**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 160 JR]**

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED BY SECTION 34 OF THE EMPLOYMENT PERMITS (AMENDMENT) ACT 2014)**

**AND IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)**

**BETWEEN**

**B.A. AND C.A. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND B.A.)**

**AND D.A. (AN INFANT SUING BY HER MOTHER AND BEST FRIEND B.A.)**

**AND**

**MARK BYRNE SITTING AS THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL**

**JUDGMENT of Mr Justice David Keane delivered on the 27th January 2017**

**Introduction**

1. This is a challenge to the decision of the International Protection Appeals Tribunal ('the IPAT'), pursuant to s. 16 (2) of the Refugee Act 1996, as amended, to affirm the recommendation that the applicants should not be declared to be refugees. The decision was made on the 26th February 2016.

2. On the 14th March 2016, the applicants were given leave to apply for an order of *certiorari* quashing the decision on a single ground. That ground is that the respondent applied an incorrect test when considering whether there are compelling reasons arising out of the applicants' previous persecution that warrant a determination that they are eligible for protection as refugees.

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

**Background**

4. In summary, the salient findings in the decision under review are as follows:

(a) The first applicant was then 37 years old and the second and third named applicants, her son and daughter, were 16 and 14 years old respectively.

(b) The applicants' family is the subject of a 'blood feud' in their country of nationality, Albania, and the first applicant's husband (the father of the second and third applicants) has been obliged to confine himself in the family home there since 2010, because, under the custom or convention that governs such feuds ('the Kanun Code'), harming a man in his own home is forbidden, as is harming a woman or child in any circumstance.

(c) There has been past persecution of the applicants, since self-confinement, as a means of escaping a blood feud, is in itself persecution both of the person concerned and, by extension, of that person's close family members.

(d) The applicants have a well-founded fear of harm at the hands of the persons concerned if returned to Albania, which potential harm would amount to persecution.

(e) There is a nexus with one of the reasons for persecution recognised under the *United Nations Convention relating to the Status of Refugees 1951* ('the Geneva Convention') and, in domestic law, under s. 2 of the Refugee Act 1996 ('the 1996 Act'), as amended. That 'Convention nexus' is the applicants' membership of a particular social group. The particular social group in this instance is the applicants' family.

(f) While the picture painted by the available 'country of origin information' ('COI') is not uniform, the more recent and authoritative information is that adequate state protection would be available to the applicants were they to return to Albania.

(g) Having found that the applicants have already been subjected to persecution, but also that there is good reason to consider that such persecution will not be repeated if they are returned to Albania because of the existence of adequate state protection there, there are no compelling reasons arising out of that previous persecution that nevertheless warrant a determination that the applicants are eligible for protection as refugees.

**Regulation 5(2)**

5. In considering whether a person claiming protection has a well-founded fear of persecution, a decision maker is required to have regard to reg. 5(2) of the European Communities (Eligibility for Protection) Regulations 2006 ('the Protection Regulations'), as substituted by reg. 32(1) of the European Union (Subsidiary Protection) Regulations 2013 ('the Subsidiary Protection Regulations'). It provides:

> 'The fact that a protection applicant has already been subject to persecution, or to direct threats of such persecution, shall be regarded as a serious indication of the applicants well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated but compelling reasons arising out of previous persecution alone may nevertheless warrant a determination that the applicant is eligible for protection as a refugee.'

6. The final sub-clause of reg. 5(2) – the 'compelling reasons' sub-clause – differs from the remainder of that clause in that it does not form part of the transposition of Council Directive 2004/83/EC of 29 April 2004 ('the Qualification Directive'). Article 4(4) of the Qualification Directive states:

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

7. The 'compelling reasons' sub-clause of reg. 5(2) of the Protection Regulations is often referred to as 'the counter-exception', having been described as such by Cooke J. in M.S.T. & *J.T. v MJELR* [2009] IEHC 529 (at §29). The basic proposition is that past persecution is regarded as a serious indication of a well-founded fear of future persecution. The exception to that proposition is where there are good reasons to consider that such persecution will not be repeated. And the counter-exception (or exception to the exception to the basic proposition) is that, even where there are good reasons to consider that past persecution will not be repeated, compelling reasons arising out of that past persecution may warrant a determination that the applicant should be declared a refugee.

8. In *S.I. v. MJELR & Ors* [2016] IEHC 112 (at §24), Humphreys J. questioned the applicability of the terminology I have just described to the component parts of reg. 5(2), taking the view that the provision contains neither an exception nor a counter-exception but rather comprises a rule regarding inferring a need for protection, and an additional rider describing an extended ground on which a need for protection may arise. Humphreys J. went on (at §25) to question the applicability of the term 'proviso' to the 'compelling reasons' sub-clause in reg. 5(2), despite its use in that context by Hogan J. in *S.N. v MJELR* [2011] IEHC 451. Instead, Humphreys J. endorsed the use of the description of the 'compelling reasons' sub-clause by Cross J. in *J.T.M. v MJELR* [2012] IEHC 99 as 'an added tail', adding that it could also be referred to as a 'rider' or 'final clause.'

9. In order to avoid wading into that controversy, I propose to refer to the reg. 5(2) sub-clause at issue as the 'final clause.'

10. In *S.N. v MJELR*, already cited, Hogan J. summarised the position in the following way (at §33):

> 'As Cooke J. further found in *MST* that the counter-exception proviso in Regulation 5(2) was an "incidental and supplemental provision to the transposition" within the meaning of s. 3(2) of the European Communities Act 1972, it would seem that this super-added provision must be treated essentially as a species of national law which hovers over the terms of Article 4(4) of the Directive, but is one which must nonetheless be interpreted in a manner compatible with the Directive itself. Moreover, as Cooke J. himself noted, the counter-exception – with its focus on past events – does not fit easily with the underlying purpose of subsidiary protection, namely, to mitigate the risk of exposing the applicant to the future risk of serious harm in the event of his return to his country of origin.'

**The part of the decision challenged**

11. Counsel for the applicants acknowledges that they did not make any case to the Tribunal that there are any compelling reasons, arising out of their past persecution, that warrant a determination that they should be declared to be refugees, although it was certainly open to them to do so. It seems that this was because the focus of the applicant's appeal was on their successful challenge to the finding of the Office of the Refugee Applications Commissioner ('ORAC') that they do not have a well-founded fear of persecution at the hands of the non-state actors concerned if returned to Albania, rather than on a challenge to the additional, though somewhat equivocal, ORAC finding that 'a degree of state protection' is available to them there.

12. The penultimate paragraph of the Tribunal decision is headed 'Compelling Reasons.' It states as follows:

> 'I will now consider whether compelling reasons arise in this case. It has been accepted that [the applicants] experienced persecution of the kind [already described]. The Tribunal acknowledges the psychological impact of the persecution but finds that it does not reach the threshold of being atrocious. As such, the Tribunal finds that it would not be wrong to return the appellant or her children to the appellant's country of nationality and therefore finds that compelling reasons do not arise in this claim.'

13. Although the applicants had not put forward any reason, arising out of their past persecution alone, why they should be declared to be refugees, the Tribunal was obliged to consider that question as part of its determination. That is because, in *K.B. v MJELR & Anor* [2013] IEHC 169, Mac Eochaidh J. accepted that a failure by the relevant decision maker to consider the application of the final clause - where otherwise satisfied that, although past persecution has occurred, there are good reasons to consider that it will not be repeated – renders a decision invalid as in breach of the requirements of reg. 5(2) of the Protection Regulations.

14. In doing so, Mac Eochaidh J. relied on two earlier decisions; those of Cooke J. in M.S.T and Hogan J. in *S.N. v. MJELR*, both already cited. While each of those cases dealt with a challenge to the refusal of subsidiary protection by the Minister for Justice, Equality and Law Reform ('the Minister') rather than a refusal of refugee status, Mac Eochaidh J. found that reg. 5(2) of the Protection Regulations was at that time applicable in the same manner to each.

15. Though not material to the relevant analysis, it should perhaps be noted that the position in that respect altered significantly with effect from the 14th November 2013, when the European Union (Subsidiary Protection) Regulations 2013 ('the Subsidiary Protection Regulations') came into operation. Those regulations substituted a new reg. 5(2) of the Protection Regulations, removing the various parallel references to 'serious harm' and 'risk of serious harm' that were contained in the original version (and which spoke, more obviously, to the relevant part of the qualifying criteria for subsidiary protection than to the qualifying criteria for refugee status), leaving only the various references to 'persecution' and 'well-founded fear of persecution' in the version in force at the time of the decision now challenged. It may also be significant to note that the terms of the final clause of reg. 5(2), as originally promulgated, referred to a discretion to determine whether an applicant was 'eligible for protection', whereas the subsequent version now at issue narrows the scope of that discretion to whether an applicant is 'eligible for protection as a refugee', thereby removing any discretion to consider an applicant's eligibility for subsidiary protection under that regulation.

16. In *S.I. v MJELR*, already cited, (at §34) Humphreys J. observed that the way in which reg. 5(2) has been thus recast is consistent with an intention on the part of the drafter of the original version that the two key concepts it invokes - those of 'persecution' and

'serious harm' - were to apply quite separately to the asylum process and the subsidiary protection application process, respectively. I concur in that analysis.

17. Returning to the judgment in *K.B. v MJELR & Anor*, Mac Eochaidh J. cited the following passage from the judgment of Hogan J. in *N. v MJELR*, already cited, (at §36), dealing with the obligations of the Minister under the provisions of reg. 5(2), as it then stood:

> 'The task confronting the Minister was a three-fold one. He was first required to ask himself whether the applicant had suffered "serious harm" in the past. If the answer to this question was in the affirmative, he was then required to consider whether there were good reasons to consider that such persecution or serious harm would not be repeated should the applicant be returned to [his country of nationality]. If that question was [answered in the] affirmative (i.e. in the sense that the risk of future persecution was small), the Minister was nonetheless required to consider the application of the counter-exception, namely, whether there were compelling reasons arising out of previous persecution or serious harm alone such as might nevertheless warrant a determination that the applicant is eligible for protection.'

18. Some confusion seems to me to have arisen in argument in *S.I. v MJELR* (at §§ 43-45), concerning the extent to which the decision of Mac Eochaidh J. in *K.B. v MJELR* conflicts with that of Hogan J. in *S.N. v MJELR*, notwithstanding the fact that the former directly cites the latter with evident approval. The suggestion appears to have been that, in his decision in *K.B.* (at §13), Mac Eochaidh J. accepted the proposition that, even where there is no evidence of previous persecution, once there is a finding that there are good reasons to consider that no such persecution will occur in future, it is then necessary to consider the application of the final clause i.e. whether in those circumstances there are compelling reasons arising out of previous persecution alone that warrant the protection of refugee status. Any such proposition would be in obvious conflict with both logic and the analysis of Hogan J. in *S.N.* just quoted i.e. that it is only where there is an affirmative finding of previous persecution that the remainder of the provision (including the final clause) arises for consideration.

19. For my part, I do not read the relevant portion of the judgment in *K.B.* in the manner that was contended for in *S.I.* Rather, I read that passage as authority for the quite different proposition that it is not necessary for an applicant, having adduced evidence that he or she has already been subject to persecution, to adduce some further evidence to 'trigger the [final clause]' - i.e. specific or specifically identified evidence that the said persecution, or some aspect of it, in and of itself gives rise to compelling reasons which warrant the protection of refugee status. The argument rejected by Mac Eochaidh J. appears to have been that the accepted evidence of persecution in that case did not demonstrate the necessary additional quality (of potentially giving rise to compelling reasons to warrant the grant of refugee status), such that the failure of the Tribunal in that case to advert to, much less assess the application of, the final clause of Reg. 5(2) of the Protection Regulations should not be seen as a fatal infirmity in the decision.

20. In *B.D.R. v Refugee Appeals Tribunal* [2016] IEHC 274, Faherty J. endorsed the view expressed by Mac Eochaidh J. in *K.B.* that a failure to consider the application of the final clause in the appropriate circumstances would be fatal to a decision. Of course, both sides accept that there was no failure to consider the final clause in this case. Rather, the applicants argue that, while the respondent did consider the application of the final clause, in doing so he applied the wrong test.

**The basis of the challenge**

21. The applicants' assert that, in considering whether there are compelling reasons arising out of the applicants' previous persecution alone that warrant a determination that they are eligible for protection as refugees, the respondent wrongly applied a test of whether the previous persecution of the applicants, or the psychological impact on the applicants of that persecution, had reached 'the threshold of being atrocious.' As a further, though subsidiary, argument, they contend that the respondent erred in failing to provide reasons to support that finding - specifically, a definition of 'atrocious' for that purpose and a statement concerning why the persecution found to have occurred in this case does not rise to that level.

**Discussion**

22. What is the correct test? As the applicants acknowledge, in *N.B.* and *O.C.B. v MJELR* & *Ors* [2015] IEHC 267 (at §64), Faherty J. pointed out:

> 'There is no definition in reg. 5 (2) of what constitutes "compelling reasons"; thus the circumstances of any particular case will fall to be considered by the decision-maker in order to determine whether the threshold has been met.'

23. What is the scope of the discretion conferred by the final clause? According to Cooke J. in *MST*, already cited, (at §32):

> '[T]here cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in article 4.4 designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons. It is relevant to bear in mind that "serious harm" is defined as including "inhuman or degrading treatment". (See para. 23 above.) It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment.'

24. Making the necessary allowance for the fact that, in *MST*, Cooke J. was dealing with a challenge to the refusal of subsidiary protection, rather than of refugee status, and was thus concerned with 'serious harm', rather than 'persecution', under the provisions of reg. 5(2) of the Protection Regulations as they then stood, several propositions emerge from the analysis just quoted. First, the final clause is intended to provide only some limited extension to the conditions of eligibility prescribed in article 4.4 of the Qualification Directive, suggesting a higher, rather than lower, threshold for its positive application. Second, the final clause appears to have been designed to allow some latitude in according refugee status based exclusively upon the fact of previous persecution, where compelling reasons arise from that persecution. And third, it is possible to envisage, as an example, past persecution in the country of nationality giving rise to such trauma that a return to that country might, in consequence, be so traumatic as to amount to a compelling reason to afford protection against return in the form of refugee status. I pause here to emphasise that this last proposition represents an example of what might amount to 'compelling reasons'; it is not posited as a test (much less as the exclusive test) for what constitutes such reasons.

25. In this instance, the respondent considered the circumstances of the previous persecution of the applicants to assess whether there are compelling reasons, arising out of that persecution alone, that warrant a determination that the applicants are eligible for refugee protection. The applicants contend that, in concluding that the persecution concerned did not reach 'the threshold of being

atrocious' and that, hence, he could find no such compelling reasons, the respondent applied the wrong test, one of his own invention, which set the threshold too high.

26. If the threshold (whereby the fact of previous persecution alone may provide compelling reasons for granting refugee status) is lower than one of that persecution 'being atrocious', what is it? The applicants do not say.

27. What of the suggestion that, by using the adjective 'atrocious' in conjunction with the noun 'persecution', the respondent has invented a new 'test' for what constitutes compelling reasons? The respondents point out, and the applicants acknowledge, that the term 'atrocious forms of persecution' has an existing currency in the sphere of refugee law.

28. In *N.N. v MJELR* [2012] IEHC 499, Clark J. observed that the genesis of the discretion conferred by the final clause in reg. 5(2) is not easy to establish, but speculated (at §16 of the judgment) that the legislative intent appears to have been to apply a humanitarian exception to the refusal of refugee status, directly comparable to the exception to the cessation of refugee status provided under Section 1C(5) of the Geneva Convention and reflected in s. 21(2) of the 1996 Act.

29. Section 1C of the Geneva Convention states, in relevant part:

> 'This Convention shall cease to apply to any person falling under the terms of Section A if:
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke *compelling reasons arising out of previous persecution* for refusing to avail himself of the protection of the country of nationality….' (emphasis supplied)

30. Section 21(2) of the 1996 Act states, in relevant part:

> 'The Minister shall not revoke a declaration [that a person is a refugee] …where the Minister is satisfied that the person concerned is able to invoke *compelling reasons arising out of previous persecution* for refusing to avail himself or herself of the protection of his nationality or for refusing to return to the country of his or her former habitual residence, as the case may be.' (emphasis supplied)

31. In *V.Z. v Minister for Justice* [2002] 2 I.R. 135 (at 145), the Supreme Court (per McGuinness J., Keane C.J., Denham, Murphy and Murray JJ. concurring) noted the use by the High Court in the decision then under appeal of the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* ('the UN Handbook') as an aid to the interpretation of the Geneva Convention (at 145). The Supreme Court endorsed that approach as correct (at 148).

32. Paragraph 136 of the *UN Handbook*, which appears under the heading 'Nationals whose reasons for becoming a refugee have ceased to exist' and which refers to Section 1C(5) of the Geneva Convention, states:

> 'The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin…. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.' (emphasis supplied)

33. It is therefore evident from the terms of the *UN Handbook*, first published in 1979 and most recently republished without relevant alteration in 2011, that the meaning of the term 'compelling reasons arising out of previous persecution', as it applies to the refusal of a person to avail himself of the protection of his or her country of nationality, is illuminated by the humanitarian principle whereby a person who – or whose family – has suffered under 'atrocious forms of persecution' should be protected from repatriation to that country.

34. Confronted with the argument that, in considering whether the applicants had suffered from an atrocious form of persecution, the respondent was doing no more than endeavouring to give substance and effect to the otherwise abstract question of whether there are compelling reasons arising from their previous persecution that require the applicants be given protection as refugees, Counsel for the applicants submitted that it is important to distinguish between previously persecuted persons who have been granted refugee status but who are subject to the cessation provisions of Section 1C(5) of the Geneva Convention (and s. 21(2) of the 1996 Act), on the one hand, and previously persecuted persons who are seeking refugee status but who are unable to establish a well-founded fear of future persecution on the other. While I accept that there is an obvious definitional distinction to be drawn between those two groups, I fail to see any reason why there should be any difference in the meaning of the term 'compelling reasons arising out of previous persecution' as it applies to each, and Counsel for the applicants was unable to suggest one.

35. In my view, it follows that, in considering whether the persecution of the applicants reached the threshold of atrocious, the respondent was not applying the wrong test or, indeed, any test. Rather, he was inquiring of his own motion into whether there were compelling reasons arising out of the previous persecution of the applicants that require them to be given protection as refugees, even though there are good reasons to consider that they would not be subject to further persecution if returned to their country of nationality. In doing so, he was quite properly using the interpretation of an identical term applied in a different, though closely analogous, context as a guide, and was using the commentary on the Geneva Convention in the UN Handbook on the use of that term in that context as an aid to its interpretation.

36. The applicants' second argument is that the respondent erred in failing to provide reasons to support his finding that the persecution experienced by the applicants, or the acknowledged psychological impact of that persecution, does not reach the threshold of being atrocious. The first part of that argument is that it was incumbent on the decision maker to define what he meant by his use of the word 'atrocious' in that context. In circumstances where there is no definition in reg. 5 (2) of what constitutes 'compelling reasons', I can find no basis for obliging each decision maker who considers the application of the final clause to devise one and include it in his or her decision. Much less can I identify any basis for requiring a decision maker to provide a definition of a subordinate term such as 'atrocious forms of persecution.'

37. The second part of this second argument is that the respondent failed to state why the previous persecution of the applicants does not rise to that level; i.e. does not amount to an atrocious form of persecution. I am satisfied that that is not a valid criticism. There is no mathematical equation whereby reasons can be demonstrated as either compelling or not compelling. Nor is there any mechanical process for determining whether a form of persecution is, or is not, atrocious. As Faherty J. explained in *N.B.* and *O.C.B.* (at §64), the circumstances of each case will fall to be considered by the decision-maker to determine whether the threshold has been met.

38. In the decision under challenge, the respondent accepted that the applicants have suffered the effects of the persecution of the first applicant's husband (in the form of his self-confinement) and that this amounted to persecution of the applicants. The respondent also accepted that this persecution had a psychological impact on the applicants. Having considered those circumstances of his own motion, he concluded that the said persecution did not amount to an atrocious form of persecution and, thus, did not provide a compelling reason for according the protection of refugee status to the applicants. Accordingly, I reject the argument that the respondent failed to provide adequate reasons for his decision.

39. In view of the conclusion I have reached that the applicants have failed to establish that the final clause of reg. 5 (2) of the Protection Regulations was not properly considered or properly applied in the decision under challenge, it is unnecessary for me to consider the extent to which the final clause is capable of being relied upon as legislation that it was within the power of the Minister to make under s. 3 of the European Communities Act 1972. Doubts about the vires of the final clause were acknowledged by Clark J. in N.N. (at §15), and the issue was concisely addressed, though not decided, by Humphreys J. in S.I. (at §§ 63-65). The resolution of that issue (and those doubts) must await a suitable case.

**Conclusion**
40. For the reasons I have given, the application must fail and the reliefs sought must be refused.