Neutral Citation: [2015] IEHC 131

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 968 J.R.]

BETWEEN

E.P. (MOLDOVA)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (SITTING AS ELIZABETH O'BRIEN, TRIBUNAL MEMBER) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 3rd day of March 2015

1. In these proceedings, the applicant seeks an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal (hereinafter the "RAT") dated 10th October, 2012, communicated to the applicant by letter dated 9th November, 2012. In effect, the RAT decision in question held that the applicant was not entitled to a declaration of refugee status because there was a system of effective State protection available to the applicant in his home state.

Background

2. The applicant is a national of Moldova. He was born in 1978. After school, he trained as a mechanical engineer at a military college. He married in 2000 and has one son born in the same year. He joined the police in 2003. His problems began in 2004 when, in the course of his work as a police officer, he became aware of corruption conducted by a named senior Lieutenant. He reported the incident and following an investigation, the Lieutenant in question was fired; however, he soon returned to his old job, and shortly afterwards, a named Colonel demanded monthly bribes from the applicant to allow him to remain in the force. The applicant reported the matter to the District Department of Internal Affairs, and to the Prosecutor's Office, which refused to register his complaint, finding that there was nothing wrong with the actions of the policemen involved.

3. The applicant transferred to another section in a district some 40km from his original posting. This was very difficult as the Colonel refused to sign his transfer request and there were delays in the processing of his application. Bribes were again demanded of him, on this occasion by his Captain, who also demanded that he fabricate a case against an innocent man. The applicant refused and left the police force, fearing that a case could in turn be fabricated against him.

4. For six months, the applicant worked with his father. He then decided to start a small business. As soon as he sought the necessary licences to start this business, members of the police demanded a large bribe for the right to run his business. They said that if he paid, he would not need a licence to open his shop and that they would help him to avoid tax. He was unable to pay the sum of €5,000 demanded and further feared that he was being set up. A series of events then occurred resulting in the applicant being arrested, detained, charged and prosecuted on fabricated public order offences. He was tried *in absentia* and convicted and received a four-year suspended sentence. He was placed on one year's probation on condition that he undertook never to return to work as a policeman and not to draw attention to himself. He appealed the conviction, but his registered appeal letter mysteriously disappeared. He and his wife and son then moved some 180km away to his wife's hometown of K, but after six months, the corrupt policemen located him there, arrested him and brought him back to his original town where he was again detained. It seems that further charges were fabricated at that stage. He realised that his life and freedom were at risk, so in January 2007, leaving his wife and child behind, he drove from his hometown to Moscow where he bought a false passport from an agent. He then travelled by car to Rome and from there by air to Cork, arriving in Ireland on 20th January, 2007.

5. He survived on money sent by his father, but was arrested in June/July 2007, and the GNIB seized his false passport. The GNIB directed him to the offices of the Commissioner, and on 14th August, 2007, he applied for asylum. He attributes the delay in so doing to his ignorance of the procedures that are available under the international protection regime.

6. The applicant submitted a volume of documentation corroborating his identity and his narrative from his university, the police, the Prosecutor, the army and the courts; he also provided documents relating to his plumbing business, his Driving Licence, Birth and Marriage Certificates and his son's Birth Certificate. He attended for two interviews with the Office of the Refugee Applications Commissioner. The first interview explored his narrative of past persecution and his travel to Ireland, while the second primarily addressed the motives of the police and the avenues of redress open to him. At the second interview, he said that after he approached the Prosecutor's office and the courts in Moldova, the only other place he could have gone was to the President who was himself corrupt. He said he did not know where else to turn. He was asked whether he had gone to the Ombudsman and he said that, unfortunately, he had not because he heard from his friends that those organisations are as corrupt as the police and by this time he had given up trying to find justice. He said "I have exhausted all the avenues open. The police force was so corrupt that no matter where I go I wouldn't find justice".

7. The interviewer stated that COI available to her indicated that the Ombudsman's Office would be an avenue for redress. The applicant disagreed, saying that the Commissioner's office did not have the full information of how the Ombudsman could be reached in Moldova, that while the Ombudsman himself may not be corrupt, one has to go through corrupt people before you reach that level, and that the person who accepts one's complaint to the Ombudsman's Office would be Moldovan and would not necessarily be an honest person.

8. A s. 13 report issued making a negative recommendation based on a combination of generic credibility findings under s. 11B(b) (failure to explain a failure to apply for asylum in the first safe country); s. 11B(d) (failure to apply immediately upon arrival in Ireland); and s. 13(6)(c) of the Refugee Act 1996 (failure to apply as soon as reasonably practicable after arrival) together with a

finding that "State protection and internal relocation was a viable option for this applicant but was not availed of by him". The Examining Officer stated that the establishment of the Centre for Combating Economic Crime and Corruption (CCECC) in 2002 had improved the Moldovan Government's record in combating fraud and corruption. It was noted that the applicant had approached the Prosecutor's Office and had appealed to the courts but it was concluded as follows:

> *"The applicant did not seek redress from any human rights organisation, for example, the Ombudsman's Office which was specifically set up to deal with human rights issues. The police Code of Ethics issued in Moldova in March 2003 (Appendix B). The 2004 USSD report on Human Rights in Moldova, pages 3 and 4 (Appendix C) states that 'the Prosecutor General's Office is autonomous and answers to Parliament for overseeing criminal charges before a court and protecting the rule of law and civil freedoms'. The applicant failed to seek redress from a number of higher authorities available before leaving his country of origin."*

9. The applicant appealed to the RAT, but as a result of the finding under s. 13(6)(c) of the Act of 1996, the applicant was not entitled to an oral hearing on appeal. The Tribunal decision, which is dated 26th September, 2008, set out in detail what the applicant had said and what documents had been furnished at his s. 11 interviews with the Commissioner. Referring to the COI appended to the s. 13 report, the Tribunal Member found that *"there is a comprehensive legislative and institutional framework in place for the combat of corruption. Moldova has embarked on a comprehensive review of its laws and has prepared a series of draft laws on, inter alia, conflicts of interest and decisional transparency"*. She noted a national strategy for the prevention and combating of money laundering and financing of terrorism, a monitoring group on its implementation, and an action plan approved by the President, together with a draft law on prevention and combating of corruption. She noted that while the applicant had approached the Prosecutor's Office and the courts, he had not made complaints to the Ombudsman's Office.

10. It was accepted that the applicant had experienced some trouble in Moldova and did appear to have been harassed by the police. His word that false charges were brought against him was accepted, but it was found odd that he would not have gone to the independent body to complain of the harassment, particularly when the COI appended to the s. 13 report showed that there was in place *"what appears, by all intents and purposes, to be a comprehensive legislative and institutional framework for combating corruption"*.

11. The Tribunal Member noted that no submissions had been made in response to that comment in the s. 13 report and that no conflicting COI had been submitted to suggest that the Ombudsman was not a proper institution and that the applicant could not have obtained redress. The Tribunal Member anticipated that the applicant might say that he could not obtain redress from the CCECC and that in practice, corruption remains a problem; she concluded that she had *"not been presented with any evidence that suggests that there is not in place a system for the protection of citizens against these problems and what may be described as a reasonable willingness to operate it"*. She found that he had not explored the avenue open to him and said:

> *"While I accept that he may have thought that this might be fruitless, the fact remains that an applicant must seek protection of his State, when there are institutions in place to enable a citizen to complain about the actions of public officials, an applicant for asylum is expected to at least explore those avenues open to him."*

12. In an *ex tempore* judgment delivered on 29th June, 2012, Clarke J. held that notwithstanding a careful recital of the narrative contained in the applicant's questionnaire and interviews, the conclusions of the Tribunal Member with respect to State protection were arrived at in error. The learned judge stated as follows at p. 5 of his judgment:

> *"The finding that this particular appellant, though credible, was not entitled to international protection because he did not exhaust all domestic remedies and specifically because he did not bring his complaint to the Ombudsman is not a fair conclusion having regard to the previous efforts made to complain to the obvious authorities and because of the very limited information available to the Tribunal Member on the role, power and function of the Ombudsman."*

13. The Court was also satisfied that the Tribunal Member had erred in law insofar as she was of the view that the applicant was obliged to exhaust all possible avenues of redress before seeking international protection. The Court stated that while it was clear that persons cannot simply leave their countries of origin and seek protection elsewhere without first exploring whether protection might reasonably be forthcoming at home, this did not equate to an obligation to go to extraordinary or unreasonable lengths to secure such protection. The requirement is for a person to take reasonable steps to seek the protection of his or her home State before seeking the protection of another, unless the act of seeking protection puts the person at risk. Having heard counsel on the matter, the learned trial judge made an order of certiorari quashing that part of the decision which related to State protection and remitted that part of the case for reconsideration by the same Tribunal Member, in particular on the following issue:

> *"Whether effective State protection might reasonably be forthcoming to the applicant from the Ombudsman's Office."*

14. In a decision dated 10th October, 2012, Ms. Elizabeth O'Brien, sitting as a member of the Refugee Appeals Tribunal, came to the following conclusion in relation to the applicant's claim to refugee status:

> *"Thus, in conclusion, while I accept that this applicant may have had a very unpleasant experience at the hands of the police in his own State, and there may indeed be grounds on which this applicant could make a claim to a right to remain on humanitarian grounds, I do not believe that this case warrants a conclusion that the applicant is entitled to refugee status, as I cannot conclude that there is not a system of effective protection available to this applicant in his own home State. Accordingly, I answer the question posed to me in the affirmative, for the sake of clarity, I find that there is a system of effective protection available to the applicant in his own home State."*

15. That decision is the subject of the application for certiorari in these proceedings. Before coming to the substance of the matter, it is necessary to set out some of the legal principles applicable in this area.

Approach of the Courts to this Issue

16. This Court must not stand in the shoes of the decision maker and decide what result ought to have been arrived at. This has been made clear in a number of authorities. In *Meadows v. Minister for Justice, Equality and Law* Reform [2010] 2 I.R. 710, Murray C.J. stated as follows at paras. 55 and 56 of his judgment:

> *"In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the Court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken.*

In doing so the Court may examine whether the decision can be truly 'said to flow from the premises' as Henchy J. put it in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642, if not it may be considered as being 'fundamentally at variance with reason and common sense'."

17. When looking at the issue of State protection, the following quotation from the judgment of Clarke J. in *Evuarherhe v. Refugee Appeals Tribunal* [2006] IEHC 23, is of significance:

> *"3.6 That leads to the question of State protection. In the course of the determination of the RAT reference is made to the relevant passage from the UNHCR Handbook. There is no doubt but that the Tribunal Member concerned accurately stated the law, which is to the effect that a person is not entitled to refugee status if there could be said to be adequate State protection available in respect of the type of persecution feared and in the absence of there being any good reason why it would be reasonable for the person concerned not to avail of that State protection.*
>
> *3.7 It has often been pointed out that State protection does not mean a State guarantee. No State is in a position, in practice, to guarantee the complete safety of its citizens. The test is as to whether the State, in practical terms, provides adequate protection, in general, in relation to the type of persecution feared. Just as the fact that a State will not be absolved from its obligation to provide such practical protection by having laws which, for whatever reason, are not enforced in practice, similarly a State will not be found to have failed to provide adequate protection because it can be shown that some incidences of the violation concerned have occurred. This latter will be particularly so where it would appear that adequate and appropriate State measures have been taken to deal with such situations or instances as arise."*

18. Also, in relation to the issue of State protection, there is a presumption which comes into play. This was laid down by the Canadian Supreme Court in *Canada (AG) v. Ward* (104) ILR 222, where it was stated as follows:

> *"Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant."*

19. This statement of law has been accepted in a number of Irish decisions. In *GOB v. Minister for Justice, Equality and Law Reform* [2008] IEHC 229, Birmingham J. stated as follows:

> *"I feel I must also have regard to the principle, accepted both domestically and internationally, that absent clear and convincing proof to the contrary, a state is to be presumed capable of protecting its citizens. This was established in the seminal case of Canada (AG) v Ward [1993] 2 RCS, which has been approved in a number of Irish cases, including the judgments of Hedigan J. in P.L.O. v The Refugee Appeals Tribunal & Anor [2007] IEHC 299 and Feeney J. O.A.A. v The Minister for Justice, Equality and Law Reform [2007] IEHC 169. There must be few police forces in the world against which some criticism could not be laid and in respect of which a trawl through the internet would fail to produce documents critical of their effectiveness and sceptical of their capacity to respond."*

20. In *NFM & Ors. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2008] IEHC 363, Hedigan J. referred as follows to the presumption:

> *"In the case of Canada (AG) v Ward [1993] 2 SCR 689, the Supreme Court of Canada held that in the absence of clear and convincing proof that a State is unable to protect its citizens and absent a complete breakdown of State apparatus, it is to be presumed that State protection is available. This principle has been cited with approval in a number of Irish decisions (see e.g. G.O.B. v The Minister for Justice, Equality and Law Reform [2008] IEHC 229)."*

21. In *DK v. Refugee Appeals Tribunal* [2006] 3 I.R. 368, Herbert J. dealt with both the presumption of State protection and the obligation on an asylum seeker to seek such protection prior to seeking international protection in the host country:

> *"I conclude that the appellant in this case has not shown 'clear and convincing' evidence that he suffers or would suffer from a failure of state protection as it relates to his claim. He never approached the authorities for assistance and, while I accept that he may have felt apprehensive about doing so, if he was the subject of a criminal offence - assault upon his person - he should have reported these acts at least. I note that President Mikhail Saakashvili was cited as saying that his government would not permit 'any kind of discrimination' against homosexuals and while actions speak louder than words I consider that the fact that homosexuality was decriminalized over 4 years ago, taken with the attitude of the leader of the country, raises a presumption that state protection is available to someone in the appellant's position. The appellant's evidence does not displace this presumption in circumstances where assistance was not sought."*

22. Later, in the same judgment, Herbert J. stated as follows:

> *"I agree with La Forest J., that subject to such exceptional cases, the fact that the power of the state to provide protection to its nationals is a fundamental feature of sovereignty and, the fact that the protection afforded by refugee status is 'a surrogate coming into play where no alternative remains to the claimant', renders it both rational and just for a requested state to presume, unless the contrary is demonstrated by 'clear and convincing proof' on the part of the applicant for refugee status, that the state of origin is able and willing to provide protection to the applicant from persecution, even if at a lesser level than the requested state."*

Further on in the judgment, at p. 37, the learned trial judge quoted from Professor Hathaway's book 'The Law of Refugee Status':

> *"Obviously there cannot be said to be failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming."*

23. Having looked at the legal parameters within which this application must be viewed, it is now appropriate to turn to the specific grounds raised by the applicant against the decision of the RAT.

Grounds upon which Relief Sought

24. The first ground on which relief was sought was based on the submission that the first named respondent had confined herself to

an analysis of whether the Ombudsman's Office was in fact acting effectively and whether it would be reasonable for the applicant to *"approach the Ombudsman's Office with a complaint"*. The first named respondent stated that as the applicant did not give the Ombudsman an opportunity to review the complaint, she could not conclude that effective State protection was not open to this applicant. The applicant submits that the first named respondent thereby failed to consider the actual question that the High Court had posed to it, namely, whether the Ombudsman's Office could provide protection to the applicant. The applicant states that no consideration of the ability of the Ombudsman's Office to provide protection to the specific applicant was carried out. Instead, the first named respondent simply found that the Ombudsman's Office was acting effectively. It was submitted that the fact of an effective Ombudsman, as found by the Tribunal Member, does not mean that the Ombudsman can actually provide State protection. It simply means that the tasks which are set for the Ombudsman are being carried out to some degree, and as found by the Tribunal *"the office appears to be taking its duties seriously, visiting prisons, interviewing witnesses and investigating cases"*. The applicant submitted that none of this amounts to any consideration as to whether the office can provide effective State protection to the applicant. By reason of the foregoing, it was submitted by the applicant that the first named respondent was irrational, unreasonable, *ultra vires* and exceeded her jurisdiction by failing to address the specific issue raised by the High Court.

25. In the present case, in reaching its conclusion, the RAT had regard to the statistics given in COI being the US State Department report:

> *"Corruption within the police and judiciary remained endemic. The Government unduly influenced the media, intimidated journalists, restricted freedom of assembly and refused official registration to some religious groups.*
>
> *With specific reference to the effectiveness of the Ombudsman in Moldova, the US State Department report states that according to the Ombudsman's report released in March, authorities received 6,027 complaints of torture or inhuman or degrading treatment allegedly committed by a Government officials in 2009, representing a significant increase over the previous years (1,075 complaints in 2008, and 1,289 complaints in 2007). In 693 cases, authorities initiated criminal investigations; 208 cases alleging acts of torture; 438 alleging acts of violence and exceeding authority and 47 alleging acts of inhuman and degrading treatment. Of the number of cases under investigation, 383 defendants were convicted. The Prosecutor's office failed to pursue an investigation in 5,334 cases citing a lack of evidence. Prosecutors completed the investigations and issued indictments in 293 criminal cases. At the year's end, 400 cases remained pending."*

26. The applicant submitted that the RAT failed to address the question posed by the High Court which was *"whether effective State protection might reasonably be forthcoming to the applicant from the Ombudsman's Office"*. The RAT confined itself to an analysis of whether the Ombudsman's Office was in fact acting effectively and whether it would be reasonable for the applicant to approach the Ombudsman's Office with a complaint.

27. It was submitted by the applicant that the RAT was required to assess a specific fact. The applicant had already been found credible in relation to his version of events and had been found to have made reasonable efforts to seek the protection of his home State. The question for consideration was whether the Ombudsman provided a level of protection against police corruption in Moldova such that the applicant would be protected from persecution.

28. The applicant submitted that the evidence in the country of origin information was unequivocal. There was an Ombudsman, but he frequently failed to investigate allegations of police abuse. It also appeared from the COI that police corruption was a serious problem that was often ignored, or only superficially examined. It was noted that one example of the Ombudsman doing his job was an ongoing investigation into an allegation of a physical beating in a prison. This was delayed significantly and no result was available before the first named respondent. However, that complaint was of a completely different character to the allegations of police corruption, such as were made by the applicant, and it was submitted, therefore, that the COI clearly demonstrated that the Ombudsman was unable to address this issue.

29. It was submitted that instead of dealing with this directly, the RAT abdicated her function by stating that it was not for her to surmise whether the stated reasons for not investigating matters were in fact true or not. It was submitted that by so doing, she refused to carry out an investigatory role and simply stopped assessing the case at the point at which he was required to form a view on the effectiveness of the Ombudsman.

30. The applicant submitted that the RAT then went on to consider whether the Ombudsman could be said to be a functioning Ombudsman. However, they point out that the Ombudsman was not on trial as to whether he was able to investigate generally, such as investigations into allegations of abuse in prisons. What she was required to assess was whether the Ombudsman was able to provide effective protection to the applicant. This was not answered and no assessment of the Ombudsman's ability to investigate or protect against police corruption was undertaken by the first named respondent.

31. It was noted that the first named respondent concluded that as the applicant *"did not give the Ombudsman an opportunity to review his complaint, I cannot conclude that effective State protection was not open to this applicant"*. It was stated that this was the exact same finding that had been made in the original RAT decision which was quashed by the High Court.

32. The applicant submitted that the principles in this area were set out in *D.K. v. Refugee Appeals Tribunal* [2006] 3 IR 368, where Herbert J. held that it was wrong in law to hold that a failure to seek State protection was sufficient to refuse refugee status in itself and that while a presumption of the availability of State protection might apply, this did not absolve the decision maker from considering whether it actually was available where COI was submitted which suggested that it was not available.

33. The applicant argued that, in effect, the first named respondent closed her mind to the issue on the basis that the applicant had not applied to the Ombudsman. However, the applicant had applied for State protection, which was refused, and the applicant had concerns about the Ombudsman, which were backed up by the COI. The fact that the first named respondent noted that had the applicant applied to the Ombudsman and been rejected, it would then be open to her to conclude that he was not afforded State protection, shows that she did not actually consider the availability of State protection and instead simply refused the application on the same basis as she did the first time, namely, that his failure to apply to the Ombudsman meant that she could not consider whether there was a failure of State protection.

34. For its part, the respondent submitted that the Tribunal Member considered whether the Ombudsman was acting *"effectively"* and found that it was. They pointed out that the first named respondent also had regard to the US State Department report discussed earlier in her consideration of the Ombudsman's role and functions in Moldova, mentioning particular instances where the Ombudsman had intervened and provoked by its actions, investigations into alleged human rights abuses. In one instance, he was about to bring a complaint against a District Prosecutor, on foot of a complaint by a prison inmate, but his actions precipitated a correction by the Prosecutor of his earlier stance regarding the inmate's rights. In finding that there was a system of effective State protection

available to this applicant in his own home State, the Tribunal Member stated as follows:

> *"I conclude from the country of origin information submitted that it is not open to criticise the Office of the Ombudsman as being inept or lacking in power. I conclude from the evidence submitted that the Ombudsman is acting and the office appears to be taking its duty seriously, visiting prisons, interviewing witnesses and investigating cases . . . I believe that if there are serious allegations to be made against the Ombudsman's Office, or if there were, for example, even suggestions that the Ombudsman's Office was not taking complaints seriously, that this would be clearly reported in the country of origin [information] available, particularly by Human Rights Watch and Amnesty International .."*

35. The applicant also submitted that there was a failure on the part of the first named respondent to consider the applicant's submissions. The RAT recited the submissions of the applicant that the Ombudsman was ineffective and that as approximately 88.5% of the cases referred to them did not result in an investigation and she determined that *"it is not open for me to surmise whether this is in fact true or not"*. She then went on to determine that it is a functioning office. In the circumstances, the applicant claimed that the first named respondent had abdicated her fact-finding function by refusing to consider the truth or otherwise of the criticisms of the Ombudsman's Office which were backed up by the US State Department report, specifically, the fact that it did not investigate the vast majority of cases referred to it.

36. The applicant submitted that the primary question addressed to the RAT was whether the Ombudsman could provide protection to the applicant as a victim of police corruption and she did not address this question, addressing instead the issue as to the effectiveness of the Ombudsman. The applicant contends that the first question is the correct question to ask and the second question is not germane to the case. It was further submitted that, even in her assessment of the efficacy of the Ombudsman, the first named respondent failed to consider the negative aspects of the functioning of his office, as seen in the COI.

37. The applicant submitted that the finding of the Ombudsman as acting effectively was an unfair finding and one which was based on one view of the COI without reference to the other views. In *DVTS v. Minister for Justice* [2007] IEHC 451, Edwards J. stated as follows:

> *"If I might just rehearse some of those well established principles. First of all, there is the principle that a judicial or quasi judicial tribunal must have regard to all of the evidence before it and cannot cherry pick the evidence. If it is to act judicially it must consider all of the evidence put before it. If there is a conflict with respect to the evidence, such that the tribunal cannot resolve that conflict, other than by preferring one piece of evidence over another piece of evidence for good and substantial reasons, then it is incumbent on the tribunal or court, as the case may be, to state clearly its reasons for doing so. It is well established that a court or tribunal may not act arbitrarily, it must act judicially and it must proceed on the basis of what is reasonable and rational. In order that an appellate tribunal might know whether the tribunal at first instance has behaved reasonably and rationally it must know the reasons for, or basis on which, the lower tribunal acted.*
>
> *Furthermore, justice must not only be done but be seen to be done. There must be transparency in the process. In certain circumstances, particularly in the administrative context, decisions can be taken without reasons necessarily having to be given. In that regard I can think of one example; the Director of Public Prosecutions for good policy reasons does not in general give reasons for his decisions. However, where you are talking about a court or a tribunal which is determining a lis inter-partes and a ruling on a matter of substance as opposed to a matter of procedure is involved, it is, in my view, the duty of such a tribunal to give reasons for its decisions.*
>
> *I think all of that is well established. I don't think I decided anything new in approaching the case on the basis that that was the established law. What we are concerned about in the Simo case primarily – certainly in terms of the question that I have been asked to certify to the Supreme Court - is the way in which the Refugee Appeals Tribunal treated 'country of origin information'. I took the view, and I don't think there was anything new or radical in this, that the Refugee Appeals Tribunal was obliged to consider all of the 'country of origin information' put before it. It is true to say, and I acknowledge that the tribunal member did state that he had considered all of the documents submitted, but he went on to prefer a portion of the 'country of origin information' over other 'country of origin information' relied upon particularly by the Applicant, and he did not give a reason for doing so. This was not a peripheral issue in the case. This was a central issue in the case. In my view, he was obliged to engage in a rational analysis of the 'country of origin information' and justify the preferment of one piece of evidence over another."*

38. In response to this, the respondent noted that the applicant had relied, in his submissions, on the judgment of Edwards J. in *DVTS v. Minister for Justice, Equality and Law Reform, Ireland and the Refugee Appeals Tribunal* [2008] 3 I.R. 476, which provided guidance in respect of the duties of the Tribunal in assessing COI. They noted that Edwards J. in his judgment stated that he reviewed COI that was before the Tribunal in his consideration of whether the applicant was correct in its contention that the manner in which same was treated was unlawful.

39. The respondent submitted that it was quite appropriate for the Court to have regard to the content of COI available to the Tribunal in assessing whether an issue arises with the manner in which it was assessed by the Tribunal. It was a matter of fact that certain information was before her and that was not disputed.

40. The respondents noted that the facts of the DVTS case gave rise to particular concerns as to the "arbitrary" quality of the Tribunal's reliance on certain COI, given the range of COI available, and the failure to explain the preference for certain information when other information supported the applicant's claims. In his judgment, Edwards J. accepted the principle that it is entirely up to the RAT to determine the weight, if any, to be attached to a particular piece of COI. He stated, however, that the Tribunal should not arbitrarily prefer one piece of COI over another.

41. The respondent submitted that that case was distinguishable from the present case, in particular with regard to the manner of the Tribunal's consideration of COI. The respondent had submitted in DVTS that the Tribunal was entitled to selectively refer to certain information as it was more *"up to date"*. The Court noted, in its analysis, that the Tribunal had not provided that as a reason for preferring the information referred to and it found that the Tribunal had provided no reasons for preferring certain information over other information:

> *"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.*

> *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 a case of conflicting information, it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify the 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."*

42. The respondent submitted that it was settled law that the Tribunal Member was not obliged to exhaustively rehearse the evidence upon which her conclusions were based, but in any event, they stated that it was clear from the rehearsal and analysis of the applicant's submissions and the range of references to the COI put before her, that the Tribunal did not disregard information put before her as claimed or "arbitrarily prefer" certain information such as to offend the reasoning in DVTS.

43. The applicant also challenged the finding of the RAT that the Ombudsman's power in Moldova equated to the Garda Síochána Ombudsman Commission in this jurisdiction. The first named respondent found that the Ombudsman was not permitted to consider complaints *"to be considered by civil or criminal courts"*, that it was the same as in Ireland as the Ombudsman was excluded from investigating where the matter *"is before the courts"*. The applicant submitted that there was a significant difference between complaints that are *"to be"* considered by the criminal courts and a complaint which *"is"* before the courts.

44. The applicant points out that this did not go as far as to say that the Ombudsman was effective in those complaints that it dealt with. The first named respondent referred to a complaint made by a prisoner which was still under active investigation and the active visitations to prisons, police stations, etc. none of the which would demonstrate that the Moldovan Ombudsman could provide a similar level of protection against police corruption as the Irish Garda Síochána Ombudsman Commission could provide against garda corruption.

45. The respondent submitted that the COI available to the Tribunal suggested that the Ombudsman had a wide remit in the area of examining complaints regarding actions by public authorities and of alleged human rights abuses. They submitted that the Tribunal Member appeared to have been aware of this, having regard to the content of the US State Department report to which she referred and the examples of intervention which she mentioned in her decision. It would not seem that there was support in the COI for a suggestion that the Ombudsman was prevented from examining complaints that concern extortion, corruption or malicious prosecution or that a lack of specific reference to these matters meant that the Ombudsman would not be in a position to deal with the applicant's complaints. They stated that it was quite clear from the US State Department report that the Ombudsman would address complaints regarding police and prison service abuse and access to justice. It was apparent from the COI before the Tribunal that such complaints could be received and examined, and where appropriate, referred for appropriate action to another authority, for example, to the Prosecutor's Office or intervention by the Ombudsman.

46. The respondents submitted that if the Prosecutor did not take appropriate action on foot of a complaint referred by the Ombudsman, anecdotal evidence in the COI suggested that the Ombudsman could bring a complaint against the Prosecutor. Insofar as the applicant claimed that his appeal of the Prosecutor's decision was lost, this issue might have been referred by the Ombudsman to the court's administration. In this regard, it was noted that the Amnesty International report submitted by the respondent states:

> *"25% of all complaints received by the Ombudsman concerned unfair trials, the most frequent concerning failure to examine cases within a reasonable time, limited access to a qualified lawyer, non-enforcement of court decisions and violations of procedural Rules of Court."*

47. The final area of complaint on behalf of the applicant was in relation to the burden of proof. He submitted that when taken as a whole, the determination of the first named respondent appeared to misapply the correct burden of proof in respect of a refugee application. More particularly, it was alleged that the Tribunal Member applied the incorrect burden when dealing with the case as per the question posed by the High Court. It was pointed out that her previous decision, excluding the applicant from refugee status because she could not conclude that there was no state protection in the absence of an application to the Ombudsman, was quashed as the applicant had already demonstrated an attempt to seek police protection in Moldova.

48. The applicant submitted that the decision of the RAT was permeated with references to it not being open to the Tribunal Member to consider the truth or otherwise of the COI or that she could not rely on the criticisms of the Ombudsman to determine that he was ineffective. In particular, her conclusions that *"it is not open to criticise the Office of the Ombudsman as being inept or lacking in power, I conclude from the evidence submitted that the Ombudsman is acting and the office appears to be taking its duties seriously*" and that she *"cannot conclude that there is a system of effective protection available to the applicant in his own home State"* suggests that the Tribunal Member was not looking at the case from the point of view of a proper inquiry into the issue, but was instead imposing an almost impossible burden on the applicant to prove a negative, *i.e.* the non-effectiveness of the Ombudsman.

49. Notwithstanding this difficulty, the applicant submitted that he had provided abundant COI to show that the Ombudsman was not in a position to protect him from police corruption as such matters were often ignored or superficially investigated. The applicant submitted that there was no COI to suggest that such issues have ever been properly investigated. Yet, the first named respondent found that she could not conclude that effective state protection was not available to the applicant.

50. The applicant had provided evidence that he had made reasonable efforts to seek state protection and that this was accepted by the High Court. That was not an issue in the remitted hearing, yet it appeared to be the first named respondent's reason for refusing to even consider the applicant's submissions. Moreover, there was nothing that the applicant could do between the decision of the High Court and the remitted hearing to change this fact.

51. The applicant cited the following portion of the judgment of Cooke J. in *OAS v. RAT* [2009] IEHC 607:

> *"It is questionable whether Regulation 7 places the onus of proof as to the unavailability of relocation as a solution upon an applicant in these circumstances. The regulations are structured on the basis that regulation No. 7 permits a protection decision maker to enquire into and to determine whether a person who is otherwise eligible for subsidiary protection or a refugee, is nevertheless not in actual need of protection because of the possibility of relocation in the country of origin. To make such a determination the decision maker must be satisfied that there is no risk of the particular persecution feared or of the serious harm in question occurring in the locality to which relocation is postulated."*

52. The applicant submitted that the first named respondent imposed an impossibly high burden on the applicant to prove that there was a lack of State protection, rather than carrying out her inquisitorial role on the basis of the shared burden of proof.

53. In reply, the respondents submitted that the Tribunal Member did not merely find that she could not conclude that there is no system of effective protection - or thereby applied an incorrect standard of proof. The decision should be read as a whole. Although the Tribunal Member included a statement to that effect, towards the end of her decision, she followed this up with a further positive statement *"for the sake of clarity, I find that there is a system of effective protection available to the applicant"*. Nor was it apparent from the decision that she failed to include anything in the decision that positively demonstrated that there was an effective system of State protection provided by the Ombudsman. The respondents submitted that when the decision is read as a whole, it was apparent that she reached her conclusions by reference to the evidence (in particular, the COI) before her regarding the functions of the Ombudsman as a vehicle for complaint and redress.

54. The respondents relied on the decision in *Kikumbi v. Refugee Applications Commissioner* [2007] IEHC 11. In particular, the finding of the Court that the weight of evidence is a matter for the decision maker "once properly admitted, the weight (if any) to be given to any evidence is exclusively a matter for the decider of fact".

55. The respondents also submitted that the system of protection at issue was not required to provide a guarantee of protection. It was clear from the COI that the Ombudsman can and had in certain instances intervened to provide redress for complainants. Otherwise, the COI essentially stated that the Ombudsman can receive and investigate or examine complaints of human rights abuses by public authorities and refer matters to appropriate authorities with a view to seeking redress.

56. Information was available to the Tribunal that suggested that the Ombudsman was a vehicle for complaint for members of the public in Moldova, including matters concerning activities of the police and matters regarding access to justice, and that a person might reasonably expect that the complaint would be examined and possibly referred to another authority for action. It was submitted that in those circumstances, the aforementioned ground raised by the applicant could not succeed.

57. The respondents submitted that in considering the allegation that the Tribunal Member failed to apply the correct burden of proof, it should be recalled that it is up to the applicant to demonstrate that he is a refugee pursuant to s. 11A of the Refugee Act 1996. It is important that in so doing, he puts forward a coherent appeal. The applicant asserted in his own evidence at interview that those who process complaints to the Ombudsman are "corrupt", but this was not supported by any of the COI relied on. Insofar as the allegation was made that the Ombudsman makes only *"token gestures"*, it was submitted that this allegation was supported by an extract from the USSD report that appeared to have been misconstrued by the applicant.

Conclusions

58. I am satisfied, having regard to the evidence and to the arguments made by counsel, that the first named respondent failed to answer the specific question put to her by the Court, which was as to whether effective State protection might reasonably be forthcoming to the applicant from the Ombudsman's Office. This required an examination of whether the Ombudsman's Office was effective in dealing with complaints against police officers accused of corruption. Notwithstanding the evidence that the Ombudsman's Office did not initiate criminal investigations in 88.5% of the complaints coming before it, the first named respondent held that the Ombudsman's Office would provide State protection to the applicant. In her report, the first named respondent stated as follows:

> *"I conclude from the country of origin information submitted, that it is not open to criticise the Office of the Ombudsman as being inept or lacking in power, I conclude from the evidence submitted that the Ombudsman is acting and the office appears to be taking its duties seriously, visiting prisons, interviewing witnesses and investigating cases. As noted above, it can simply not be expected that prosecutions will result in the majority of cases, indeed the problem was sufficiency of evidence given that we are talking in the realm of criminal law is always going to be a problem. This does not mean, however, that the Office of Ombudsman is ineffective, reliance on statistics is always dangerous. I believe that if there were serious allegations to be made against the Ombudsman's Office, or if there were, for example, even suggestions that the Ombudsman's Office was not taking complaints seriously, this would be clearly reported in the country of origin information available, particularly by Human Rights Watch and Amnesty International, the US State Department report submitted certainly suggests to me that the Office of the Ombudsman in Moldova is functioning as effectively as it can, given the obvious limitations in prosecuting and in conducting thorough investigations where adequate evidence is, generally speaking, an issue. This is not a problem that is peculiar to the Moldovan Ombudsman."*

59. The first named respondent appears to have proceeded on the basis that as the applicant had not applied to the Ombudsman's Office for State protection, she could not find that protection would not have been forthcoming from that entity; in such circumstances she held that State protection would have been forthcoming from the Ombudsman's Office. The first named respondent stated as follows on this aspect:

> *"Notwithstanding the submission on behalf of the applicant that he could not be expected to seek protection from the authorities as he had no trust of them, I still consider that it was reasonable for him and would be reasonable for him to approach the Ombudsman's Office with a complaint with respect to the treatment he alleged he suffered. Clearly, if the applicant had approached the Ombudsman, had shown that he had given all the evidence that was required, and cooperated with the Ombudsman and still, no action had been taken, it would be then open for the Tribunal to conclude that the applicant was not afforded effective State protection. However, in the current circumstances, where the applicant did not give the Ombudsman an opportunity to review his complaint, I cannot conclude that effective State protection was not open to this applicant. It is not open to this Refugee Appeals Tribunal to second guess what the Ombudsman might have said or done."*

60. By holding that she could not reach a conclusion that the Ombudsman's Office was not acting effectively because the applicant had not made a complaint to it, the RAT thereby failed to consider the actual question which the High Court had posed to it, namely, whether the Ombudsman's Office could provide protection to the applicant.

61. In the circumstances, I find that the applicant is entitled to an order quashing the decision of the RAT dated 10th October, 2012, and that the matter should be referred back to the RAT for determination of the question by another Tribunal Member