THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 472 JR]

BETWEEN

C.G.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr Justice David Keane on the 10th May 2019

Introduction

1. This is the judicial review of a decision of the Refugee Appeals Tribunal, now the International Protection Appeals Tribunal ('the IPAT'), dated 19th May 2016 and made under Regulation 8(22)(a) of the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'), then applicable, affirming a recommendation of the Refugee Applications Commissioner ('the Commissioner') that the applicant should not be declared to be a person eligible for subsidiary protection ('the IPAT decision').

2. On 25 July 2016, Mac Eochaidh J granted the applicant leave to apply for various reliefs, principal among which is an order of *certiorari* quashing the IPAT decision.

3. At the time when leave was granted, the International Protection Appeals Tribunal was known as the Refugee Appeals Tribunal. When s. 71(5) of the International Protection Act 2015 ('the Act of 2015') came into force on 31 December 2016, the former was substituted for the latter in these proceedings by operation of law.

Background

4. The applicant is a national of Bangladesh, born a Hindu in 1983.

5. He entered Ireland on a student visa in 2006. In 2010, after a three week visit back to Bangladesh, he returned to Ireland and applied for refugee status, claiming a well-founded fear of persecution on grounds of religion and political opinion.

6. On 21 May 2010, the Commissioner recommended that the applicant not be recognised as a refugee on the basis that he had failed to establish that his fear of persecution if returned to Bangladesh was objectively well-founded or that effective state protection would not be available to him there. On 22 July 2010, the Refugee Appeals Tribunal affirmed that recommendation on, effectively, the same grounds.

7. On 7 September 2010, the applicant applied for subsidiary protection. After an interval that has not been explained, but in respect of which no complaint is made on either side in these proceedings, the applicant was interviewed on behalf of the Commissioner on 19 June 2014, in accordance with Regulation 5(3) of the 2013 Regulations which had come into operation on 14 November 2013. Under Reg. 3(2) of the 2013 Regulations, any application for subsidiary protection under the 2006 Regulations upon which the Minister had not made a decision before the commencement of the 2013 Regulations, was deemed to be an application made under the later regulations. A report of that interview, dated 19 June 2014, was furnished to the Commissioner in accordance with Reg. 5(9) of the 2013 Regulations.

8. The Commissioner's written report on the investigation of the applicant's subsidiary protection claim, required under Reg. 6(1) of the 2013 Regulations, is dated 10 July 2014. It was subsequently referred to by the tribunal as 'the SP report'; 'SP' presumably standing for subsidiary protection. In very short summary, it concluded that, while a widespread level of political violence and of violence against members of the Hindu minority in Bangladesh did create a real risk of serious harm to the applicant, that risk was mitigated by the availability of both effective state protection and an internal relocation alternative there. On 18 July 2014, the Commissioner recommended that the applicant should not be declared to be a person eligible for subsidiary protection.

9. The applicant submitted a note of appeal on 6 November 2014. That appeal was heard on 12 May 2016.

The decision under challenge

10. The IPAT decision is dated 19 May 2016 and was furnished to the applicant under cover of a letter, dated 20 May 2016. It concluded that the applicant had failed to establish the credibility of his personal narrative concerning his own experiences and those of his family in Bangladesh, or his claims to have been the target of threats as a student political activist in Bangladesh or as person politically outspoken on Facebook while in Ireland. That conclusion on credibility is not challenged in these proceedings.

11. Having accepted nonetheless that the applicant is a national of Bangladesh and a Hindu, the IPAT decision went on to consider whether the applicant had shown substantial grounds for believing that, if returned there, he would face a real risk of suffering serious harm. In that context, the IPAT decision accepted the finding, set out in the SP report, that, although the applicant's family has lived in Bangladesh without incident for many years, country of origin information ('COI') indicates that violence against Hindus and political violence has led to incidents of serious harm.

12. The IPAT decision then addressed the availability of effective state protection, acknowledging the relevant finding in the SP report and considering various COI reports relied upon by the applicant. Its conclusion on that issue, which is the focus of the present challenge, was as follows:

> 'It is clear, from all of the evidence before the Tribunal, that Hindus in Bangladesh do face discrimination and that many

> were subjected to attacks post the January [2014] elections. The Tribunal has assessed all of the evidence before it and I find 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. Violence against the Hindu population cannot be said to be carried on with the tacit consent of the State. In order to show that [the applicant] would not be safe in Bangladesh, there must be clear and convincing evidence of a lack of state protection. The COI cited above does not disclose that this is the case. The [applicant] never went to the police in relation to his alleged problems as he felt there was no point. Instead he sought out surrogate protection at the first possible opportunity. The Tribunal is cognisant of the fact that surrogate protection only comes into play when there is clear and convincing evidence of a lack of state protection in the home country. The Tribunal also notes that local failures in State protection do not amount to a failure by the State as a whole. The evidence before the Tribunal, which is set out above, does not suggest that this is the case. The COI cited refers to instances where the High Court [of Bangladesh] had denounced attacks against Hindus and to situations where the police have intervened and arrested perpetrators in such attacks. In the circumstances, I uphold the findings in the SP report.'

13. One further significant finding made by the tribunal is that, having found no clear and convincing evidence of lack of state protection, it was not necessary to address the issue of an internal protection alternative (in the alphabet soup of immigration and asylum practice, an 'IPA'), and the tribunal did not do so.

Procedural history
14. The applicant sought, and was granted, leave to bring these proceedings on 25 July 2016, based on an amended statement of grounds of the same date, filed in the Central Office on 3 August 2016, grounded on an affidavit of the first applicant, sworn on 28 June 2016. The Minister filed a statement of opposition, joining issue with the applicant on each of the grounds raised, on 31 March 2017.

Extension of time
15. Mac Eochaidh J granted the applicant leave to seek, among other reliefs, an order granting an extension of time for the issue of these proceedings. In their statement of opposition, the respondents point out that the proceedings were not brought within the statutory time limit set down by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, and are out of time because the IPAT decision of 19 May 2016 was furnished to the applicant under cover of a letter of the following day, whereas the order granting leave was not made until 25 July 2016, strongly suggesting that the application for leave was made well outside the relevant time limit.

16. Section 5, sub-s 2 of the Illegal Immigrants (Trafficking) Act 2000, as substituted by s. 34 of the Employment Permits (Amendment) Act 2014 provides in respect of the judicial review of various types of decision, including, by operation of s. 5(1)(o), a decision of the tribunal under Reg. 8(22)(a) of the 2013 Regulations, that:

> 'An application for leave to apply for judicial review … shall be made within the period of 28 days commencing on the date on which the person was notified of the decision…unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision…is invalid or ought to be quashed.'

17. However, a solicitor representing the applicant swore an affidavit on 26 May 2017, deposing to a number of matters that, the applicant submits, amount to good and sufficient reason for extending time. In short, the decision was received in that solicitor's office on 23 May 2016; the applicant was notified straight away and immediately formed the intention to challenge it if possible; the Whit vacation had not quite concluded; Junior Counsel suggested that the opinion of Senior Counsel be sought on the lawfulness of the decision; proceedings were drafted on 24 June and settled three days later; the applicant swore the grounding affidavit on 28 June and papers were filed in the Central Office the following day; an application was brought before the High Court on 4 July 2016 to 'formally' open the application for leave, without actually doing so (in my view, a dubious practice at best, although an extremely prevalent one); and the matter was then adjourned to the 25 July when it was actually opened before, and heard by, Mac Eochaidh J.

18. Having been apprised of these events, Ms Brett S.C. for the respondents indicated that they adopted a neutral position on an extension of time. The delay in this case was reasonably short and the applicant showed reasonable diligence in seeking access to the court. In granting leave, Mac Eochaidh J has already determined that the applicant meets the substantial grounds test. Thus, following the authority of the decision of the Supreme Court in *C.S. v Minister for Justice* [2005] 1 IR 343, I am satisfied that there is good and sufficient reason for extending the time for making the application for leave in this case and I will order accordingly, granting an extension of time up to the 25 July 2016, the day on which the application was made to Mac Eochaidh J.

Grounds of challenge
19. In his amended statement of grounds, the applicant enumerates the following three grounds upon which the IPAT decision is unlawful:

> (a) the tribunal erred in law in holding that local failures in state protection do not amount to a failure by the state as a whole;
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> (b) the tribunal engaged in selective use of country of origin information, resulting in an unreasonable or irrational decision; and
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> (c) the tribunal erred in law in failing to apply the correct test for assessing the availability of state protection as set out in Reg. 16(1) of the 2013 Regulations.

Analysis
i. an error of law in respect of state protection?

20. Reg. 16(1) of the 2013 Regulations, which deals with 'actors of protection' and which is an almost literal transposition of Art. 7(1) and (2) of Council Directive 2004/83/EC ('the Refugee Qualification Directive'), provides:

> 'Protection against serious harm shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the

territory of a state to prevent the suffering of serious harm, including by the operation of an effective legal system for the detection, prosecution and punishment of acts constituting serious harm, where the applicant has access to such protection.'

21. The applicant submits that the tribunal made a fundamental error of law when it noted in the decision under challenge that 'local failures of state protection do not amount to a failure by the state as a whole.' The applicant, who cites no authority contrary to this proposition, criticises the tribunal for citing no authority in favour of it, nor any logical reasoning in support of it. Thus, the issue is presented to this Court as though it were an issue of first impression. Of course, it is not.

22. The authors of the English text Jorro and Symes, *Asylum Law and Practice*, 2nd edn., (2010) state (at para. 5.4):

> 'Mere localised failures of protection will not necessarily be of sufficient gravity for the international community's responsibility to be engaged.'

23. The footnote that accompanies that proposition lists extensive supporting authority from both the United Kingdom and Canada. To take one example, in *Zhuravlvev et al v Canada (Minister of Citizenship and Immigration)* (IMM-3603-99, April 14, 2000), (approved by Dawson J in *Khaioutine v Canada (Minister for Citizenship and Immigration)* (IMM-2067-99; 9 June 2000), Justice Pelletier in the Federal Court of Canada observed:

> '…when the agent of persecution is not the state, the lack of state persecution has to be assessed as a matter of state capacity to provide protection rather than from the perspective of whether the local apparatus provided protection in a given circumstance. *Local failures to provide effective policing do not amount to lack of state protection*. However, where the evidence, including the documentary evidence situates the individual claimant's experience as part of a broader pattern of state inability or refusal to extend protection, then the absence of state protection is made out.'
>
> (emphasis supplied)

24. In addition to the authorities cited in Jorro and Symes, more recently, *in Mari Cruz Hernandez Fuentes v Canada (Minister of Citizenship and Immigration)* 2010 FC 119 (at [13]), Justice Pinard stated:

> '*The law is now settled that local failures to provide effective policing do not amount to a lack of state protection*, and that an applicant may seek redress and protection from protection agencies other than police.'
>
> (emphasis supplied)

25. The applicant refers the Court to paragraph 65 of the United Nations High Commissioner for Refugees ('UNHCR') *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (1979, reissued in 2011) ('the UNHCR Handbook'), which is most apposite. It states under the heading *'(g) Agents of persecution':*

> '65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'

26. In *V.Z. v Minister for Justice* [2002] 2 I.R. 135, the Supreme Court (per McGuinness J., Keane C.J., Denham, Murphy and Murray JJ. concurring) endorsed the use of the UN Handbook as an aid to the interpretation of the United Nations Convention relating to the Status of Refugees 1951 ('the Geneva Convention'), and in *A.N. v Minister for Justice* [2008] 2 IR 49 (at 63 *et seq*) the Supreme Court applied that approach.

27. The relevant sentence in the IPAT decision reads much more obviously in a way consistent with the guidance just quoted from the UNHCR Handbook than in one conflicting with it. In the same paragraph as that in which the sentence appears, 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. The tribunal also found that there were instances where the High Court [of Bangladesh] had denounced attacks against Hindus and situations where the police have intervened and arrested perpetrators in such attacks. I cannot accept that, in the midst of laying out those findings, the tribunal paused to state, as the applicant would contend, that they were in effect superfluous because the tribunal had had formed the erroneous view that failures of local protection do not *in any circumstances* amount to a failure of state protection overall.

28. The applicant's argument on this point is based on a strained or over-literal reading of the relevant sentence in the IPAT decision as importing just such a meaning, i.e. that local failures of state protection do not *in any circumstances* amount to a failure of state protection overall, rather than that they do not necessarily amount to such a failure. Construing the relevant comment in context, I am quite satisfied that the latter meaning is the one that the tribunal intended to convey, as it is far more obviously in keeping with all of the authority to which I have just made reference. As Peart J observed in *G.T. v Minister for Justice, Equality and Law Reform* [2007] IEHC 287, (Unreported, High Court, 27th July, 2007), in the slightly different context of the assessment of an applicant's credibility by the tribunal:

> 'It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon have been clearly misunderstood or mis-stated by the decision maker. The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion.'

29. I do not believe that, on a reasonable construction of the relevant sentence in the IPAT decision in the wider context of the paragraph in which it appears, it demonstrates that the tribunal mis-stated or misunderstood the law or, more fundamentally, that the tribunal misapplied it.

30. Thus, I reject the applicant's argument that the IPAT decision contains the error of law that he asserts.

ii. selective use of country of origin information?

31. In the following well-known passage from the judgment of this Court *in D.V.T.S. v Minister for Justice* [2008] 3 I.R. 477 (at 496-7), Edwards J stated:

> '43. The courts attention was drawn to the decision of the High Court in O*.A.A. v. Refugee Appeals Tribunal* [2007] IEHC 169 (Unreported, High Court, Feeney J., 9th February, 2007) wherein it stated:-
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> > "As pointed out by the High Court (Herbert J.) in *Kvaratskhelia v Refugee Appeals Tribunal* [2006] IEHC 132, (Unreported, High Court, Herbert J., 5th May, 2006) 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. The Tribunal member correctly identified that the obligation was on the applicant to provide clear and convincing evidence of the State's inability to protect. This was not a situation of a 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 such rebuttal required clear and convincing evidence."

44. In this particular case the applicant did provide evidence to the Tribunal of the State's inability to protect. I have just rehearsed some of it. The second named respondent asserts in his ruling that he had regard to all of the relevant facts. However, the country of origin information before him contained conflicting information. He gives no indication as to how, or on what basis, he resolved the conflicts in the information before him. Moreover, he gives no indication as to the basis on which he elected to prefer the apparently anecdotal accounts of certain interviewees quoted in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission report on Cameroon 2004. While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis. The difficulty in the present case is that the second named respondent firstly, does not allude to the fact that the information is conflicting and secondly, does not give any indication as to why he was inclined to prefer the information contained in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission Report 2004 to that contained in the reports submitted by or on behalf of the applicant.'

32. Perhaps understandably, the applicant seeks to argue that the manner in which the tribunal addressed the country of origin information in this case amounted to a failure to acknowledge and resolve conflicts within it on a reasoned basis, rather than a failure to weigh its contents concerning attacks on religious minority communities after elections in areas known to be vulnerable to determine whether it amounted to clear and convincing evidence of a complete breakdown of law and order sufficient to rebut the presumption that the state concerned was capable of protecting its citizens.

33. However, the applicant has identified no significant conflict in the country of origin information; rather, he seeks to criticise the tribunal for what he asserts was its failure, in making reference to a particular paragraph of an NGO report, to put it in what he claims was its proper context. That is an argument about the significance, or weight, of that evidence. It is not an argument about a failure to acknowledge the existence of conflicting evidence or to explain in a reasoned way the basis for its rejection.

34. For that reason, I am satisfied that it was open to the tribunal to come to the view that it did on the evidence before it. I am further satisfied that, in its assessment of the country of origin information, the decision of the tribunal was neither irrational nor unreasonable, applying the test for invalidity recognised by the Supreme Court in *Meadows v Minister for Justice* [2010] 2 IR 701.

iii. the application of the wrong test for state protection?

35. The test for effective state protection contained in Reg. 16(1) of the 2013 Regulations, transposing Art. 7(1) and (2) of the Refugee Qualification Directive, has already been set out at paragraph 20 of this judgment.

36. Once again, the applicant isolates a single sentence from the IPAT decision as the basis for his argument, in this instance, that the tribunal applied the wrong test. The sentence concerned, already quoted in a longer extract from the IPAT decision set out earlier in this judgment, is: 'Violence against the Hindu population cannot be said to be carried out with the tacit consent of the [s]tate.' The applicant submits that this represents the application of the wrong test.

37. I am quite satisfied that in the single sentence from the IPAT decision the applicant relies on, the tribunal was not assaying an alternative (and incorrect) test for the availability of effective state protection. It was addressing the implicit, if not explicit, contention of the applicant that the widespread localised failures to protect members of the Hindu community, particularly at election times, that were evident from the country of origin information before the tribunal, amounted to a failure to meet the requirements for effective state protection under Reg. 16(1) of the 2013 Regulations on the basis that there had been a failure by the state to prevent serious harm, by failing to operate an *effective* legal system for the detection, prosecution and punishment of acts constituting serious harm. In effect, the tribunal was applying the dictum from the decision of Justice Pelletier for the Federal Court of Canada in *Zhuravlvev*, already cited, that the issue is one of state capacity to provide protection, rather than whether the local apparatus provided protection in a given circumstance, while acknowledging that, where a broader pattern of state inability or refusal to extend protection is established, then the absence of state protection is made out.

38. Finally, the applicant suggests that the tribunal failed to lay a sufficient evidential basis for its conclusion that violence against Hindus is not carried out with the tacit support of the state in Bangladesh. With respect, that is an inversion of the burden and standard of proof. The tribunal states that it based its conclusion on the very extensive country of origin information that was before it. The applicant does not contend, as far as I am aware, that the tribunal disregarded any of that information. If he did, then, as the Supreme Court pointed out in *G.K. & Ors v Minister for Justice, Equality and Law Reform & Ors* [2001] IESC 205 (Unreported, Supreme Court (Hardiman J; Denham and Geoghegan JJ concurring), 17th December, 2001), he would have to produce some evidence, direct or inferential, of that proposition before he could be said to have even an arguable case.

39. 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.'

40. Thus, the applicant has failed to persuade me that the tribunal applied the wrong test or that it wrongly disregarded the evidence concerning the availability of effective state protection.

Conclusion
41. I refuse the application.