properly applied s. 28(6) of the 2015 Act, I can be satisfied that the Tribunal proceeds on the basis that a future risk of harm is established and the Tribunal does not treat the presumption under s. 28(6) as rebutted.
- 53. It follows that I reject the Applicant's submission that because s. 28(6) was not referred to explicitly "this is, in itself... a reason for the decision under review to be quashed based on NS, IL and NU...". The Applicant was not deprived of the benefit of s. 28(6) and a failure to apply the rebuttable presumption or to treat that presumption as rebutted without expressly so stating is not the reason the application failed.

Whether the concept of "State Protection" was correctly applied

54. The Tribunal does not set out in clear terms in its Decision in this case the test it applies in determining that State protection is available. The Decision does, however, expressly refer to s. 31(2) when dealing with the concept of State protection but without also referring to s. 31(4) as regards the requirement for an effective legal system. As already noted above, the failure to set out clearly and in express terms the test being applied, albeit unhelpful, is not fatal to a decision. In his decision in *W.T. v. Minister for Justice and Equality* [2016] IEHC 108 Humphreys J. stated (para. 53):

"In the analysis regarding state protection, the Minister does not analyse the country of origin material in terms of the wording of the individual elements of the test as set out in art. 7.2 of the directive. That requires the State or the entity governing the territory concerned to, inter alia, operate an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection.... I would consider that a failure to state and analyse the express test is not fatal as long as it is clear that it was understood and considered in substance."

55. Considering whether the test has been understood and considered in substance requires identification of what the test is. It is submitted on behalf of the Applicant that the key concept

in applying s. 31 is to determine if there is "effective prevention". It is claimed that "effective prevention" is generally provided by an effective legal system for 'detection, prosecution and punishment.' I note, however, that the words "effective prevention" do not appear in s. 31 of the 2015 Act. Rather, effective protection is further explained in s. 31 as being generally provided where the State or parties or organisations providing protection take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detention, prosecution and punishment of acts constituting persecution or serious harm, and when the Applicant has access to such protection.

56. In *L.A.A.* (*Bolivia*) & *Ors. V. Refugee Appeals Tribunal* & *Ors.* [2016] IEHC 12, Stewart J. addressed the test for State protection, quoting from the decision in *Idiakheua v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 150, as follows:

"The true test is whether the country concerned provides reasonable protection in practical terms"

Stewart J. went on to assert at para. 19 that:

"State protection can never be perfect protection."

The Tribunal reflects this at paragraph [5.32] wherein it is stated that "there is no obligation on a State to provide perfect protection, rather the test is whether effective protection is provided". There is nothing in the text of either the 2004 or 2011 Directive which might prompt a different interpretation of s. 31 such as to equate effective protection with effective prevention.

57. While protection must be effective it is not required to be perfect in order to qualify as effective. Under s. 31 a State is only required to take "reasonable steps" to achieve effective protection and it appears from the terms of s. 31(2)(a) and (b) that protection is to be regarded as being available where reasonable steps to prevent the persecution or suffering of serious harm are taken and the applicant has access to such protection. Given that what is generally required is that "reasonable steps" are taken to make protection available and that where such

steps are taken protection "shall" be regarded as generally provided, it must follow that for the Tribunal to conclude that State protection is available, it is not the case that there must be evidence that both crime and corruption are completely or even substantially under control in a state. Were this the standard there would be few enough states, if any, which might be considered capable of passing the test. Instead, the test turns not on success rates in preventing crime or corruption but on the nature of the measures put in place and whether they can be characterized as "reasonable steps".

- 58. In this case I have followed the approach endorsed by Barrett J. in *B.C. v. IPAT* [2019] IEHC 763 (para. 10) in considering whether it has been shown that the correct test for State protection has been applied in substance. This involves asking if the decision-maker answered the following relevant questions:
 - "(1) Does the State in question take reasonable steps to prevent the persecution or suffering of the serious harm feared by a particular applicant?
 - (2) Do such steps include the operating of an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm?
 - (3) Is such protection effective and of a non-temporary nature?
 - (4) Does the particular applicant have access to such protection?"

It seems to me that the substance of these four questions is addressed in the terms of the Tribunal Decision.

- 59. In relation to crime committed by non-state actors, the Tribunal acknowledges the high levels of crime throughout the Decision. However, the Tribunal also finds that there is COI to show that reasonable steps are being taken to deal with same (see, for example, paragraph [8.3] of the Decision).
- 60. As for State actors, the Tribunal refers to information within the COI relating to the institutions tackling police corruption (see, for example, para. 5.7) as well as the arrests, charges and prosecution of police officers. The Decision refers to COI which suggests a high level of police corruption in South Africa but also evidences the existence of bodies in place to monitor, investigate and prosecute corrupt police officers and documents the conviction of

State officials for corruption.

- 61. There is consistent reference to the detection, prosecution and punishment of acts constituting persecution or serious harm in South Africa, for example at paragraphs [5.5] to [5.13] wherein COI was quoted that South Africa has a "vibrant legal system". Further at paragraph [5.31] the First Named Respondent sets out that there are bodies to "monitor and investigate corrupt police officers and there is evidence to suggest that members of the SAP are prosecuted". Regard is also had to the failure of the Applicant to invoke these measures. There is reference throughout the decision to instances of punishment for wrongdoers, for example at paragraph [5.28]. It is therefore clear that the requirements of s. 31(4) of the 2015 Act were considered by the Tribunal and applied to the facts of the case in order to determine the operation of an effective legal system in support of a finding that there was effective State Protection, albeit without express reference to s. 31(4).
- 62. In terms of its approach to the assessment of corruption by State actors and the availability of State protection, the Tribunal's finding (at paragraph 5.28) that "it cannot be said that such corruption is systematic and carried on with the tacit consent of the State" was the focus of some particular submission in this case. Further reference to the "tacit consent" of the State was made at paragraph 5.32. It is submitted that this reference to the "tacit consent" of the State is indicative of the application of the wrong test, the point being made that a non-effective system can arise without "tacit consent" of a State, and "tacit consent" is not the test.
- 63. I do not accept that the test applied was one which required the "tacit consent" of the State to corruption before it could be concluded that State protection was not available. Instead, it seems to me that the issue of police corruption was part of the Tribunal's overall considerations rather than the test used. As set out by Humphreys J. in *F.A.Y.* (Nigeria) v. The Minister for Justice and Equality [2019] IEHC 373 (para. 39):

"It is not the law that if a decision-maker says something, he or she is thereby asserting that that something amounts to a legal test. A decision-maker is allowed to make findings and even comments without every word being held to be automatically pivotal or determinative. Decisions should be read where possible in a manner that renders

them valid rather than invalid (leaving aside entirely the need to read them in a common-sense manner rather than a contrived and artificial manner)."

64. From a common-sense reading of the Decision in this case, the comments in relation to police corruption should properly be understood as forming part of the Decision but were not a test to ground same. Afterall, a consideration of whether corruption is carried on with the tacit consent of a State is a valid factor in determining the effectiveness of protection. In *C.G. v. The International Protection Appeals Tribunal & Anor.* [2019] IEHC 300, which related to similar facts to the present case, Keane J. stated at para. 27:

"having considered the COI, the tribunal found that, while there are policemen and people in authority in Bangladesh who are corrupt and complicit in attacks against minorities, that cannot be said of the entire system, leading it to conclude that violence against the Hindu population cannot be said to be carried on with the tacit consent of the State."

65. The decision in *C.G.* was not made in the context of the 2015 Act regime, however, this does not displace the correctness of the position there espoused that the attitude of the State to corruption is a relevant consideration in assessing whether State protection is available. The fact that the attitude of the State to corruption is a relevant consideration is also clear from the extract relied upon by the Applicant from Hughes and Hughes, 'The International Protection Act: Annotated', (Clarus Press, 2020) where the authors quote from comments contained in the EU Commission's "*Proposal for a Council directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise need International Protection" relating to provision for State Protection as follows (p. 295):*

"This paragraph is about the evaluation of the effectiveness, including the availability of State protection. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious harm. The issue at stake is whether such a system as a whole offers a sufficient and accessible level of protection to all members of the population. For the system to offer effective protection, the State mush be able and

willing to operate it, such that there is no significant risk of persecution or other serious harm being realised.

In the first part of this evaluation, relating to the determination of whether or not the State has taken, or could be reasonably expected to take, adequate steps to control or combat the infliction of harm, Member States should consider the following factors:

- (a)...
- (b) the State's complicity with respect to the infliction of harm at stake;
- (c)
- (*d*)
- (e)
- (f) whether there is a pattern of State unresponsiveness."
- 66. Similarly, I reject the contention made on behalf of the Applicant that the Tribunal erred in failing to treat State protection as "temporary" in circumstances where the Decision reflected a factual conclusion that it had been available on "some" occasions. It seems to me that considerations of temporariness or conversely permanency in this context relate to considerations of regime change or similar, rather than questions of variable success in terms of outcomes relating to the investigation and prosecution of crimes, or otherwise holding wrongdoers to account. As no issue arises in this case concerning a change in law or regime change nor is there any suggestion that measures of State protection are in some way transitory, I do not see any merit in the arguments made on behalf of the Applicant that the approach of the Tribunal was based on an error of law in its understanding and application of a "non-temporary" test.
- I am satisfied from the terms of the Decision that the "path" of the Tribunal's reasoning (to adopt the term used by O'Donnell J in Y.Y. v Minister for Justice and Equality [2017] IESC 61 at para. 80) is readily apparent. The determination that State protection is available in circumstances of previous harm was reached in this case with due regard to the fact that measures in place did not operate to prevent such previous harm and the Tribunal explains why such measures can nonetheless be considered to constitute effective State protection within the meaning of s. 31 of the 2015 Act. The Decision addresses the steps taken in South Africa to deal with both crime and abuse, it considers the effectiveness of those steps and has regard to the operation of the legal system for detection, prosecution and punishment of acts constituting

harm. It further refers to the Applicant's own past failures to follow up or to report, explaining that effective protection does not mean perfect protection. It is clear from the Decision that the Tribunal had regard to the fact that State protection did not avail the Applicant previously, addressed why this was so and concluded that, in the circumstances of this case, State protection was available because steps to prevent the suffering of serious harm, which the Tribunal considered to be reasonable, had been taken and the Applicant had and would have (if returned) access to such protection.. I am satisfied that the Tribunal properly construed and applied s. 31 of the 2015 Act in considering the availability of State protection in South Africa.

Section 33 of the 2015 Act

- 68. The fact that South Africa is designated a safe country under s. 33 of the 2015 Act was never mentioned by the Tribunal and the designation of South Africa as a safe country was not relied upon in the impugned Decision. It is submitted on behalf of the Applicant that further important context to the assessment under s. 31 is that it took place in circumstances in which either the Tribunal did not appreciate that s. 33 could be relevant or the Tribunal implicitly found that a procedural hurdle imposed by s. 33 of the 2015 Act had been overcome by the Applicant owing to his personal circumstances. The asserted failure to properly set out the Tribunal's approach to s. 33 was urged as evidence of a failure to apply the correct test.
- 69. In contending that the Decision was flawed by reason of the failure to address s. 33 in express terms, the Applicants relied extensively on my earlier decision in *N.U.*. It is important to recall, however, that in that case I was considering a decision where there had been an apparent conflation of ss. 31 and 33 such that the Tribunal in that case relied on the s. 33 designation in the context of the s. 31 assessment. I found that the designation of a State as a safe country of origin ceases to be a relevant factor once s. 31 is applied and the task is to consider:
 - " ...whether actual state protection within the meaning of s. 31 is available in the individual circumstances of the applicant" (para. 55).
- 70. Unlike the situation in N.U., in this case it is clear from the fact that there is no reference to s. 33 or the concept of safe country of origin and explicit references to s. 31(2) at [5.22 and

5.27], that s. 33 was not applied to disentitle the Applicant to protection but instead the Tribunal proceeded to decide whether actual State protection within the meaning of s. 31 is available in the individual circumstances of the Applicant. In those circumstances, I am satisfied that there was no requirement to expressly record a decision that s. 33 was not relied upon or to explain why this is so. The situation would be different had the Tribunal invoked the safe country of origin designation (as arguably it did in N.U.), because then it would have been necessary to explain why the Tribunal did not consider the Applicant to have submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his eligibility for international protection (under s. 33(b)). The facts of this case are entirely distinguishable from N.U. in that there is no apparent conflation of the tests under ss. 31 and 33 in this case.

Presumption of State Protection

- 71. There was some discussion before me as to whether it was proper to rely on a presumption of State protection in view of the terms of s. 31 of the 2015 Act. Reliance was placed on extracts from Hathaway and Foster, 'The Law of Refugee Status' (2nd edn, Cambridge University Press, 2014) at ch. 4, where it is argued that there is no principled basis on which to ground a presumption in relation to the question of whether the home state is unable or unwilling to protect. Rather, it is argued, the question of whether the State is unable or unwilling to provide protection is a question of fact and must, like all questions of fact, be investigated in line with the shared duty of fact finding.
- **72.** I was referred by counsel on behalf of the Respondent to the decision of Birmingham J. in *G.O.B. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 229 where he stated (para. 28):
 - "I feel I must also have regard to the principle, accepted both domestically and internationally, that absent clear and convincing proof to the contrary, a state is to be presumed capable of protecting its citizens... There must be few police forces in the world against which some criticism could not be laid and in respect of which a trawl through the internet would fail to produce documents critical of their effectiveness and skeptical of their capacity to respond."

73. Other statements to similar effect have been made in the context of the pre-2015 Act regime including in *C.G. v. International Protection Appeals Tribunal and the Minister for Justice and Equality* [2019] IEHC 300 where, at para. 39 of the judgment, Keane J. stated:

"Otherwise, there are authorities almost beyond number that establish that the applicant bears the burden of establishing an inability (or unwillingness) to provide effective state protection and that the standard of proof that the applicant must meet is one of clear and convincing evidence. To select just one such authority for the purpose of illustration, I would refer to the dictum of Feeney J in O.A.A. v Minister for Justice & Anor [2007] IEHC 169, set out in the passage from D.V.T.S. quoted earlier in this judgment, that:

"[T]he obligation was on the applicant to provide clear and convincing evidence of the state's inability to protect. This was not a situation of complete breakdown of law and order and therefore the correct approach was that it must be presumed that the state was capable of protecting its citizens. It was recognised that such presumption could be rebutted but that such rebuttal required clear and convincing evidence."

74. In this case, the Tribunal stated that it had not been established that State protection was not available. There is nothing in the Decision, however, to support a conclusion that a presumption of State protection was relied upon to defeat the claim as it is clear that the Tribunal conducted an evaluative assessment of the actual protections available and arrived at a conclusion on the facts as supported by the material before the Tribunal. In the circumstances, I do not consider that it is necessary for the purposes of this case to determine whether a reverse evidential burden or presumption has survived the enactment of the 2015 Act and applies as a matter of Irish law.

Reasons and Rationality

75. To a large extent the three grounds of challenge are interlinked. To be satisfied that the correct legal tests were applied above, I had regard to the reasoning offered in the Decision. From the reasoning, as set out above, it was clear to me that there was no failure to apply the

correct test. I turn now for completeness, however, to address the case made that the Decision was inadequately reasoned and/or unreasonable as a matter of law.

- 76. In my view, where a finding has been made of past harm, the Tribunal must positively address whether a future risk warranting protection is established. Where it is concluded that a future risk giving rise to a right to protection is not established notwithstanding that it has been found that harm has already occurred, the Decision must make clear why this is so. This does not amount to a "higher standard" of justification, as has been contended. In my view, the standard remains the same but there is a need for positive engagement with the evidence to demonstrate a sustainable basis for the decision with regard to the existence of State protection. This in turn gives rise to a need for cogency in the record of the Decision sufficient to explain on what basis the Tribunal was satisfied that notwithstanding previous harm having occurred, the Applicant is not entitled to international protection.
- 77. In this case particular focus has been placed on the Tribunal's categorisation of the Applicant's experiences as including "some instances whereby the police took reasonable steps to investigate the crimes perpetrated upon him," and found that "[w]hile the Appellant may believe that the police did not do enough and it is clear that some of the policemen he encountered were corrupt, it cannot be said that there is clear evidence of a lack of effective State Protection in South Africa in relation to the Appellant's fears." It is contended that the actual evidence was solely of police arriving on the scene of crimes which it is submitted does not constitute, "reasonable steps to investigate the crimes perpetrated upon him," within the meaning of the 2015 Act, particularly as it was accepted that some of the investigating police were corrupt.
- 78. It seems to me, however, that the evidence and reasoning went further than this. The Tribunal had regard to the response of police when the Applicant made a complaint, the failure of the Applicant to follow up on matters that had been reported to police, the failure of the Applicant to report some instances to the police at, altogether with his failure to report instances of corruption to the relevant authorities. The Tribunal also had regard to the detection, prosecution and punishment of acts constituting persecution or serious harm in South Africa, for example at paragraphs [5.5] to [5.13] where COI was quoted to the effect that South Africa

has a "vibrant legal system". COI substantiating efforts made by the SAPS to improve its response to crime in recent years was referred to at paragraph [5.5]. Further at paragraph [5.31] the Decision sets out that there are bodies to "monitor and investigate corrupt police officers and there is evidence to suggest that members of the SAP are prosecuted". There is reference throughout the decision of instances of punishment for wrongdoers. In this way the Tribunal identified a proper basis upon which to determine that an effective legal system was in operation in support of a finding that there was effective State protection.

- 79. It is well established that the Tribunal is not entitled to use COI selectively or to ignore relevant COI in the Applicant's favour without comment. The Tribunal is required to weigh the different and conflicting information and explain why it is considered that notwithstanding that the information goes in contrary directions, a particular conclusion or finding is being reached or one part of the information preferred over another (see *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor.* [2007] IEHC 305, [2008] 3 I.R. 476). In this case, however, it is clear that the Tribunal did not ignore aspects of the COI which tended to support the Applicant's claim for protection but considered and assessed the body of information (as opposed to every itemised element of it) in its Decision.
- 80. The requirement to consider and assess different and conflicting COI does not equate to a requirement to quote in full all elements of contrary COI, once it is clear that the contrary information has been weighed and once weighed, why the decision maker finds the decision made to be adequately supported by the material even where some of the material would support a contrary conclusion. In *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 418 Hardiman J. stated (para. 3):
 - "A person claiming that a decision-making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."
- 81. It is important not to conflate the Tribunal's obligation to consider all objective COI, with an obligation to narratively discuss all material presented. As confirmed by Humphreys

J. in *O.M.A.* (Sierra Leone) v. The Refugee Appeal Tribunals & Ors [2018] IEHC 370 (Unreported, High Court, 12 June 2018) at para. 8:

"it is not necessary to tediously list every element of an applicant's case and reject it point by point. A court or tribunal or other decision maker is entitled to reject the evidence generally."

- 82. In this case the Tribunal set out in full a list of the COI considered. The Decision further clearly records that the Tribunal had considered all the COI at paragraph [2.13/2.14]. It quoted extensively from COI which was critical of the levels of State protection available in terms of its effectiveness, as well as COI which demonstrated that State protection was available. The Tribunal proceeded to explain that notwithstanding shortcomings which were acknowledged in the terms of the Decision, it was concluded that State protection was available. Contrary, COI was not ignored in this case. The reasons given adequately explain the Decision, even though a contrary decision would also have been supported by some of the material before the decision-maker.
- 83. Contrary to what is contended on behalf of the Applicant, the law does not provide that a "higher standard" of justification is required where a finding that State protection is available in respect of State actors, is made as opposed to a case involving non-State actors. No authority was identified for such a proposition. Similarly, no express provision is made in the 2015 Act for a higher standard or level of justification in that category of cases involving harm at the hands of State actors. That said, in the context of a finding of State protection, where past harm has been found to have occurred, it is my view that clear reasons for the conclusions reached are required to be given whether the protection be from State or non-State actors. Where a finding of harm has been made, but it is concluded that an entitlement to protection does not arise because of the availability of State protection, then it is necessary for the decision maker to explain why this conclusion is reached. This is so that it is clear that a claim for protection from a risk of future harm has been properly considered. A determination that State protection is available in circumstances of previous harm must be reached with due regard to the fact that measures in place did not operate to prevent such previous harm and should explain why such measures can nonetheless be considered to constitute effective State protection within the meaning of s. 31 of the 2015 Act. It seems to me that the reasoning in this case is adequate in this regard.

84. The next question is whether the reasons given adequately justify the conclusion arrived at. I consider that they do. The dicta of Clarke J. in *Idiakheua v. The Minister for Justice*, *Equality and Law Reform* [2005] IEHC 150 remain apposite. There the Court ruled (para. :

"The existence of legislation proscribing certain practices is not enough to show the existence of state protection. These laws must also be enforced by the state."

- **85.** As recently set out by Ferriter J. in a case also concerning police failures in South Africa, *F.M. & R.M. v. IPAT & M.J.* [2021] IEHC 817 (para. 30):
 - "30. ...It is no answer that "a state is doing its incompetent best if it never the less falls below the appropriate standard [of protection]" (to adopt the phrase used by Baker L.J. in the English Court of Appeal in R (Atkinson) v. Secretary of State for the Home Department [2004] All ER (D) 14 at paragraph 22)."
- 86. It is clearly necessary for the Tribunal to consider the standard of protection available. I am satisfied that it did so in this case. In this regard, it is noted that the Tribunal found at paragraph [5.30] that "the evidence suggests that a policeman did arrive at the scene and made reasonable efforts to investigate the matter" of the crime perpetrated upon him in 2009. On this occasion in 2009, the Applicant himself never followed up the investigation and lost the case number. On two further occasions, the Applicant did not report crimes to the SAPS or to SAHRC. On reporting the armed robbery which occurred at his premises in 2017, the Applicant is actually quoted within a newspaper article as saying that the SAPS were investigating the matter. He is reported as having thanked a local police force for their response as quoted at paragraph [5.25] of the Decision. Overall the Tribunal found [paragraph 5.32] that:

"it is clear that there are high levels of corruption within the police force in South Africa and it is also clear that the Appellant was the victim of a number of distressing robberies and attacks. However, the Appellant also gave evidence of some instances whereby the police took reasonable steps to investigate the crime perpetrated upon him.. he also agreed that he could have reported concerns regarding corrupt police to the SAHRC but he failed to do so... it cannot be said that there is clear evidence of lack of effective State Protection in South Africa in relation to the Appellant's fears".

87. In Y.Z. (Pakistan) v. Refugee Appeals Tribunal and the Minister for Justice Equality and Law Reform [2014] IEHC 498 the Court found that while the applicant in that case had suffered some serious crimes (of a similar nature to those in the present case), the police had made some efforts to seek out the applicant in the aftermath of same. Barr J. in the High Court found, in light of those efforts that (para. 35):

"The Tribunal had evidence before it which allowed it to come to the conclusion that while the situation in Pakistan was far from perfect, the COI showed that the police did take action against extremists. In these circumstances, the Tribunal Member was acting within jurisdiction when he found that State protection would be available to the applicant."

88. In *Kvaratskhelia v. Refugee Appeals Tribunal* [2006] IEHC 132, (Unreported, High Court, 5th May, 2006) Herbert J. stated:

"it is the function of the Refugee Appeals Tribunal and, not of this court in a judicial review application, to determine the weight, if any, to be attached to country of origin information and other evidence proffered by or on behalf of the applicant."

89. The decision of Humphreys J. in W.T. v. Minister for Justice and Equality is also instructive in this regard. In W.T., the applicant had sought an order of *certiorari* quashing the decision of the Respondent refusing to grant subsidiary protection to the applicant. The argument made was that upon reading all of the COI provided there was (para. 52):

"considerable evidence that the Cameroonian legal system was ineffective"

90. The Court stated (para. 52):

"I tend to agree that there was such evidence, but on the other hand, there was also some material on which the Minister could have drawn an alternative conclusion. On that basis, I would not hold a decision that the Cameroonian legal system was effective within the meaning of the qualification directive, if such had been properly made was irrational."

- 91. It seems to me, in the light of the evidence as a whole, I am not entitled to treat as being unreasonable the Tribunal conclusion that there was effective State protection provided to the Applicant. There was ample material before the Tribunal and identified in the Decision to support this conclusion.
- **92.** From the terms of the Decision it is demonstrated that the Tribunal engaged in an evaluation of the protections available in this case. It recognised that the level of protection was not perfect and was only "*moderately*" effective. In this way it is manifest that the Tribunal did not adopt an uncritical approach. Instead the Tribunal reflected that there were problems and shortcomings but that the steps taken were nonetheless reasonable and constitute effective protection within the meaning of s. 31. In *B.A. v. IPAT* [2020] IEHC 589 (Unreported High Court 20th October 2020) Burns J. correctly stated (para. 24):

"It is not for this Court to substitute its view on the evidence for that of the First Respondent. Rather, this Court must determine whether the decision was arrived at in a lawful and appropriate manner, taking into account correct considerations and coming to a rational and reasonable decision on the material before the decision maker."

93. Whether one agrees or not with the conclusion that State protection is available (which is not the test in judicial review proceedings), it cannot be said that the Tribunal did not conduct a rational analysis of conflicting country of origin information and did not justify any preferment of one piece of information over another. The Decision arrived at with regard to the availability of State protection is made with full regard to the problems experienced with State protection in South Africa. The justification advanced for the Decision of the Tribunal is set out in a cogent and clear fashion. In my view the Tribunal came to a rational decision for reasons properly set out and the Decision has not been established to be unreasonable.

CONCLUSION

94. For all of the reasons set out above, I dismiss the within application for judicial review. This matter will be listed after the expiry of two weeks from the delivery of this judgment to deal with any consequential matters or matters arising.