Neutral Citation [2015] IEHC 472

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 395 J.R.]

BETWEEN

K.M.A (ALGERIA)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 16th day of July, 2015

1. This is a telescoped hearing of an application for an order of *certiorari* quashing the decision of the first named Respondent which affirmed the recommendation of the Refugee Applications Commissioner that the Applicant should not be declared a refugee.

2. The Applicant is an Algerian national who entered the State on the 4th June 2013. Following his arrival in the State, the Applicant made an application for refugee status at the Office of the Refugee Applications Commissioner and was issued with an ASY1 Form at the time of his application. He subsequently completed an application for refugee status questionnaire. He attended for interview on the 11th July 2013 with the Office of the Refugee Applications Commissioner and by letter dated the 8th August 2013 the Applicant was notified of the decision of the Office of the Refugee Applications Commissioner to refuse his application for refugee status. By letter dated the 26th August 2013 Messrs Sinnott Solicitors submitted a notice of appeal form and on the 27th February 2014 Messrs Sinnott Solicitors wrote to the first named Respondent enclosing copies of three documents in respect of which no translations were on file. Further on the 28th February 2014 the Applicant's solicitors submitted to the first named Respondent country of origin information reports and detailed submissions.

3. The Applicant's appeal before the first named Respondent proceeded on the 4th March 2014 and on the 29th May 2014 the first named Respondent affirmed the recommendation of the Refugee Applications Commissioner that the Applicant would not be declared a refugee. She confirmed that no negative credibility findings were reached by the first named Respondent in respect of the Applicant's core claim. The first named Respondent accepted the Applicant's account of his past experiences in Algeria giving rise to the ill treatment suffered but also accepted that such treatment was sufficiently serious by its nature to constitute persecution as defined under Regulation 9(1) of S.I. 518 of 2006 (Eligibility for Protection) Regulations 2006. The first named Respondent reached the finding that State protection must be considered as not available with the qualification "at least in relation to this particular locality". The first named Respondent then proceeded to make a recommendation in the matter of internal relocation and made a finding that the Applicant would not be at risk of persecution in Algiers and in the circumstances it would not be unreasonable for him to locate there. These proceedings were originated on the 10th July 2014 and among the reliefs sought was an application to extend time which was not opposed, correctly, by the Respondents. This case came by way of hearing before this court on the 3rd July, 2015.

4. The grounds upon which reliefs were sought were on three grounds:-

> (1) The adverse conclusions reached by the first named Respondent in respect of the matter of the Applicant's fear of a failed asylum seeker were an error of law and fact and/or unreasonable and/or in breach of s. 16(16) of the Refugee Act 1996 and/or failed to consider relevant information.
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> (2) Ground two raised the issue that the first named Respondent having accepted the Applicant's credibility and his account of his past experiences to which he was espoused which emanated from the state of Algeria and/or its agents, the first named Respondent erred in law, failed to apply established refugee law principles and/or to have regard to the UNHCR Guidelines on International Protection "Internal Flight or Relocation Alternative" by considering in the assessment conducted concerning the matter of internal relocation.
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> (3) The findings reached by the first named Respondent with regard to internal relocation and in particular the finding that the Applicant would not be at risk of persecution if internally relocating is unreasonable and internally illogical and not supported on an adequately reasoned basis in particular in the light of the earlier finding that the first named Respondent made with respect to the lack of state protection against a fear from state authorities in the Applicant's home location.

The decision of the first named Respondent

5. The decision of the first named Respondent is a very clear and well articulated analysis of the claim and the use by the first named Respondent of the numbered paragraphs was particularly helpful. In her introduction she set out the position of the Applicant and said that his claim is based on his fear of being subjected to discrimination and ill treatment at the hands of state and/or non state agents arising from societal attitudes towards Berbers by the Algerian majority. He also fears being subjected to ill treatment based on his imputed political opinion by virtue of his alleged or perceived opposition to the aims and purpose of the Judicial Police Mobile Brigade (BMPJ) as well as based on his status as a failed asylum seeker.

6. Under the heading "Case Facts and Documents" the first named Respondent stated that the Applicant's ethnic origin is Berber and he comes from the Kabylie region in northern Algeria. His father passed away in 1990 and subsequently he was living with his mother and siblings in Tigzirt. He and his family members were discriminated against based on their ethnic origin and were left particularly vulnerable after their father's death, following which the local police brigade put pressure on them to leave their house which was located directly beside the BMPJ barracks. They did not receive any realistic option for re-housing and instead were intimidated, including house searches, and a fire being set next to their house on one occasion. His brother, Rabah, was arrested on a number of occasions and held in pre-trial detention, for one year, only to be released without charge. Another brother, Karim, who was a bookseller, was arrested on one occasion for selling a "forbidden book" by a Berber author.

7. The first named names Respondent identified all the documents submitted by the Applicant including some country of origin documentation and submissions dated the 28th February 2014. She noted that all the documentation provided had been fully considered by her.

8. The first named Respondent said that she accepted the Applicant's nationality had been established as Algerian and considered the facts in the claim along with the representations of the parties on the issues. The court then noted that the issue of the analysis of credibility was separately noted again in a most helpful way.

Risk of discrimination based on Berber ethnic origin at school
9. The Applicant claims to have been discriminated against in school because of his involvement with the daughter of a senior police officer and that this discrimination was linked to the fact that he is of Berber ethnic origin and belongs to a family which, unlike the family of his former girlfriend has refused to assimilate with the dominant Arab culture in Algeria. This claim has been consistent and is capable, on the balance of probabilities, of being believed. However it is also noted that he was able after repetition of his second year to finish school and subsequently gained admission to University.

Risk of discrimination based on Berber ethnic origin at University
10. The Applicant reports (supported by copy documents submitted by him to the Tribunal) that he sought a transfer from Mouloud Mammeri University in Tizi-Ouzou to the University of Boumerdes and that same was refused by the receiving University. On the balance of probabilities the first named Respondent accepted that the Applicant was not successful in his attempt to change Universities on the basis of the grounds submitted by him to the University, that is personal reasons and the instability of the level of education at Mouloud Mammeri.

Attempted evacuation of the Applicant's family from their home
11. The Applicant's claim that his family were harassed by members of the local BMPJ in an attempt to get them to relocate away from the vicinity which was located directly beside the local BMPJ barracks, is unsupported by documentary evidence. However country of origin information submitted by the Applicant including a 1999 report from Cultural Survival "Algiers joined Berbers in protest" confirms that at least in the past "many of Algerian Arabs have been unsympathetic to Berbers' demands for linguistic and cultural recognition" and "faced with a stagnant economy, high employment and housing shortages, Arabs have not prioritised Berber concerns over their own". However while it is acknowledged that there had been recent conflicts between Arabs and Berbers in the Algerian city of Ghardaia in the M'zab Valley in the heart of Algerian Sahara which is reported to reflect the inability of the Algerian authorities to "properly manage regional and minority demands amid a declining security situation" . These developments do not appear to have impacted on the overall situation of the Berber ethnic minority which in most recent human rights reports is now described as participating "freely and actively in the political process and represented one third of the government". Whilst this cannot be established with any degree of certainty the first named Respondent said that she accepted that the Applicant grew up in a situation where following the death of his father in 1990 his family including seven children was put under ongoing pressure to vacate their house and that they received repeated threats from members of the local BMPJ in an attempt to force him out of his house. However it is noted that the Applicant confirms that his family continued to live in the same house.

Risk of arrest and ill treatment by the police
12. The Applicant alleges to have been associated with a terrorist group because of his contact with a man called O who now believes to have been an agent working for the police. He claims to have been arrested by the BMPJ on a number of occasions, ten times according to the questionnaire and five to seven times according to the information provided by him at the hearing of the appeal. He was questioned about his connection with O and it was alleged that the Applicant himself was involved in terrorist activities. However at the oral hearing of this appeal the Applicant confirmed that he believed that the police knew that he was not himself involved in any such activity. The Applicant submitted a copy medical certificate and prescription dated the 1st May 2007 confirming that he suffered "a wide, third-degree burn" and this burn was "due to an undetermined factor". This copy certificate has very little probative value regarding an injury suffered by the Applicant seven years ago. However in the light of the country of origin information dating back to 2005, which confirms that "media sources generally report that unrest has been a feature of the Kabylie region since at least 2001, when the death of a Berber youth in police custody triggered political violence across the region" including the Economist Intelligence Unit observing in its January 2004 Political Stability Risk Assessment for Algeria that "simmering unrest with Kabylie's Berber community is likely to continue, since the underlying cause of Kabylie frustration (a lack of jobs, housing and police) are unlikely to be ameliorated in the short term". She also cited an International Crisis Report from 2003 confirming that since 2001 Kabylie in particular have received ill treatment at the hands of security forces and police". She decided on the balance of probabilities to accept that until 2010 the Applicant was arrested for questioning on a number of occasions and ill treated – suffering a third degree cigarette burn to his chest – on one of these occasions.

Risk of persecution as a failed asylum seeker
13. The Applicant states that he would be at risk of persecution, including threats to his life and freedom and threat of torture, compounded by the attitude applied by the ruling regime in Algeria towards failed asylum seekers. In support of this claim he refers to a research report from the Refugee Documentation Centre entitled "Algeria – Problems faced by failed asylum seekers upon return to Algeria" which dated from July 2009. This report makes reference *inter alia*, to UNHCR concerns expressed in a 2004 position paper that "asylum seekers found not to be in need of international protection and returned to Algeria, may face hostile treatment due to the Algerian government's perception that such persons may have been involved in international terrorism" and there is a strong presumption that "such persons may be subject to persecutory treatment upon return. Therefore, the UNHCR continues to emphasise the need to exercise the utmost caution when considering the forced return of rejected asylum seekers to Algeria".

14. The first named Respondent however, referred to more recent country of origin information submitted by the Applicant as part of his appeal which contained more up to date information which confirms that "the government generally cooperates with the UNHCR and other humanitarian organisations in providing protection and assistance to internally displaced persons, refugees, returning refugees, asylum seekers, stateless persons and other persons of concern". This report contains no reference to current human rights concerns regarding asylum seekers returning to Algeria. This quotation is from the US State Department Country Reports on Human Rights Practices for 2012 – Algeria. The second named Respondent found that the Applicant's claim to be at risk of persecution as a failed asylum seeker had been contradicted by more up to date country of origin information than that highlighted in the legal submissions made on his behalf, with regard to this aspect of his claim, and I therefore find his claim in this regard not credible.

Analysis of well-founded fear
15. The first named Respondent said that having determined which material facts of the Applicant's claim are accepted she would now proceed to analyse whether these facts provided a basis for finding that the Applicant's fears are well-founded.

Persecution
16. The arrest and ill treatment in the form of cigarette burns, suffered by the Applicant at the hands of the local BMPJ between 2007

and 2010 are sufficiently serious by their nature to constitute persecution as defined under Regulation 9(1) of the Protection Regulations 2006.

17. The discrimination suffered by the Applicant while in secondary school between 2003 and 2006 was not to the level of a substantially prejudicial nature for the Applicant in his access to normally available educational facilities. It was not restricted on an ongoing basis and he was not only able to finish secondary school but also subsequently admitted to University. Furthermore, while it is recognised that discrimination may give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned a feeling of apprehension and security as regard his future existence, this cannot be said in relation to the Applicant who, following completion of his secondary education, was admitted to University without, as he confirmed at oral hearing of this appeal, being discriminated against based on his Berber ethnic background.

18. Similarly, the first named Respondent stated that she did accept that the Applicant's family – following the death of his father in 1990 – was put under ongoing pressure to vacate their house and that they received repeated threats from members of the local BMPJ in an attempt to force them out of their home, the fact that the family – as confirmed by the Applicant at the oral hearing of this appeal – remains in their house more than 20 years later, confirms that any measures taken against the family did not lead to consequences of a substantially prejudicial nature that would have seriously restricted their right to a home. The treatment of the Applicant in this regard was therefore not sufficiently serious to constitute persecution as defined under Regulation 9(1) of the Protection Regulations 2006.

Nexus to Convention grounds
19. The first named Respondent said that she had considered whether the persecution feared by the Applicant should he return to Algeria has a nexus to Convention grounds. The Applicant set out that he believes that the arrests and ill treatment he suffered at the hands of the local BMPJ was based on his ethnic origin as a Berber in Algeria. She stated that the definition of "race" contained in s. 2 of the Refugee Act 1996 (as amended) has to be understood in its widest sense to include all kinds of ethnic groups and the Applicant's ethnic background therefore provides a nexus to the Convention.

State Protection
20. The first named Respondent stated that she had considered whether state protection would be available to the Applicant if he returned to Algeria. She stated that, on the evidence before her, she found that the Applicant's claim is based on his fear of persecution by members of the local BMPJ in Tigzirt and stated that state protection must be considered as not available at least in relation to this particular locality (the court's emphasis).

Internal Protection alternative
21. The first named Respondent said that she had considered whether a viable internal protection alternative existed for the Applicant and said that this issue was raised with him at the hearing of the appeal. She stated that on the evidence before her she found there was no serious possibility of the Applicant being persecuted in the city of Algiers and the location is practical, safe and legally accessible to the Applicant. Her reasons for reaching this conclusion are that the Applicant, as confirmed by him at the oral hearing of the appeal, had already lived and worked in Algiers for one month without the police following him there or encountering any other difficulties. While the Applicant clarified he was not working "legally" and that therefore there would be no record of him being in Algiers, he also confirmed that following his return to Tigzirt, members of the local BMPJ indicated that they were aware of his whereabouts. Further the Applicant also confirmed he was not followed to Tizi-Ousou where he was in University from 2009 to the time he left Algeria in 2011.

22. The first named Respondent stated that having found that there was no serious possibility of persecution in Algiers, the issue then became whether it would be unreasonable for the Applicant to seek refuge there. She stated that having considered the conditions in Algiers, and all the circumstances of this case including those particular to the Applicant, in particular the fact that he had lived and worked there already, she found that it is not unreasonable for him to seek refuge in Algiers. She continued that the Applicant had submitted that on the basis of the compelling nature of the prior persecution suffered by him, he should be granted refugee status without recourse to the forward looking nature of the test, as provided for in Regulation 5(2) of S.I. 518 of 2006 and she considered whether compelling reasons arose in this case. She stated that given the nature of the persecution suffered in the past, as documented in this decision, she is of the view that it does not reach the threshold of being so atrocious – also when compared to the facts of the previous RAT decision submitted in this regard- that returning the Applicant to Algeria would be wrong and therefore she finds that compelling reasons do not arise in the claim. For that reason she affirmed the recommendation of the Commissioner that the Applicant not be declared a refugee.

Submissions by counsel for the Applicant
23. Counsel for the Applicant, Ms Eve Bourached BL, dealt firstly with the internal relocation assessment and referred to the UNHCR Guidelines "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and of the 1967 Protocol relating to the Statute of Refugees published on the 23rd July 2003. The UNHCR Guidelines, this court notes, are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

24. Counsel for the Applicant quoted para. 13 and 14 of the Guidelines. Paragraph 13 states:-

> "The need for an analysis of internal relocation only arises where the fear of being persecuted is limited to a specific part of the country, outside of which the feared harm cannot materialise. In practical terms, this normally excludes cases where the fear of persecution emanates from or is condoned or tolerated by the state agents, including the official party in one party states, as these are presumed to exercise authority in all parts of the country. Under such circumstances the person is threatened with persecution countrywide unless exceptionally it is clearly established that the rest of the persecution stems from an authority of the state whose power is clearly limited to a specific geographical area or where the state itself only has control over certain parts of the country."

25. Paragraph 14 then states:-

> "Where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a state it will be rarely necessary to consider potential relocation as it can generally be presumed that such local or regional bodies derive their authority from the state. The possibility of relocating internally may be relevant only if there is clear evidence that the prosecuting authority has no reach outside its own region and that there are particular circumstances to explain the national governments' failure to counteract the localised harm".

26. Counsel for the Applicant submitted that the only starting position with respect to the matter of internal relocation is that same

can only be a relevant consideration where the state does not play a part in the prosecution treatment of an asylum Applicant. She referred to the decision of *B.P. v. Minister for Justice Equality and Law Reform & Anor* [2003] 4 I.R. 220 and Counsel referred to the following quotation from Gilligan J.:-

> *"The apparent absence of any comparison between conditions in the Applicant's place of habitual residence and conditions in any proposed place of internal relocation indicates an arguable case that the Refugee Appeals Tribunal failed to assess whether the Applicant's fear of persecution would be well-founded were he to internally relocate: it is therefore arguable that the second Respondent did not apply the objective limb of the test for refugee status as required. In particular, the Applicant complains of persecution by the police: it appears from the decision that the second Respondent paid insufficient regard to the reality that internal relocation is generally not an alternative to refugee status where the persecution complained of emanates from the State."(It is noted that this decision pre-dates the Protection Regulations).*

27. Counsel for the Applicant further submitted that the first named Respondent had acted in breach of Regulation 7 of S.I. 518 of 2006 and reached findings which were unreasonable and internally illogical. She stated that the Regulation requires the appeal adjudicator if considering the matter of internal relocation to:-

> (1) Identify as a proposed area of relocation as part of the Applicant's country of origin.
>
> (2) To determine that there is no risk of persecution in the identified place.
>
> (3) To determine that the Applicant can reasonably be expected to stay in that identified place.
>
> (4) Having regard to the general circumstances prevailing in that identified place in making the said determination.
>
> (5) Having regard to the personal circumstances of the Applicant in making the said determination.

28. Regulation 7 provides as follows:-

> *"7. (1) As part of the assessment of protection needs, a protection decision maker may determine that a protection Applicant is not in need of protection if the Applicant can reasonably be expected to stay in a part of his or her country of origin where there is no well-founded fear of being persecuted or real risk of suffering serious harm.*
>
> *(2) In examining whether a part of the country of origin accords with paragraph (1), the protection decision-maker shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the Applicant."*

She referred to the judgment of the High Court in *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481. In that judgment Clark J. set out a number of principles that could be said to apply to an assessment of the internal relocation alternative. Counsel for the Applicant quoted in particular the fourth principle headed "*Localised Risk*":-

> *"Where it is accepted that an Applicant has a well-founded fear of persecution for Convention reasons but that fear is localised and confined to a particular area, it is relevant to consider the possibility of internal relocation as an alternative to refugee status. In such cases, Regulation 7(1) of the Protection Regulations requires the protection decision maker to identify (if only in general terms) a place or area within the country of origin where the risk of persecution does not exist and where the Applicant might reasonably be expected to stay. Security from persecution or serious harm and meaningful state protection in the proposed area of relocation are key."*

29. Counsel for the Applicant stated that these principles make it clear that the cornerstone of any assessment of internal relocation is a consideration of the risk of persecution in a nominated internal relocation site before in turn considering whether it is reasonable in all the circumstances to require an Applicant to relocate there to avoid persecution. She submitted that the first named Respondent reached his findings in respect of the likelihood of the Applicant being persecuted in Algiers and the reasonableness of him seeking refuge there to avoid persecution without properly or adequately determining the relevant matters which fall for consideration in this connection. She argues that the risk of persecution and the reasonable test in respect of Algiers were flawed.

30. She further argued that where a protection adjudicator has accepted a well-founded fear of persecution and seeks to find internal relocation to be a viable option, he/she carries a shared burden with the Applicant and he/she must ensure a careful inquiry is carried out in respect of any proposed relocation site. She further submitted that where the persecution feared emanates from the State (whether at a localised level or otherwise) the burden of proof shifts entirely and exclusively to the protection adjudicator. No authority for this submission however was provided to the court.

31. Counsel also referred to the Michigan Guidelines in Internal Protection Alternative, which is a report of colloquium on the challenges in international refugee law convened by the programme in refugee and asylum law at the University of Michigan Law School in 1999. In particular, counsel quoted para. 12 of the paper as follows:-

> "The first question to be considered is therefore whether the asylum-seeker faces a well-founded fear of persecution for a Convention reason in at least some part of his or her country of origin. This primary inquiry should be completed before consideration is given to the availability of an 'internal protection alternative'. The reality of internal protection can only be adequately measured on the basis of an understanding of the precise risk faced by an asylum-seeker."

And at para. 15:-

> " First, the 'internal protection alternative' must be a place in which the asylum-seeker no longer faces the well-founded fear of persecution for a Convention reason which gave rise to her or his presumptive need for protection against the risk in one region of the country of origin. It is not enough simply to find that the original agent or author of persecution has not yet established a presence in the proposed site of internal protection. There must be reason to believe that the reach of the agent or author of persecution is likely to remain localized outside the designated place of internal protection."

32. Counsel for the Applicant further referred the court to the summary conclusions- Internal Protection/Relocation Flight Alternative, which was an expert round table organised by the UNHCR at the International Institute of Humanitarian Law in San Remo, Italy. One of the summary conclusions was:-

> "Where the risk of being persecuted emanates from the state (including the national government and its agents) international protection, international relocation and flight alternative is not normally a relevant consideration as it can be presumed that the state is entitled to act throughout the country of origin. Where the risk of being persecuted emanates from local or regional governments within that state internal relocation may only be relevant in some cases as it can generally be presumed that local or regional governments derive their authority from the national government."

Counsel for the Applicant describes that where an asylum Applicant has suffered persecution emanating from the state the default position is that internal relocation is not an alternative to refugee status. Counsel referred the court to the US case of *Abdel-Masieh v. INS* 73 F. 3d 579 and in particular to the following paragraph:-

> *"We hold that the BIA (Board of Immigration Appeals) erred in finding no reasonable likelihood of persecution on the theory that Abdel could escape persecution by living in southern Sudan where Christians were in the majority. The immigration judge sua sponte reached the above conclusion that Abdel could probably live in safety in southern Sudan after the deportation hearing was concluded. The INS had not previously raised this issue and Abdel had no opportunity to address it during the hearing Furthermore, there is no substantial evidence in the record to support the BIA in holding that Abdel failed to establish a likelihood of persecution on a country-wide basis."*

Further Circuit Judge Garwood said:-

> *"We have recognized that where there was a danger of persecution in a single village from guerillas who knew the petitioner, and no showing of such danger elsewhere in the country, the petitioner failed to establish eligibility for asylum."*

33. Counsel for the Applicant raised two further issues, that the first named Respondent was required in her assessment to have regard to the Applicant's status if returned to Algeria as a failed asylum seeker and bases her submissions in this regard on country of origin information. The first named Respondent rejected same on the basis of more up to date country of origin information. The original documentation was country of origin information from the Refugee Documentation Centre of July 2009. The report, according to the first named Respondent, makes reference to UNHCR concerns expressed in a 2004 position paper as the more recent country of origin information submitted by the appellant was US State Department Country Reports on Human Rights Practices for Algeria in 2012. Counsel submitted that the first named Respondent had wholly misconstrued and misinterpreted the content of the US DOS country report. She submitted that this section does not purport to deal with any matters concerning returning failed asylum seekers.

34. In conclusion, she mentioned the decision of Faherty J. in *N.B.. & Anor v. Minister for Justice Equality and Law Reform & Ors* [2015] IEHC 267 in the context of his being a Berber. She quoted Faherty J. at para. 57 where she the learned judge stated:-

> *"The effect of the past persecution on the first named Applicant was set out in the medical and other reports and this was a specific factor which should have been alluded to in the context of determining the efficacy of the internal relocation option for her."*

Submissions of counsel for the Respondent

35. Although not opened to the court, the first submission made in written submissions by the counsel was a breach of Practice Direction HC56-Judicial Review Asylum Immigration and Citizenship and I take the complaint to be of para. 20 of the Practice Direction:-"Save for exceptional cases, outline submissions in Pre-Leave cases should not exceed four A4 pages and in Post-Leave cases should not exceed six A4 pages". I am assuming that the complaint related to the Applicant's written submissions which ran to 12 pages. This court also has an issue with regard large files containing substantial volumes of country of origin documentation where these documents should be separately bound from the statement of grounds and particular passages relied on should be highlighted.

36. Counsel on behalf of the Respondent cited Regulation 7 of the Qualifications Regulations and also brought the court's attention to the general principles set out by Clark J. in *K.D.* (supra) in relation to localised risk. Ms Stack SC (with Mr O'Connor BL) submitted that the Applicant's submissions were based in their entirety on the premise that internal relocation can never be considered where it is found that the agents of persecution are state agents and that any such consideration in and of itself renders a decision unsafe. Counsel argued that this was an error of law and that, in the authorities cited by the Applicant, every court admits that their circumstances, where internal relocation can be considered are where the agents of persecution are state agents.

37. Counsel submitted that the correct position is that there is a presumption that internal relocation will not be a viable option where the agents of persecution are state actors and such presumption may be rebutted by evidence that the agents in question act locally and the persecution is localised meaning that such persecution will not follow the person should they relocate internally and counsel quoted the UNHCR Guidelines:-

> "The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national governments failure to counteract the localised harm."

38. Counsel for the Respondent referred to the Applicant's own evidence that he had internally relocated in Algiers on more than one occasion to at least two separate locations (Algiers and Tizi-Ouzu) and faced no persecution from state actors in those new locations as was raised with and confirmed by the Applicant. Counsel further submitted that the clear evidence was that the persecuting authority, the BMPJ, while aware of his relocation, had not acted outside of the Applicant's home region and that there was no action taken against the Applicant by them in Algiers, the suggested relocation site.

39. Counsel also indicated that the law in Ireland was as stated in S.I. 518 of 2006 (European Communities (Eligibility for Protection) Regulations 2006) and that the UNHCR Guidelines were not binding on the first named Respondent.

40. Counsel for the Respondent also addressed the issue of burden of proof and initially said that by operation of s. 11 A(3) of the Refugee Act 1996 (as amended) it was for an Applicant to show that he or she is a refugee. The burden of proof rests on the Applicant to show he is entitled to a declaration of refugee status and suggested that the comments of Clark J. in *K.D.* (supra) in respect of shared burden of proof in relation to internal relocation must be read in this light as referring to a shared inquiry and referred to principle 10 of the principles set out by Clark J. under burden of proof:-

> *"There is a shared burden of proof. The protection decision-maker who accepts a well-founded fear of persecution but determines that refugee status is not appropriate because internal relocation is available must conduct a careful enquiry*

to identify a safe relocation area, having regard to up-to-date objective evidence about that area and also to the Applicant's own evidence in that regard."

41. Counsel for the Respondent submitted that having regard to the full comments of the learned judge, that in this context "burden of proof" refers to a shared evidential burden in carrying a careful inquiry, rather than a shared legal burden of proof.

42. In respect of a failed asylum seeker that this ground was entirely misconceived, the Applicant, by prosecuting an appeal to the Refugee Appeals Tribunal was not a failed asylum seeker but an asylum seeker. The person seeking asylum on the grounds that he or she will be persecuted as a failed asylum seeker is seeking asylum on a basis that can only arise if that asylum application is refused.

43. Counsel also indicated that Michigan Guidelines, although interesting, were not binding on the first named Respondent, nor were the summary conclusions on international protection organised by the UNHCR for refugees binding on the first named Respondent.

44. Counsel on behalf of the Respondent indicated that the Applicant's submissions in regard to internal relocation were considered by the first named Respondent.

Discussion
45. The judicial review process does not specifically consider the merits of a particular decision but rather the means by which that decision has been reached. Judicial review is not concerned with the decision but with the decision-making process. Judicial review remedies are therefore available in a number of circumstances:-

(1) The Applicant has not been afforded fair procedures.

(2) The decision-making body has acted unreasonably.

(3) The decision-making body has acted in excess of its jurisdiction.

In the case of *Rawson v. The Minister for Defence* [2012] IESC 26 a judgment of Clarke J. it was stated:-

"While the circumstances in which a decision made by a public person or body may be found to be unlawful are varied, it is possible to give a non-exhaustive account of the principal bases by reference to which such a finding might be made. First, the decision must be within the power of the person or body concerned. Second, the process leading to the decision must comply both with fair procedures and with whatever procedural rules may be laid down by law for the making of the decision concerned. Third, the decision maker must address the correct question or questions which need to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence."

It continued:-

"There may, of course, be many variations or additions to that very broad description of the matters that need to be assessed in order to decide whether a decision affecting rights and obligations has been lawfully made. However, it seems to me that a party faced with a decision which affects their rights and obligations must be entitled to assess whether they have a basis for challenging the lawfulness of the decision in question. The courts have consistently held that it is an inherent part of the judicial review role of the courts that parties need to know enough about the process and the decision which affects them to be able to mount a challenge to that decision on the grounds of unlawfulness in an appropriate case."

46. Clarke J. then referred to *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 and continued:-

"Sometimes, of course, the process itself will provide for an appeal. It has consistently been held that parties who have a right of appeal within a process are entitled to sufficient information to enable them to consider, and if appropriate to mount, such an appeal."

47. Clarke J. also referred to *Meadows v. The Minister for Justice Equality and Law Reform* [2010] 2 IR 701 and quoted Murray C.J. (as he was then) in which he said that failure to supply sufficient reasons would affect the Applicant's "*constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective*".

48. Clarke J. then stated:-

"As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness."

49. It appears to this court, reading the decision of the first named Respondent, that the clarity of reasoning which is sought by the jurisprudence mentioned appears in the decision of the first named Respondent. I am satisfied that her analysis is clear.

50. In 2006, the then Minister for Justice Equality and Law Reform set out Regulations in the form of S.I. 518 of 2006, the European Communities (Eligibility for Protection) Regulations 2006. These set of Regulations were for the purpose of giving effect to Council Directive 204/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted. These Regulations, coupled with the Refugee Act 1996 (as amended) form the basis of the legal obligations and framework for protection decision-makers.

51. Regulation 7 deals with internal protection and has been quoted above. Whilst the UNHCR Guidelines on "Internal Flight or Relocation Alternative" are very useful guidelines to protection decision-makers they are not binding on the protection decision-maker. It is also clear that the Michigan Guidelines while again a helpful aid for a protection decision-maker are not binding on that protection decision-maker. This also applies to the expert round table organised by the UNHCR in San Remo in 2001.

52. The head note of the decision of *B.P. v. The Minister for Justice Equality and Law Reform & Anor* [2003] 4 IR 2000 notes the decision of Gilligan J. :-

> *"That the Applicant had established substantial grounds for contending that the second Respondent failed to undertake any detailed consideration of whether the risk of the Applicant facing persecution extended to any of the other areas of Georgia to which it was proposed that the Applicant ought to have internally relocated."*

However the first named Respondent in this case clearly undertook a very detailed consideration of whether the risk of the Applicant facing persecution extended to other areas of Algeria. She raised this issue with the Applicant and in the first place the internal relocation alternative should only be considered where there are no issues of credibility and in this case, as counsel for the Applicant stated, the first named Respondent found no issues with regard to the credibility of the Applicant. Clark J. in K.D. (*supra*) at rule 9 states:-

> *"The UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative (2003) indicate that consideration should be accorded to whether the applicant could lead a relatively normal life in the selected place of relocation without undue hardship, in the context of the country concerned. Unless there is objective evidence that the general circumstances prevailing in the proposed area are harsh – for example if the proposed area is the site of a conflict or a humanitarian crisis – there is in general no obligation to seek out a specific town or detailed information on economic and social conditions in the proposed location. However, if a specific objection is taken by the applicant to the location this objection must be examined."*

53. It is clear that the first named Respondent carried out such an exercise in relation to burden of proof and Clark J. at rule 10 stated:-

> *"There is a shared burden of proof. The protection decision-maker who accepts a well-founded fear of persecution but determines that refugee status is not appropriate because internal relocation is available must conduct a careful enquiry to identify a safe relocation area, having regard to up-to-date objective evidence about that area and also to the applicant's own evidence in that regard."*

54. There is no suggestion in Clark J.'s judgment that the burden of proof shifts to the decision-maker solely, at any stage.

55. The emphasis of Clark J.'s decision is the requirement for careful inquiry into a safe location and I am satisfied that the first named Respondent conducted such an inquiry.

56. Counsel for the first named Respondent raised the issue of the Applicant's fear of the failed asylum seeker documentation which was provided by the Applicant, in which it was clear that the UNHCR were satisfied with the Algerian government's treatment of all refugees, internally displaced persons, returning refugees and asylum seekers.

57. The role of this court is not the function of the High Court in judicial review to substitute its own view for that of the decision-maker. I am satisfied that the first named Respondent carried out her statutory obligations in a fair and reasonable way, that each of her decisions were reasoned, that the Applicant had been afforded fair procedures and in the words of Clark J. "*each of the parties within the process were given sufficient information to enable them to consider an appeal*".

58. In those circumstances I refuse the application for *certiorari* as sought by the Applicant in the notice of motion.

Counsel for the Applicant, Ms Eve Bourached BL, instructed by Ms. Ring of Sinnotts Solicitors

Counsel for the Respondents, Ms Stack SC and Mr O'Connor BL, instructed by the Chief State Solicitors Office.